TEXAS REGISTER

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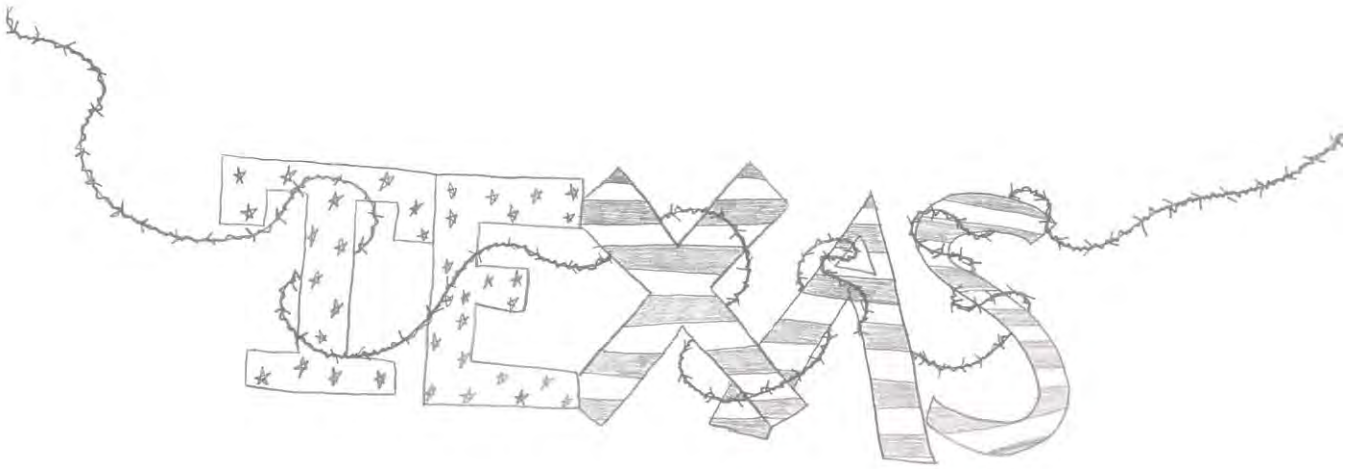
Mikayla Perkins
8th Grade



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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinion

RQ-0896-GA

Requestor:

The Honorable Florence Shapiro

Chair, Committee on Education

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Appointment by the Governor of members of the Texas Higher Education Coordinating Board (RQ-0896-GA)

Briefs requested by July 28, 2010

For further information, please access the website at www.oag.state.tx.us. or call the Opinion Committee at (512) 463-2110.

TRD-201003787

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: July 6, 2010

♦ ♦ ♦

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS
SUBCHAPTER M. SWEET POTATO WEEVIL QUARANTINE

4 TAC §19.133

The Texas Department of Agriculture (the department) adopts on an emergency basis an amendment to Chapter 19, §19.133, concerning clarification to the Sweet Potato Weevil Quarantine. The amendment provides that sweet potatoes from out-of-state sweet potato weevil quarantined areas are prohibited entry into sweet potato weevil-free areas of Texas. This clarification is necessary due to an oversight in the recently adopted amendment to §19.133, published in the June 25, 2010, issue of the *Texas Register.* The amendment to §19.133 was adopted to facilitate the movement of sweet potatoes exported from quarantined areas of other states to the sweet potato weevil quarantined areas of Texas under phytosanitary certification by the exporting state departments of agriculture. However, this was not clearly stated in the adopted rule. This emergency rule is to clarify that sweet potatoes grown in sweet potato quarantined areas of other states are prohibited entry into sweet potato weevil-free areas of Texas. The department will file a proposed rule to establish the change on a permanent basis.

The department believes it is necessary to take this immediate action to prevent the spread of sweet potato weevil into sweet potato weevil-free areas of Texas and adoption of the proposed emergency amendment is both necessary and appropriate.

The amended section is adopted on an emergency basis under the Texas Agriculture Code, §71.004, which provides the Texas Department of Agriculture with the authority to establish emergency quarantines; §71.007 which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; and the Texas Government Code, §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

The code affected by the proposal is the Texas Agriculture Code, Chapter 71.

§19.133. Restrictions.

(a) General. Quarantined articles are prohibited entry into Texas [~~and shall not be moved from any quarantined area into or within the free area of Texas~~], except as provided in subsection (b)(1) [~~subsections (b) and (c)~~] of this section.

(b) Exceptions.

(1) All shipments of sweet potatoes must be accompanied by a certificate or other phytosanitary document, issued by and bearing the signature of an authorized representative of the origin state's department of agriculture, certifying that such shipment was inspected and found to be free of sweet potato weevil. Quarantined articles from quarantined areas of other states are prohibited entry into sweet potato weevil-free areas of Texas.

(2) - (4) (No change.)

(c) - (g) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by 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 2, 2010.

TRD-201003727
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: July 2, 2010
Expiration Date: October 29, 2010
For further information, please call: (512) 463-4075

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING
SUBCHAPTER A. EXAMINATION

22 TAC §571.19

The Texas Board of Veterinary Medical Examiners (Board) adopts, on an emergency basis, a new rule §571.19, relating to the Temporary Licensure of Veterinarians Providing Relief Services During a Natural Disaster. As authorized by Texas Government Code §2001.034, the Board may adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and hearing, if the Board finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days notice. An emergency rule adopted under §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days. In addition, under Texas Occupations Code §801.258, the Board may, by rule, provide for the issuance of a temporary license.

The Board finds that there is a continuing imminent peril to public welfare due to the number of veterinarians in Texas who may be displaced by a natural disaster and are not available to provide necessary veterinary services in the disaster areas and to accommodate the licensed veterinarians from other jurisdictions who wish to provide relief veterinary services to supplement this public need. On June 28, 2010, Governor Rick Perry issued a proclamation certifying that Tropical Storm Alex poses a threat of imminent disaster along the Texas coast. In accordance with §418.014 of the Texas Government Code, Governor Perry has declared a state of disaster based on the existence of the threat of a disaster and directed that all necessary measures be implemented to ensure prompt response to this threat. On June 29, 2010, the Board held a meeting at 1:00 p.m. by telephone conference from the Board's offices in Austin to consider this emergency rule.

Under this emergency rule, the Board will issue a temporary license to veterinarians who can demonstrate that they are licensed in good standing in any of the United States. The veterinarian must complete and file an Application for Temporary Emergency License, and the application fee is waived. An application for a Texas Department of Public Safety Controlled Substances Registration must also be submitted to that agency.

The emergency rule is adopted under Texas Government Code §2001.034, relating to emergency rulemaking, Texas Occupations Code §801.151, relating to rules, and Texas Occupations Code §801.258, relating to temporary license. Texas Government Code §2001.034 authorizes the adoption of an emergency rule without prior notice or hearing, or with an abbreviated notice and hearing if an agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. Texas Occupations Code §801.151 authorizes the Board to adopt rules as necessary to administer the Veterinary Licensing Act. Texas Occupations Code §801.258 authorizes the Board by rule to issue temporary licenses. The proposed emergency rule has been reviewed by legal counsel and is within the Board's authority to adopt.

No other statutes, articles, or codes are affected by this emergency rule.

§571.19. Temporary Licensure of Veterinarians Providing Relief Services During a Natural Disaster.

(a) An individual who is licensed to practice veterinary medicine in any of the United States may be issued a temporary license under the following circumstances:

(1) The applicant must complete an Application for Temporary Emergency License.

(2) The Board will verify that the veterinarian is licensed in the states indicated in the Application and will confirm good standing.

(3) The applicant must file an application with the Texas Department of Public Safety for a controlled substances registration.

(4) An application fee is waived.

(b) A veterinarian granted a temporary license under this section shall abide by the Texas Veterinary Licensing Act and the Board's rules. Violations of the Act, Board rules, or the temporary emergency license will subject the temporary licensee to disciplinary action by the Board.

(c) A temporary emergency license issued under this emergency rule will be valid until July 27, 2010 unless the Executive Director extends this emergency rule.

(d) A temporary emergency license issued prior to the expiration of this emergency rule will remain in effect until the temporary license expires even if this emergency rule is no longer in effect.

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

Filed with the Office of the Secretary of State on June 30, 2010.

TRD-201003686
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective Date: June 30, 2010
Expiration Date: October 27, 2010
For further information, please call: (512) 305-7563

♦ ♦ ♦

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 53. HOME PROGRAM RULE

SUBCHAPTER A. GENERAL

10 TAC §§53.1 - 53.9

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

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter A, §§53.1 - 53.9. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.1. Purpose.

§53.2. Definitions.

§53.3. Ex Parte Communications.

§53.4. Waivers in Disaster Areas.

§53.5. Printed Materials Available.

§53.6. Alternative Dispute Resolution.

§53.7. Compliance Rules.

§53.8. Notice of Receipt of Application or Proposed Application.

§53.9. Environmental Clearance and Loan Closing Are Required Prior to Construction.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003734
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER B. ALLOCATION OF FUNDS

10 TAC §53.20, §53.21

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter B, §53.20 and §53.21. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to

comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.20. Consolidated Plan.

§53.21. Allocation of Funds.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003735
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

♦ ♦ ♦

SUBCHAPTER C. PROGRAM ACTIVITIES

10 TAC §§53.30 - 53.37

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter C, §§53.30 - 53.37. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.30. Activities in Consolidated Plan.

§53.31. Owner-Occupied Housing Assistance Program (OCC).

§53.32. Homebuyer Assistance Program (HBA).

§53.33. Tenant-Based Rental Assistance Program (TBRA).

§53.34. Rental Housing Development Program (RHD).

§53.35. Single Family Housing Development Program.

§53.36. CHDO Pre-Development Loan Program.

§53.37. Prohibited Activities.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER D. APPLICATION REQUIREMENTS AND PROCEDURES

10 TAC §§53.40 - 53.49

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter D, §§53.40 - 53.49. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.40. Competitive and Open Cycles.
§53.41. Eligible Applicants.
§53.42. Ineligible Applicants and Applications.
§53.43. Application Forms and Materials and Deadlines.
§53.44. General Applicant Eligibility Requirements.
§53.45. Rental Housing Development (Multifamily) Application Requirements.
§53.46. Multifamily Applicants also Seeking Housing Tax Credits.
§53.47. Application and Award Limitations.
§53.48. Application Review Process.
§53.49. Selection Criteria for Program Activities.

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

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SUBCHAPTER E. COMMUNITY HOUSING DEVELOPMENT ORGANIZATION (CHDO)

10 TAC §53.50

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter E, §53.50. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.50. Application Procedures for Certification of CHDO.

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

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SUBCHAPTER F. AWARDS AND CONTRACTS

10 TAC §§53.70 - 53.74

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

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter F, §§53.70 - 53.74. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there

will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.70. Process for Awards.

§53.71. Contract Required after Award.

§53.72. Pre-Award Costs.

§53.73. Contract Terms.

§53.74. Contract Amendments.

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

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SUBCHAPTER G. LOANS AND CONTRACT ADMINISTRATION

10 TAC §§53.80 - 53.85

(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 Housing and Community Affairs or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Housing and Community Affairs proposes the repeal of 10 TAC Chapter 53, Subchapter G, §§53.80 - 53.85. This repeal is proposed in order to consolidate and simplify the existing rules for the HOME Program.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed repeal is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeal as proposed.

Mr. Gerber 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 enforcing the new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. The repealed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on this repeal, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed repeal affects no other code, article or statute.

§53.80. Documents Supporting Mortgage Loans.

§53.81. General Contract Administration.

§53.82. Conflict of Interest.

§53.83. Procurement.

§53.84. Project Setups and Disbursement Requests.

§53.85. Administrative and Soft Cost Limitations.

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

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SUBCHAPTER A. GENERAL

10 TAC §53.1, §53.2

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter A, §53.1 and §53.2. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.1. Purpose.

This chapter clarifies the use and administration of all funds provided to the Texas Department of Housing and Community Affairs (Department) by the United States Department of Housing and Urban Development (HUD) pursuant to Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 USC §§12701 - 12839) and HUD regulations at 24 CFR, Part 92. All provisions of this chapter apply to any Application received on or after the date of adoption of this chapter by the Department's Board. Existing Contracts executed within the preceding twelve (12) months from the date of adoption of this chapter or current pending Applications may be amended in writing at the request of the Contract Administrator (CA) or Applicant, and with Department approval, to subject the Contract or Application to all provisions of this chapter. Amendments proposing only partial adoption of this chapter are prohibited and no amendment adopting this chapter shall be granted if, in the discretion of the Department, any of the provisions of this chapter conflict with the Notice of Funding Availability under which the existing Contract was awarded or Application was submitted. All CAs with an active Contract may become Reservation System Participants (RSPs), at the written request of the CA without the submission of an Application, and with Department approval, subject to all applicable provisions of this chapter. The State's HOME Program is designed to:

(1) Focus on the areas with the greatest housing need described in the State Consolidated Plan;

(2) Provide funds for home ownership and rental housing through acquisition, new construction, rehabilitation, and tenant-based rental assistance;

(3) Promote partnerships among all levels of government and the private sector, including non-profit and for-profit organizations; and

(4) Provide low, very low, and extremely low income families with affordable, decent, safe, and sanitary housing.

§53.2. Definitions.

Unless the context clearly indicates otherwise, the following capitalized terms, when used in this chapter, shall have the following meanings ascribed to them; provided that certain capitalized terms used and not defined in this chapter, shall have the meanings ascribed to them in or for purposes of the HOME Final Rule or Chapter 2306 of the Texas Government Code.

(1) Activity--A single housing unit with a unique physical address. An activity may also refer to an individual Project, Development, or site.

(2) Administrative Deficiencies--The absence of or lack of clarity in information or documentation as required in this chapter, the applicable NOFA, or in order to meet state or federal requirements in staff's determination. The Department staff may request clarification or correction of such Administrative Deficiencies during the review of an Application or at any time prior to the end of a Contract and including, but not limited to, review of performance under a Contract, processing of documentation for a Reservation or Commitment of Funds, closing of a loan, processing of a disbursement request, close-out of a contract, or resolution of any issues related to compliance.

(A) The Department staff may request clarification or correction in a deficiency notice in the form of a facsimile or electronic transmittal, and a telephone call to the Applicant advising that such a request has been transmitted.

(B) The time period to cure an Administrative Deficiency is reflected under each applicable section of this chapter. The time period begins at the start of the business day following the deficiency notice date.

(C) To cure an Administrative Deficiency, an Applicant or Contract Administrator must provide a clarification, further definition or exposition of an issue, an explanation as to why an Applicant or Contract Administrator has provided certain information or resolution of a discrepancy where an Applicant or Contract Administrator has provided conflicting information.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest.

(4) Affiliated Party--A Person with a contractual relationship with the Contract Administrator on a Contract with the Department.

(5) Applicant--A Person who has submitted to the Department an Application for Department funds or other assistance.

(6) Application--A request for a Contract award or to participate in a reservation system submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Submission Procedures Manual (ASPM)--The manual that sets forth the procedures, forms, and instructions for the completion and submission of an Application to the Department.

(8) Area Median Family Income (AMFI)--The income estimated and determined by HUD as the median family income with adjustments for family size and geographic locations.

(9) Board--The governing board of the Texas Department of Housing and Community Affairs.

(10) CFR--Code of Federal Regulations.

(11) Chapter 2306--The enabling statute for the Department found in the Texas Government Code.

(12) Commitment of Funds--Occurs when the Activity or Project is approved by the Department and set up in the disbursement and information system established by HUD.

(13) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA) that will include a submission deadline and selection or scoring criteria.

(14) Contract--The executed written agreement between the Department and a Contract Administrator, Reservation System Participant, or Development Owner, performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(15) Contract Administrator (CA)--The Person responsible for performing under a Contract with the Department as approved under §53.22 of this chapter.

(16) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing member of a limited liability company or managing General Partner of a limited partnership or any similar member.

(17) Deobligated Funds--The funds released by a CA or Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and a CA or Development Owner.

(18) Department--The Texas Department of Housing and Community Affairs.

(19) Developer--Any Person entering into a Contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(20) Development--A Project in which an Applicant, CA, or Development Owner has or will have an ownership interest and that has a construction component, either in the form of New Construction or Rehabilitation of multi-unit or single family residential housing.

(21) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract and is the Person responsible for performing under the Contract with the Department.

(22) Development Site--The area, or if scattered site, areas for which the Development is proposed to be located.

(23) General Contractor--A Person who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. The prime subcontractors will also be treated as a General Contractor if any of the following are true (in which case, contractor fees will be treated as fees to the General Contractor):

(A) More than 50% of the contract sum in the construction contract is subcontracted to one subcontractor, material supplier, or equipment lessor ("prime subcontractors"); or

(B) More than 75% of the contract sum in the construction contract is subcontracted to three or less subcontractors, material suppliers, and equipment lessors ("prime subcontractors").

(24) General Partner--A Person, or Persons, who is identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(25) General Requirements--An allowance for the General Contractor's on-site overhead expenses. General Requirements shall be limited as prescribed in §1.32 of this title and must follow the standards published by the Construction Specifications Institute.

(26) HOME Final Rule--The regulations with amendments promulgated at 24 CFR, Part 92 as published by HUD for the HOME Investment Partnerships Program at 42 USC §§12701 - 12839.

(27) Housing Contract System (HCS)--The electronic information system established by the Department to be used for tracking, funding, and reporting HOME Contracts and Activities or Projects.

(28) HUD--The United States Department of Housing and Urban Development, or its successor.

(29) IDIS--The electronic grants management information system named the Integrated Disbursement and Information System established by HUD to be used tracking and reporting HOME funding progress.

(30) Land Use Restriction Agreement (LURA)--An agreement between the Department and a Person related to a specific Property or Properties which is filed with the responsible recording authority.

(31) NOFA--Notice of Funding Availability, published in the *Texas Register.*

(32) Open Application Cycle--A defined period of time during which Applications may be submitted according to a published NOFA and which will be reviewed on a first-come, first-served basis until all funds available are committed, or until the NOFA is closed, whichever is earlier.

(33) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(34) Persons with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs consistent with 42 USC §§12701, et seq. and as provided in the Consolidated Plan and may include any Households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domestic violence, persons with HIV/AIDS, homeless populations, migrant farm workers, and public housing residents.

(35) Predevelopment Costs--Costs related to a specific eligible Project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, costs of preliminary financial applications, legal fees, architectural fees, engineering fees, engagement of a development team, and site control;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(36) Principal--A Person, or Persons, that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, special limited partners, and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(37) Principal Residence--The primary housing unit a Person or Household inhabits.

(38) Program Activity--The specific purposes for which HOME funds are applied for and used.

(39) Reservation of Funds--Occurs when the Activity or Project is submitted to the Department by a Reservation System Participant.

(40) Reservation System Participant (RSP)--The Person responsible for performing under a Contract with the Department as approved under §53.23 of this chapter.

(41) Service Area--The city(ies), county(ies) and/or place(s) identified in the Application and/or Contract that the CA will serve.

(42) TAC--Texas Administrative Code.

(43) Texas Minimum Construction Standard (TMCS)--The program standard used to determine the minimum acceptable housing condition for the purposes of rehabilitation, new construction, and acquisition.

(44) Third Party--A Person who is not:

(A) An Applicant, CA, Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(B) An Affiliate, Affiliated Party to the Applicant, CA, Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(C) A Person receiving any portion of the administration, contractor fee, or developer fee.

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

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Texas Department of Housing and Community Affairs
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SUBCHAPTER B. AVAILABILITY OF FUNDS, APPLICATION REQUIREMENTS, AND REVIEW AND AWARD PROCEDURES

10 TAC §§53.20 - 53.28

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter B, §§53.20 - 53.28. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.20. Availability of Funds.

The Department will make HOME funds available through Notices of Funding Availability (each a NOFA) or the procurement of a contractor. Funds made available under a NOFA may be allocated through

Contract awards to Contract Administrators (CAs) or by providing the ability to submit Reservations of Funds for Reservation System Participants (RSPs). Funds subject to regional allocation shall be made available as follows:

(1) Applicants applying in response to a Competitive Application Cycle will be ranked highest to lowest by subregion. Funding that remains available after awarding all available eligible Applications in each subregion shall collapse and be directed to the next Application in the most underserved subregion. If funding is made available to multiple Program Activities under one NOFA, the funds remaining after awarding all eligible Applications by Program Activity shall collapse and be directed to the next Application in the most underserved subregion regardless of Program Activity;

(2) Funds made available through an Open Application Cycle and subject to regional allocation shall be made available to each subregion for a time period to be specified in the applicable NOFA, after which the funds remaining shall collapse and be made available statewide; and

(3) In the event of a tie between two or more Applicants, the Department reserves the right to determine which Application will receive a recommendation for funding, or as otherwise specified in the NOFA. Tied Applicants may also receive a partial recommendation for funding.

§53.21. Application Forms and Materials and Deadlines.

(a) The Department will develop and publish an Application, which if completed by an eligible Applicant, would satisfy the requirements for requesting funds from the Department. The Department will also issue an ASPM to provide guidance on proper completion of the Application.

(b) Applicants must submit an Application for a Contract award by the deadline date specified in the NOFA. Applications for participation in a reservation system may be submitted on an ongoing basis throughout the year. All Applications must be received during business hours on any day in which the Department is open for business.

§53.22. Contract Award Application Review Process.

(a) An Application received by the Department in response to an Open Application Cycle NOFA will be assigned a "Received Date" based on the date it is received by the Division. An Application will be prioritized for review based on its "Received Date." An Application with outstanding Administrative Deficiencies may be held from further review until all Administrative Deficiencies have been cured. Applications that have completed the review process may be presented to the Board for approval with priority over Applications that continue to have Administrative Deficiencies at the time Board materials are prepared, regardless of "Received Date." If all funds available under a NOFA are awarded, all remaining Applicants will be notified and the remaining Applications will not be processed. Notwithstanding the foregoing, for an Applicant that has also applied under the competitive housing tax credit cycle for the same development, the following shall apply:

(1) The HOME Application shall not lose its "Received Date" priority to applicants that are not requesting housing tax credits unless the development does not receive an award of housing tax credits by July 31st of the year of the cycle (For example: A HOME-only application that is received after the start of the competitive housing tax credit cycle may not be presented to the Board for approval until HOME and housing tax credit layered applications with priority "Received Dates" are presented for approval and the layered application would maintain its "Received Date" priority); and

(2) Applications that have not submitted third party reports due to a later deadline under the housing tax credit program may be held as incomplete Applications until the housing tax credit deadline for submission of third party reports. Such Applications will not be considered complete Applications and shall not be assigned a "Received Date" until the third party reports are received.

(b) For Applications received by the Department in response to a Competitive Application Cycle NOFA, the Department will accept Applications on an ongoing basis during the Application Acceptance Period as specified in the NOFA. Applications will be prioritized for review based upon the score of the Application.

(c) Administrative Deficiencies. An Administration Deficiency may not be cured if it would require substantially changing an Application or providing any new unrequested information. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, and may not add any set-asides, increase the award request amount, or revise the unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in this chapter or by amendment of an Application after the Board approval of a HOME award. The curative time periods allowable for Administrative Deficiencies are: for Applications received under an Open Application Cycle NOFA, Administrative Deficiencies not cured within five (5) business days will be terminated. Applicants that have been terminated may reapply for funds; or for Applications received under a Competitive Application Cycle NOFA, if Administrative Deficiencies are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then five (5) points shall be deducted from the selection score for each additional day the Administrative Deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated. An Applicant may not adjust the self-score without a request from the Department as a result of an Administrative Deficiency.

§53.23. Reservation System Participant Review Process.

(a) In order for an Applicant to participate in the reservation system, the Department must review and approve an Application to become a Reservation System Participant (RSP). Applications will be reviewed and presented to the Executive Director for approval in the order they are received. Any such approval will be subject to ratification by the Board prior to Commitment of Funds.

(b) Applications for recertification may be submitted ninety (90) days prior to the end of the RSP agreement term and will be required to demonstrate that all Application requirements are met.

(c) Administrative Deficiencies must be cured within ten (10) business days of the date of the deficiency notice. If Administrative Deficiencies are not clarified or corrected within ten business days from the deficiency notice date, the Application may be terminated.

§53.24. General Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) An Applicant certification of compliance with state and federal laws and state and federal rules and guidance governing the HOME Program;

(2) A resolution signed and dated within the six (6) months preceding the Application submission date from the Applicant's direct governing body which includes:

(A) Authorization of the submission of the Application;

(B) Commitment and amount of cash reserves, if applicable, for use during the Contract or RSP agreement term;

(C) Source of funds for Match obligation and Match dollar amount, if applicable;

(D) Name and title of the person authorized to represent the organization; and

(E) Signature authority to execute a contract;

(3) Any Applicant requesting $25,000 or more must be registered in the federal Central Contractor Registration (CCR) and have a current Data Universal Numbering System (DUNS) number. Applicants requesting funds for multifamily housing development and that are "to-be-formed" are not required to submit a CCR or DUNS number until after award but prior to Contract execution. If the property will be owned by a partnership, the partnership must be the registrant. If a partnership will be receiving funds under the CHDO set-aside, the partnership and the CHDO must both be registered;

(4) An Application fee, to be defined in the NOFA, which is sufficient to discourage the submission of partial or incomplete Applications except as otherwise allowed by state statute;

(5) To be eligible for a new Contract award, an Applicant must have committed funds to at least 80% of the total number of contractually required Households or has committed at least 80% of the total Project funds on their current Contract for the same Program Activity. This provision shall not apply to Applications submitted for disaster relief funding or those with an exclusively different Service Area;

(6) An Application must be substantially complete when received by the Department. An Application will be terminated if an entire volume of the Application is missing; has excessive omissions of documentation from the threshold or selection criteria or uniform Application documentation; or is so unclear, disjointed, or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. Such Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's termination will be included in the notification sent to the Applicant but, because of the suspended review, may not include an all inclusive list of deficiencies in the Application; and

(7) The Department may incentivize or provide preference to Applicants targeting very low and extremely low income Households or to Applicants that have successfully executed a previous HOME Contract with the Department. Such incentives may be established in the form of threshold or selection criteria in the NOFA and may be different for each Program Activity.

§53.25. Contract Award Limitations.

(a) Project Funds Limits. Project funds for Contract awards are limited to $500,000 per Contract Administrator for Homeowner Rehabilitation and Contract for Deed Conversion Program Activity Applicants and $300,000 per Contract Administrator for Homebuyer Assistance and Tenant-Based Rental Assistance Program Activity Applicants. The Contract award limits for Project funds for Single Family Development and Multifamily (Rental Housing) Development Program Activity Applicants may be higher and will be established in the NOFA for these activities.

(b) Contract Award Terms. With the exception of Tenant-Based Rental Assistance, all Program Activity Contract awards will have a Contract term of twenty-four (24) months exclusive of any applicable affordability period or loan term. Tenant-Based Rental Assistance Program Activity Contract awards will have a Contract term of thirty-six (36) months.

(c) Contract Award Benchmarks. All Contract Administrators must submit to the Department complete Project setup information for the Commitment of Funds of all contractually required Households in accordance with the requirements herein within twelve (12) months from the effective date of the Contract. All remaining funds will be automatically deobligated and returned to the Department unless an amendment has been requested in writing prior to this date and is approved.

(d) Amendments. The Division Director may approve amendments to Contract awards except amendments to extend the Contract and benchmarks by more than six (6) months, increase Project funds, or that would have negatively impacted the priority of the Board-approved Application. The Executive Director may approve amendments except to extend the Contract and benchmarks by more than twelve (12) months, increase Project funds by more than 25% or $50,000, whichever is greater, or that would have negatively impacted the priority of the Board approved Application in the Executive Director's estimation. The Board may, on a case by case basis, approve amendments provided such approval would not cause a violation of the Department's rules or federal requirements.

(e) Voluntary deobligation. The Contract Administrator may fully deobligate funds in the form of a written request signed by the executor of the Contract. The Contract Administrator may partially deobligate funds under a Contract in the form of a written request from the executor if the letter also deobligates the associated number of targeted Households, funds for Administrative costs, and Match and the partial deobligation would not have impacted the award of the Contract.

(f) The Department may request information regarding the performance or status under a Contract prior to a Contract benchmark or at various times during the term of a Contract. Contract Administrator must respond in a timely manner to such requests from the Department. Prolonged or repeated failure to respond may result an Administrative Deficiency and ultimately in termination of the Contract by the Department.

(g) The Department reserves the right to reduce the amount requested in an Application, condition the award recommendation, or terminate the Application based on Program Activity or Project feasibility, past performance, underwriting analysis, or availability of funds. The recommendation with amendments, if any, approved by the Board, will supersede any conflicting Application information.

(h) Pre-Award Costs. Before the effective date of the HOME Contract, the Contract Administrator may incur and be reimbursed for travel costs, as provided for with Administrative funds, related to mandatory training required by the Department as a condition of receiving a HOME award and Contract. Department authorized pre-award costs for predevelopment costs, including but not limited to legal, architectural, engineering, appraisal, surveying, environmental, and market study fees, may be paid if incurred before the effective date of the Contract if the costs are in accordance with 24 CFR §92.212 and at the sole discretion of the Department.

§53.26. Reservation System Participant (RSP) Agreements.

(a) Terms of agreement. RSP agreements will have a twenty-four (24) month term for all Program Activities. Execution of an RSP agreement does not guarantee the availability of funds under a reservation system.

(b) Limits on Number of Reservations. The number of Homeowner Rehabilitation or Homebuyer Assistance reservations for an RSP is limited to five (5) per county within the RSP's Service Area at any given time. The number of Tenant-Based Rental Assistance reservations for an RSP is limited to thirty (30) at any given time.

(c) Extremely Low-Income Households. Each RSP will be required to serve at least one (1) Household at or below 30% of AMFI out of every four (4) Households submitted and approved for assistance.

(d) Match. An RSP must meet the tiered Match requirements per Program Activity for at least every fourth Household submitted and approved for assistance. For example, if Match is not provide for the first three (3) Households assisted by an RSP, the Match provided to the fourth Household must meet the Match requirement for all four (4) Households.

(e) Completion of Construction. For Activities involving construction, an RSP must complete construction and submit all requests for disbursement within nine (9) months from the Commitment of Funds for the Activity.

(f) Extensions. The Division Director may approve one three (3) month time extension to the Commitment of Funds to allow for the completion of construction.

(g) An RSP must remain in good standing with the Department, the State of Texas, and HUD. If an RSP is not in good standing, participation in the reservation system will be suspended and may result in termination of the RSP agreement.

§53.27. Procurement of Contractor.

The Department may procure a contractor or contractors to provide services for the administration of the HOME Program through a Request for Proposals. A contractor must provide services and/or administer HOME funds in accordance with state and federal rules and the program requirements of this chapter for the applicable Program Activity.

§53.28. General Administrative Requirements.

Unless otherwise provided in this chapter, the CA, RSP, or Development Owner, must comply with the following requirements for the administration and use of HOME funds:

(1) Complete training, as applicable;

(2) Provide all applicable Department Housing Contract System access request information and documentation requirements;

(3) Establish and maintain sufficient records at its regular place of business and make available for examination by the Department, HUD, the Auditor of the State of Texas, the United States General Accounting Office, the Comptroller of the State of Texas, and the Comptroller of the United States, or any of their duly authorized representatives;

(4) For non-development Program Activities, develop and establish written procurement procedures that comply with federal, state, and local procurement requirements including the following:

(A) Develop and comply with written procurement selection criteria and committees;

(B) Develop and comply with a written code of conduct governing employees, officers, or agents engaged in administering HOME funds and appoint a Procurement Officer to manage any bid process;

(C) Ensure consultant or any procured service provider does not participate in or direct the process of procurement for professional service. In other words, a consultant cannot assist in their own procurement before or after an award is made;

(D) Procedures established for procurement of building construction contractors may not include requirements for the provision of general liability insurance coverage for an amount to exceed the value of the contract;

(E) Building construction contractors must be procured using a formal sealed bid procedure for single family New Construction, Reconstruction or Rehabilitation Activities or Projects;

(F) Professional service providers (consultants) must be procured using an open competitive procedure and may not be procured based solely on the lowest priced bid; and

(G) Any Request for Proposals or Invitation for Bid must include:

(i) An equal opportunity disclosure and that bidders are subject to search for listing on the Excluded Parties List;

(ii) Bidders' protest rights and outline the procedures bidders must take to address procurement related disputes;

(iii) A Conflict of Interest disclosure;

(iv) A clear and accurate description of the technical requirements for the material, product, or service to be procured. The description must include complete, adequate, and realistic specifications;

(v) For sealed bid procedures, disclose the date, time and location for public opening of bids and indicate a fixed-price contract; and

(vi) For competitive proposal specific, disclose the selection/evaluation criteria;

(5) In instances where a potential conflict of interest exist, follow procedures to submit a request to the Department to grant an exception to any conflicts prohibited by 24 CFR §92.356. The request submitted to the Department must include a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made. No HOME funds will be committed to or reserved to assist a Household until HUD has granted an exception to the Conflict of Interest provisions;

(6) Perform environmental clearance procedures, as required, before acquiring any Property or before performing any construction activities, including demolition, or the occurrence of the loan closing, if applicable;

(7) Develop and comply with written applicant intake and selection criteria for and ensure program eligibility (except for Multifamily Development) and promote and comply with Fair Housing requirements;

(8) Except for Multifamily Development, complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of HOME assistance within sixty (60) days following receipt of the intake application. For Homeowner Rehabilitation Assistance and Contract for Deed Conversion the CA or RSP must:

(A) Provide Rehabilitation as an available option to Households, provide Households with a general cost estimate, and to the extent that Rehabilitation would not meet the program requirements, explain these program requirements;

(B) Unless not allowed by local code, provide replacement of an existing MHU with a new MHU as an available option; and

(C) Explain relocation as an available option to any Households located within the 100-year floodplain and present the costs associated with flood insurance;

(9) Determine the income eligibility of a Household using the "Annual Income" as defined at 24 CFR §5.609;

(10) Except for Multifamily Development and Single Family Development, complete an updated income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and the date the HOME assistance is provided to the Household. For Single Family Development, complete income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and earlier of the date the HOME assistance is provided to the Household or the date the contract to purchase the housing unit is executed with the Household. For Tenant-Based Rental Assistance, in the event that a Household's monthly gross income changes by more than $200, the Household must be re-certified and the rental subsidy recalculated;

(11) For single family Program Activities involving construction, perform initial inspection and at least four (4) progress inspections. Property inspections must include photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms. The inspection must be signed and dated by the inspector and CA or RSP. For Tenant-Based Rental Assistance, perform initial and an annual HQS inspection. The inspection must be signed and dated by the inspector and CA or RSP;

(12) Submit requests for the Commitment or Reservation of Funds, loan closing preparation, and disbursements and all required information and verification documentation in the Housing Contract System. A request will not be reviewed by the Department until the CA, RSP, or Development Owner has submitted all required documentation. If, during review, the Department identifies Administrative Deficiencies, the Department will allow a cure period of ten (10) business days beginning at the start of the first business day following the date the CA, RSP or Development Owner is notified of the deficiency. If any Administrative Deficiency remains after the cure period, the Department, in its sole discretion, shall disapprove the request. Disapproved requests will not be considered sufficient to meet the performance benchmark and shall not constitute a Reservation of Funds;

(13) Not proceed or allow a contractor to proceed with construction, including demolition, on any Activity, Project or Development without first completing the required environmental clearance procedures, preconstruction conference and receiving notice to proceed, if applicable, and execution of grant agreement or loan closing with the Department, whichever is applicable;

(14) Not retain Program Income of any kind, including Program Income to fund other eligible HOME Activities;

(15) Submit any Program Income received by the CA, RSP or Development Owner to the Department within ten (10) business days of receipt. Return any refunds to the Department's accounting division and include a written explanation of the return of funds, the Contract number, name of CA, RSP, or Development Owner, Activity address and Activity number referenced on the check;

(16) Submit required documentation for Project completion reports no later than thirty (30) days after the completion of the Activity. For MFD, the Development Owner must periodically update completion reports to provide information on tenants until all HOME units have been occupied;

(17) For Contract awards, submit certificate of Contract Completion no later than sixty (60) days from the Contract end date;

(18) Submit to the Department reports or information regarding the operations related to HOME funds provided by the Department; and

(19) Match must be contributed to a Project or Activity assisted with funds under this chapter and cannot include mortgage revenue bond programs and cannot include any other sources of Department funding unless otherwise approved by the Department.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003742
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER C. HOMEOWNER REHABILITATION ASSISTANCE (HRA) PROGRAM ACTIVITY

10 TAC §§53.30 - 53.32

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter C, §§53.30 - 53.32. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.30. Homeowner Rehabilitation Assistance (HRA) Program Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match. For Applications submitted to become an RSP, the Department may withhold disbursements if after every four reservations sufficient Match documentation has not been provided. The Department shall use population figures from the most recently available U.S. Census to determine the applicable tier for an Application. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this subsection. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Program Activity. Except for Applications for disaster relief, Match shall be required based on the following tiers:

(A) zero percent of Project funds if serving a city of less than 3,000 Persons or a county of less than 20,000 Persons;

(B) ten percent of Project funds if serving a city of between 3,001 and 5,000 Persons or a county of between than 20,001 and 75,000 Persons; and

(C) twelve and one-half percent of Project funds for all other applications.

(2) Documentation of a commitment of at least $80,000 or for a Contract award 80% of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) Financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) Evidence of an available line of credit or equivalent in an amount equal to or exceeding the above requirement; or

(C) The CPA opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

(3) Housing construction plans must be certified by a licensed architect. The Department may procure and make architect certified plans available.

(A) The Department will reimburse only for the first time a set of architectural plans are used unless any subsequent site specific fees are paid to a Third Party architect; and

(B) A NOFA may include incentives or otherwise require architectural plans to incorporate "green building" elements.

§53.31. Homeowner Rehabilitation Assistance (HRA) Program Requirements.

(a) Eligible activities are limited to:

(1) The Rehabilitation or Reconstruction of existing owner-occupied housing on the same site. The Rehabilitation of an MHU is not an eligible activity;

(2) The New Construction of site-built housing on the same site to replace an existing owner-occupied Manufactured Housing Unit (MHU);

(3) For only the purposes of relocating the existing housing out of the floodplain, the replacement of existing owner-occupied housing with an MHU or New Construction of site-built housing on another site;

(4) If housing unit is uninhabitable as a result of disaster or condemnation by local government, the Household is eligible for the New Construction of site-built housing or an MHU under this section provided the assisted Household documents that the housing unit was previously their Principal Residence through evidence of a homestead exemption from the local taxing jurisdiction and Household certification; or

(5) If allowable under the NOFA, the refinance of an existing mortgage meeting the federal requirements at 24 CFR §92.206(b) and any additional requirements in the NOFA.

(b) HOME funds may be used to replace (Reconstruct) an owner-occupied housing unit with a new MHU or Modular Home if:

(1) The unit complies with standards at 24 CFR §92.205 and with the Texas Manufactured Housing Standards Act under Chapter 1201 of the Texas Occupation Code;

(2) The unit is permanently installed with a concrete perimeter foundation and in accordance with the Texas Manufactured Housing Standards Act, Chapter 1201 of the Texas Occupations Code;

(3) The unit is permanently attached to utilities; and

(4) The ownership of the unit is recorded in the taxing authority of the county in which it is located.

(c) Real property taxes assessed on the housing unit must be current and/or the Household must be participating in an approved payment plan with the taxing authority.

(d) The property must not be encumbered with tax liens, child support liens, or mechanic or materialmen's liens.

(e) If a housing unit has an existing mortgage loan and Department funds are provided in the form of a loan, the Department will require a first lien if the loan has an outstanding balance that is less than the investment of HOME funds and any of the following are true:

(1) A federal affordability period is required; or

(2) Any existing mortgage has been in place for less three years from the date the Household applies for assistance; or

(3) The HOME loan is structured as a repayable loan.

(f) The Household must be current on any existing mortgage loans or home equity loans. If the Department's assistance is provided in the form of a loan, the property cannot have any existing home equity loan liens.

(g) The total Project costs are inclusive of hard construction costs, demolition costs, aerobic septic systems, refinancing costs (as applicable), and Match funds for Project costs, and are limited to:

(1) Reconstruction and New Construction of site-built housing: The lesser of $73.00 per square foot or $80,000 or for Households of 6 or more Persons the lesser of $73.00 per square foot or $85,000;

(2) Replacement with an MHU: $65,000;

(3) Rehabilitation that is not Reconstruction: $30,000; and

(4) Refinancing of existing mortgages: in addition to the costs limited under paragraphs (1) - (3) of this subsection, the cost to refinance an existing mortgage is limited to the amount determined by an affordability analysis that evidences the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance) is no less than 25% and no greater than 30% of the Household's gross monthly income based on a thirty (30) year amortization schedule. Refinancing is not eligible for an Activity involving relocation under subsection (a)(3) of this section.

(h) In addition to the Project costs allowable under subsection (g) of this section, up to $5,000 will be allowed in Project costs for additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.

(i) Project soft costs are limited to:

(1) Reconstruction or New Construction: no more than $7,000 per housing unit;

(2) Replacement with an MHU: no more than $3,500 per housing unit;

(3) Rehabilitation that is not Reconstruction: $5,000 per housing unit. This limit may be exceeded for lead-based paint remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are Reconstructed or if the existing housing unit was built after December 31, 1977; and

(4) Third-party Project soft costs related to loan closing requirements, such as appraisals, title reports or insurance, tax certificates, recording fees, and surveys are not subject to a maximum per Activity or Project.

(j) Funds for Administrative costs are limited to no more than 4% of the total Project costs, exclusive of Project soft costs and Match funds.

(k) In the following instances, the assistance to an eligible Household shall be in the form of a loan in the amount of the total Project costs excluding Match funds. The loan will be at 0% interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(1) An MHU being replaced with newly constructed housing (site-built) on the same site;

(2) Any housing unit being replaced on an another site;

(3) Any housing unit that is being relocated out of the floodplain or replaced due to uninhabitability as allowed under subsection (b) of this section;

(4) Any Project Activity that includes any amount of refinancing of existing debt; and

(5) Any Project Activity that requires a federal affordability period.

(l) In all other instances not described in subsection (k) of this section, the assistance to an eligible Household may be in the form of a loan or grant agreement with an affordability term for the amount of the total Project costs excluding Match funds and based on AMFI as reflected in Figure: 10 TAC §53.31(l).
Figure: 10 TAC §53.31(l)

(m) In the event that the housing unit ceases to be the Principal Residence of the Household, the forgiveness of the loan or grant agreement will cease and the Department has established that the federal recapture requirements as defined in 24 CFR §92.254 will be imposed.

(n) In the event that the housing unit transfers by devise, descent or operation of law upon the death of the assisted homeowner, the heir or remainderman Household or if sold by the decedent's estate, the purchasing Household must qualify for assistance in accordance with this chapter in order for the forgiveness of the loan or grant agreement to continue until maturity.

(o) In the event that the housing unit is sold and the purchasing Household does not provide documentation evidencing their income eligibility, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and the housing unit must be sold for an amount not less than the current appraised value as then appraised by the appropriate governmental authority without prior written consent of the Department unless the entire balance on the loan or grant agreement will be paid at closing.

(p) For Reconstruction and New Construction, housing units must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with this chapter.

§53.32. Homeowner Rehabilitation Assistance (HRA) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit the following true and complete information, certified as such, with a request for the Commitment or Reservation of Funds:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition, and construction costs, soft costs and administrative costs requested, a maximum of 5% of hard construction costs for contingency items, Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application, which must include:

(A) Household composition including name, date of birth, relationship to head of Household, gender, and social security number for each Household member;

(B) Identification and resolution of potential and/or existing conflicts of interest;

(C) Identification of amounts of housing assistance or insurance proceeds previously received from other sources;

(D) Identification if any Household member owes a debt to the State of Texas;

(E) Identification that the housing unit is located or proposed to be located outside of the 100-year floodplain;

(F) Identification of head of Household's race and ethnicity;

(G) Household special needs status, if applicable;

(H) Names of Household members who are temporarily absent and reason for absence, if applicable;

(I) Future Household members and explanation, if applicable;

(J) Income sources and gross amounts for all Household members;

(K) Full-time student status of Household members over age 18, if applicable;

(L) Type and source of all assets owned by Household members including cash value and annual asset income;

(M) Year in which property to be assisted was built;

(N) Household's occupancy requirements including number of bedrooms being requested;

(O) Household expense information including current rent, phone, medical expenses, credit card payments, utilities, car payments, cable television, insurance including Medicare if applicable, loan payments, child care for children under age 13, and other expenses; and

(P) Signatures of all Household members age 18 or over;

(5) Certification of the income eligibility of the Household signed by the CA or RSP and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within $3,000 of the 80% AMFI, all documentation used to determine the income of the Household;

(6) Provide written consent from all Persons who have a valid lien or ownership interest in the Property for the rehabilitation or reconstruction activities;

(7) In the instance of relocation in accordance with §53.31(a)(3) of this chapter, the Household must document Homeownership of the existing unit to be replaced and must establish Homeownership of the lot on which the replacement housing unit will be constructed. The Household must agree to the demolition of the existing housing unit. HOME Project funds cannot be used for the demolition of the existing unit and any funding used for the demolition is not eligible Match; however, solely for an Activity under this paragraph, the CA or RSP Match obligation may be reduced by the cost of such demolition without any Contract amendment in order to facilitate relocation;

(8) Identification of any Lead-Based Paint (LBP);

(9) For housing units located within the 100-year floodplain, a quote for the cost of flood insurance;

(10) Consent to demolish from any existing mortgage lien holders and consent to subordinate to the Department's loan, if applicable;

(11) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, duplication of benefit, or floodplain mitigation;

(12) A title commitment or policy or a down date endorsement to an existing title policy, and the actual documents, or legible copies thereof, establishing the Household's ownership, such as a warranty deed or 99-year leasehold. In instances of an MHU, a Statement of Ownership and Location (SOL). Together, these documents must evidence the definition of Homeownership is met. The title commitment or down date endorsement must not be older than ninety (90) days on the date submitted to the Department for a Commitment of Funds;

(13) Tax certificate that evidences a current paid status, and in the case of delinquency, evidence of an approved payment plan with the taxing authority and evidence that the payment plan is current;

(14) A copy of the completed grant agreement, if applicable; and

(15) Any other documentation necessary to evidence that the Activity meets the program requirements.

(b) Loan closing. The CA or RSP must comply with or submit the following with a request for the preparation of loan closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment that expires prior to execution of closing must be updated at closing and must not have any adverse changes in order to close;

(2) In the instances of replacement with an MHU, information necessary to draft loan documents and issue SOL; and

(3) Life event documentation, as applicable, and all information necessary to prepare any applicable affidavits such as marital status and heirship.

(c) Disbursement of funds. The CA or RSP must comply with all of the following requirements for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with following requirements may be required with a request for disbursement.

(1) For construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) If applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) Property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and CA or RSP;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) The executed grant agreement or original, executed, legally enforceable loan documents and SOL, if applicable, for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA or RSP to make modifications to the disbursement request and is authorized

to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA or RSP as may be necessary or advisable for compliance with all Program Requirements;

(7) With the exception of up to 10% of the total funds available for Administrative costs, the request for funds for Administrative costs must be proportionate to the amount of Project costs requested or already disbursed;

(8) Include the withholding of 10% of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction;

(9) For final disbursement requests, evidence that the demolition or, if an MHU, salvage and removal of all dilapidated housing units on the lot occurred for Newly Constructed or Rehabilitated housing unit, certification or other evidence acceptable to Department that the replacement house, whether site-built or MHU, was constructed or placed on and within the same lot for which ownership was established and on and within the same lot secured by the loan or grant agreement, if applicable, and evidence of floodplain mitigation; and

(10) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003743
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER D. HOMEBUYER ASSISTANCE (HBA) PROGRAM ACTIVITY

10 TAC §§53.40 - 53.42

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter D, §§53.40 - 53.42. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.40. Homebuyer Assistance (HBA) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match. The Department may not require such support at the time an Application is submitted when the funds are made available under a reservation system. Except for Applications for disaster relief and Persons with Disabilities set-asides, the amount of Match required must be at least 5% of Project funds requested. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this subsection. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Program Activity.

(2) Documentation of a commitment of at least $80,000 or for a Contract award 100% of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) Financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) Evidence of an available line of credit or equivalent in an amount equal to or exceeding the above requirement; or

(C) The CPA opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

§53.41. Homebuyer Assistance (HBA) Program Requirements.

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation for accessibility modifications of single family housing units.

(b) A new MHU is an eligible property type for acquisition only. HOME funds may be used to acquire a new MHU or Modular Home if:

(1) The unit complies with standards at 24 CFR §92.205 and with the Texas Manufactured Housing Standards Act under Chapter 1201 of the Texas Occupation Code;

(2) The unit is permanently installed with a concrete perimeter foundation and in accordance with the Texas Manufactured Housing Standards Act;

(3) The unit is permanently attached to utilities; and

(4) The ownership of the unit is recorded in the taxing authority of the county in which it is located.

(c) The Household must complete a homebuyer counseling program/class.

(d) The first lien purchase loans must comply with the following requirements:

(1) No adjustable rate mortgage loans (ARMs) or temporary interest rate buy-down loans are allowed;

(2) No mortgage loans with a total loan to value equal to or greater than 100% are allowed;

(3) No Subprime Mortgage Loans are allowed;

(4) Other than surveys and appraisals reimbursed to third-parties and fees allowed for the origination of single family mortgage revenue bond and mortgage credit certificate programs, fees charged by the lender in connection with mortgage loans may not exceed 2% of the loan amount or $2,500, whichever is greater;

(5) The debt to income ratio (back-end ratio) may not exceed 45%;

(6) No identity of interest relationship between the lender and the Household is allowed; and

(7) If an identity of interest exists between the Household and the seller, the Department may require additional documentation that evidences that the sales price is equal to or less than the appraised value of the property as documented by a Third-Party appraisal ordered by the first lien lender. If an identity of interest exists between the builder and CA or RSP, the CA or RSP must provide documentation that evidences that the sales price does not provide for a profit of more than 15% of the total hard construction costs and does not exceed the current appraised value as documented by a Third-Party appraisal ordered by the first lien lender.

(e) The total Project costs are inclusive of acquisition and closing costs, hard construction costs for accessibility modifications, and Match funds, and limited to:

(1) Acquisition and closing costs: the lesser of $20,000 or the amount necessary as determined by an affordability analysis that evidences the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance) is no less than 25% and no greater than 30% of the Household's gross monthly income based on a thirty (30) year amortization schedule; and

(2) Rehabilitation for accessibility modifications: $20,000.

(f) Project soft costs are limited to:

(1) Acquisition and closing costs: no more than $1,500 per housing unit; and

(2) Rehabilitation for accessibility modifications: $5,000 per housing unit.

(g) Funds for Administrative costs are limited to no more than 4% of the total Project costs, exclusive of Project soft costs and Match funds.

(h) The assistance to an eligible Household shall be in the form of a loan in the amount of the total Project costs excluding Match funds. The loan will be at 0% interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(i) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(j) In the event that the housing unit ceases to be the Principal Residence of the Household, the Department has established that the federal recapture requirements as defined in 24 CFR §92.254 will be imposed.

(k) In the event that the housing unit ceases to be the Principal Residence of the Household, the forgiveness of the Loan, if applicable, will cease.

(l) In the event that the housing unit is sold, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and the housing unit must be sold for an amount not less than the current appraised value as then appraised by the appropriate governmental authority unless the balance on the Loan will be paid at closing.

(m) Housing units that will be rehabilitated with HOME funds must meet or exceed the TMCS, as applicable, and all applicable codes and standards. In addition, housing that is Rehabilitated under this chapter must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with t. Housing units that are provided assistance for acquisition only must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

§53.42. Homebuyer Assistance (HBA) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit the following true and complete information, certified as such, with a request for the Commitment or Reservation of Funds:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition, and construction costs, soft costs and administrative costs requested. A maximum of 5% of hard construction costs for contingency items, Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application, which must include:

(A) Household composition including name, date of birth, relationship to head of Household, gender, and social security number for each Household member;

(B) Identification and resolution of potential and/or existing conflicts of interest;

(C) Identification of amounts of housing assistance or insurance proceeds previously received from other sources;

(D) Identification if any Household member owes a debt to the State of Texas;

(E) Identification that the housing unit is located or proposed to be located outside of the 100-year floodplain;

(F) Identification of head of Household's race and ethnicity;

(G) Household special needs status, if applicable;

(H) Names of Household members who are temporarily absent and reason for absence, if applicable;

(I) Future Household members and explanation, if applicable;

(J) Income sources and gross amounts for all Household members;

(K) Full-time student status of Household members over age 18, if applicable;

(L) Type and source of all assets owned by Household members including cash value and annual asset income;

(M) Year in which property to be assisted was built;

(N) Household's occupancy requirements including number of bedrooms being requested;

(O) Household expense information including current rent, phone, medical expenses, credit card payments, utilities, car payments, cable television, insurance including Medicare if applicable, loan payments, child care for children under age 13, and other expenses; and

(P) Signatures of all Household members age 18 or over;

(5) Certification of the income eligibility of the Household signed by the CA or RSP, and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within $3,000 of the 80% AMFI, all documentation used to determine the income of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) For housing units located within the 100-year floodplain, a quote for the cost of flood insurance;

(8) Executed sales contract and documentation that the first lien mortgage meets the eligibility requirements;

(9) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, or duplication of benefit; and

(10) Any other documentation necessary to evidence that the Activity meets the program requirements.

(b) Loan closing. The CA or RSP must submit the following with a request for the preparation of loan closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment to issue a title policy not older than ninety (90) days when submitted for a Commitment of Funds that evidences the property will transfer with no tax lien, child support lien, mechanic's or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close; and

(2) A good faith estimate that is or letter from the lender confirming that the loan terms and closing costs will be consistent with the executed sales contract, the first lien mortgage loan requirements, and the requirements of this chapter.

(c) Disbursement of funds. The CA or RSP must comply all of the following requirements for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with following requirements may be required with a request for disbursement:

(1) For construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) If applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) Property inspections. The inspection must be signed and dated by the inspector and CA, RSP, or Development Owner;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable loan documents for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official. This provision is not applicable for funds made available at the loan closing;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA or RSP to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA or RSP as may be necessary or advisable for compliance with all program requirements;

(7) With the exception of up to 10% of the total funds available for Administrative costs, the request for funds for Administrative costs must be proportionate to the amount of Project costs requested or already disbursed;

(8) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated loan closing date. Such a request must include a draft settlement statement, title company payee identification information, the Development Owner's authorization for disbursement of funds to the title company, request letter from title company to the

Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) For Activities involving Rehabilitation, include the withholding of 10% of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction; and

(10) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER E. CONTRACT FOR DEED CONVERSION (CFDC) PROGRAM ACTIVITY

10 TAC §§53.50 - 53.52

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter E, §§53.50 - 53.52. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.50. Contract for Deed Conversion (CFDC) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) Documentation of a commitment of at least $80,000 in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) Financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) Evidence of an available line of credit or equivalent in an amount equal to or exceeding the above requirement; or

(C) The CPA opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

(2) Housing construction plans must be certified by a licensed architect. The Department may procure and make architect certified plans available.

(A) The Department will reimburse only for the first time a set of architectural plans are used unless any subsequent site specific fees are paid to a Third Party architect; and

(B) A NOFA may include incentives or otherwise require architectural plans to incorporate "green building" elements.

§53.51. Contract for Deed Conversion (CFDC) Program Requirements.

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation, Reconstruction, or New Construction of single family housing units.

(b) A new MHU is an eligible property type for acquisition only. An MHU is not an eligible property type for Rehabilitation. HOME funds may be used to replace (Reconstruct) an existing unit with a new MHU or Modular Home if:

(1) The unit complies with standards at 24 CFR §92.205 and with the Texas Manufactured Housing Standards Act under Chapter 1201 of the Texas Occupation Code;

(2) The unit is permanently installed with a concrete perimeter foundation and in accordance with the Texas Manufactured Housing Standards Act;

(3) The unit is permanently attached to utilities; and

(4) The ownership of the unit is recorded in the taxing authority of the county in which it is located.

(c) The Household's income must not exceed 60% AMFI and the Household must complete a homebuyer counseling program/class.

(d) The Property must not be encumbered with tax liens, child support liens, or mechanic or materialmen's liens.

(e) The Department will require a first lien position.

(f) The total Project costs are inclusive of acquisition costs, closing costs, hard construction costs, demolition costs, aerobic septic systems, and Match funds, and limited to:

(1) Acquisition and closing costs: $35,000. In the case of a contract for deed conversion housing unit that involves the acquisition of a loan on an existing MHU and/or the loan for the associated land, the Executive Director may grant an exception to exceed this amount, however, the Executive Director will not grant an exception to exceed $40,000 of assistance;

(2) Reconstruction and New Construction of site-built housing: The lesser of $73.00 per square foot or $80,000 or for Households of 6 or more Persons the lesser of $73.00 per square foot or $85,000;

(3) Replacement with an MHU: $65,000; and

(4) Rehabilitation that is not Reconstruction: $30,000.

(g) In addition to the Project costs allowable under subsection (f) of this section, up to $5,000 will be allowed in Project costs for additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.

(h) Project soft costs are limited to:

(1) Acquisition and closing costs: no more than $1,500 per housing unit;

(2) Reconstruction or New Construction: no more than $7,000 per housing unit;

(3) Replacement with and MHU: no more than $3,500 per housing unit; and

(4) Rehabilitation that is not Reconstruction: $5,000 per housing unit. This limit may be exceeded for lead-based remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are Reconstructed or if the existing housing unit was built after December 31, 1977.

(i) Funds for Administrative costs are limited to no more than 4% of the total Project costs, exclusive of Project soft costs and Match funds.

(j) The assistance to an eligible Household shall be in the form of a loan in the amount of the total Project costs excluding Match funds. The loan will be at 0% interest and include deferral of payment and annual pro-rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(k) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(l) In the event that the housing unit ceases to be the Principal Residence of the Household, the Department has established that the federal recapture requirements as defined in 24 CFR §92.254 will be imposed.

(m) In the event that the housing unit ceases to be the Principal Residence of the Household, the forgiveness of the loan, if applicable, will cease.

(n) In the event that the housing unit is sold, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and the housing unit must be sold for an amount not less than the current appraised value as then appraised by the appropriate governmental authority unless the balance on the loan will be paid at closing.

(o) Housing units that are Reconstructed must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the Final Rule. Housing units that are provided assistance for acquisition only, must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

§53.52. Contract for Deed Conversion (CFDC) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit the following true and correct information, certified as such, with a request for the Commitment or Reservation of Funds:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition, and construction costs, soft costs and administrative costs requested, a maximum of 5% of hard construction costs for contingency items, Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application, which must include:

(A) Household composition including name, date of birth, relationship to head of Household, gender, and social security number for each Household member;

(B) Identification and resolution of potential and/or existing conflicts of interest;

(C) Identification of amounts of housing assistance or insurance proceeds previously received from other sources;

(D) Identification if any Household member owes a debt to the State of Texas;

(E) Identification that the housing unit is located or proposed to be located outside of the 100-year floodplain;

(F) Identification of head of Household's race and ethnicity;

(G) Household special needs status, if applicable;

(H) Names of Household members who are temporarily absent and reason for absence, if applicable;

(I) Future Household members and explanation, if applicable;

(J) Income sources and gross amounts for all Household members;

(K) Full-time student status of Household members over age 18, if applicable;

(L) Type and source of all assets owned by Household members including cash value and annual asset income;

(M) Year in which property to be assisted was built;

(N) Household's occupancy requirements including number of bedrooms being requested;

(O) Household expense information including current rent, phone, medical expenses, credit card payments, utilities, car payments, cable television, insurance including Medicare if applicable, loan payments, child care for children under age 13, and other expenses; and

(P) Signatures of all Household members age 18 or over;

(5) Certification of the income eligibility of the Household signed by the CA or RSP and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within $3,000 of the 80% AMFI, all documentation used to determine the income of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) For housing units located within the 100-year floodplain, a quote for the cost of flood insurance;

(8) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, duplication of benefit, or floodplain mitigation; and

(9) Any other documentation necessary to evidence that the Activity meets the program requirements.

(b) Loan closing. The CA or RSP must submit the following with a request for the preparation of loan closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment to issue a title policy not older than ninety (90) days when submitted for a Commitment of Funds that evidences the property will transfer with no tax lien, child support lien, mechanic's or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close;

(2) In the instances of replacement with an MHU, information necessary to draft loan documents and issue Statement of Ownership and Location (SOL);

(3) Life event documentation, as applicable, and all information necessary to prepare any applicable affidavits such as marital status and heirship; and

(4) A copy of the recorded contract for deed and a current payoff statement.

(c) Disbursement of funds. The CA or RSP must comply all of the following requirements for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with following requirements may be required with a request for disbursement.

(1) For construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) If applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) Property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and CA or RSP;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable loan documents, and SOL, as applicable, for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official. This provision is not applicable for funds made available at the loan closing;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA, RSP, or Development Owner to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA or RSP as may be necessary or advisable for compliance with all program requirements;

(7) With the exception of up to 10% of the total funds available for Administrative costs, the request for funds for Administrative costs must be proportionate to the amount of Project costs requested or already disbursed;

(8) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated loan closing date. Such a request must include a draft settlement statement, title company payee identification information, the Development Owner's authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) Include the withholding of 10% of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction;

(10) For final disbursement requests, evidence that the demolition or, if an MHU, salvage and removal of all dilapidated housing units on the lot, certification or other evidence acceptable to Department that the replacement house, whether site-built or MHU, was constructed or placed on and within the same lot secured by the loan or grant agreement, if applicable, and evidence of floodplain mitigation; and

(11) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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

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Michael Gerber
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SUBCHAPTER F. TENANT-BASED RENTAL ASSISTANCE (TBRA) PROGRAM ACTIVITY

10 TAC §§53.60 - 53.62

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter F, §§53.60 - 53.62. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.60. Tenant-Based Rental Assistance (TBRA) Threshold and Selection Criteria.

All Applicants and Applications must submit Documentation of a commitment of at least $15,000 in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(1) Financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(2) Evidence of an available line of credit or equivalent in an amount equal to or exceeding the above requirement; or

(3) The CPA opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

§53.61. Tenant-Based Rental Assistance (TBRA) Program Requirements.

(a) The Household must participate in a self-sufficiency program.

(b) The amount of assistance will be determined using the Housing Choice Voucher Method.

(c) Households certifying to zero income must also complete a questionnaire which includes a series of questions regarding how basic hygiene, dietary, transportation, and other living needs are met.

(d) The Household paid portion of the monthly rent cannot exceed 40% of the Household's gross monthly income.

(e) Project funds are limited to:

(1) Rental subsidy: No more than twenty-four (24) months per Household with an additional twelve (12) months extension available to Households participating in a reservation system; and

(2) Security deposit: No more than the amount equal to two (2) month's rent for the unit.

(f) The rent (payment) standard must be the current HUD "Fair Market Rent for the Housing Choice Voucher Program" at the time the household is income certified (or the rental coupon is executed). In instances where the area rents exceed the established Fair Market Rent, the CA or RSP may submit a written request to the Department for approval of a higher rent. The request must be evidenced by a market study. For HOME-assisted units, the payment standard must be the current HOME rent applicable for the unit.

(g) Funds for Administrative costs are limited to 8% of Project funds excluding Match funds. Funds for Administrative costs may be increased an additional 1% of Project funds, if Match is provided in an amount equal to 5% or more of Project funds.

(h) Rental units must be inspected prior to occupancy, annually upon Household recertification, and must comply with Housing Quality Standards established by HUD.

§53.62. Tenant-Based Rental Assistance (TBRA) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit the following with a request for the Commitment or Reservation of Funds:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds and Administrative costs requested, Match to be provided, evidence that Project cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application, which must include:

(A) Household composition including name, date of birth, relationship to head of Household, gender, and social security number for each Household member;

(B) Identification and resolution of potential and/or existing conflicts of interest;

(C) Identification of amounts of housing assistance or insurance proceeds previously received from other sources;

(D) Identification if any Household member owes a debt to the State of Texas;

(E) Identification of head of Household's race and ethnicity;

(F) Household special needs status, if applicable;

(G) Names of Household members who are temporarily absent and reason for absence, if applicable;

(H) Future Household members and explanation, if applicable;

(I) Income sources and gross amounts for all Household members;

(J) Full-time student status of Household members over age 18, if applicable;

(K) Type and source of all assets owned by Household members including cash value and annual asset income;

(L) Year in which property to be assisted was built;

(M) Household's occupancy requirements including number of bedrooms being requested;

(N) Household expense information including current rent, phone, medical expenses, credit card payments, utilities, car payments, cable television, insurance including Medicare if applicable, loan payments, child care for children under age 13, and other expenses; and

(O) Signatures of all Household members age 18 or over;

(5) Certification of the income eligibility of the Household signed by the CA or RSP, and all Household members age 18 or over, and including the date of the income eligibility determination. All documentation used to determine the income and rental subsidy of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) If applicable, documentation to address or resolve any potential Conflict of Interest or duplication of benefit; and

(8) Any other documentation necessary to evidence that the Activity meets the program requirements.

(b) Disbursement of funds. The CA or RSP must comply all of the following requirements for a request for disbursement of funds. Submission of documentation related to the CA's or RSP's compliance with following requirements may be required with a request for disbursement.

(1) If required or applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(2) Property inspections. The inspection must be signed and dated by the inspector and CA or RSP;

(3) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(4) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA or RSP to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA, RSP, or Development Owner as may be necessary or advisable for compliance with all Program Requirements;

(5) With the exception of up to 25% of the total funds available for Administrative costs, the request for funds for Administrative costs must be proportionate to the amount of Project costs requested or already disbursed;

(6) Requests may come in up to ten (10) days in advance of the first day of the following month; and

(7) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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

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SUBCHAPTER G. SINGLE FAMILY DEVELOPMENT (SFD) PROGRAM ACTIVITY

10 TAC §§53.70 - 53.72

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter G, §§53.70 - 53.72. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.70. Single Family Development (SFD) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) An Application for CHDO certification.

(2) If the total of Department loans equals more than 50% of the total development cost, except for developments also financed with USDA funds, the Applicant must provide:

(A) Evidence of a line of credit or equivalent tool equal to at least 10% of the total development cost from a financial institution that is available for use during the proposed development activities; or

(B) A letter from a third party CPA verifying the capacity of the owner or developer to provide at least 10% of the total development cost as a short term loan for development; and

(C) A letter from the developer's or owner's bank(s) confirming funds amounting to 10% of the total development cost are available.

(3) A proposed development plan that is consistent with the requirements of §53.71 of this chapter, all other federal and state rules, and includes:

(A) A floor plan and front exterior elevation for each proposed unit which reflects the exterior building composition;

(B) A FEMA Issued Flood Map that identifies the location of the proposed site(s);

(C) Letters from local utility providers, on company letterhead, confirming each site has access to the following services: water and wastewater, sewer, electricity, garbage disposal and natural gas, if applicable;

(D) Documentation of site control of each proposed lot, as follows: A recorded warranty deed with corresponding executed settlement statement; or a contract or option for the purchase of the proposed lots that is valid for at least one hundred-twenty (120) days from the date of application submission; and

(E) An "as vacant" appraisal of at least one of the proposed lots if: The Applicant has an Identity of Interest with the seller or current owner of the property; or any of the proposed property is part of a newly developed or under-development subdivision in which at least three other third-party sales cannot be evidenced. The purchase price of any lot in which the current owner has an Identity of Interest must comply with the Identity of Interest transfer requirements in §1.32 of this title.

(4) The Department may prioritize Applications or otherwise incentivize Applications that partner with other lenders to provide permanent purchase money financing for the purchase of units developed with funds provided under this subchapter.

§53.71. Single Family Development (SFD) Program Requirements.

(a) Eligible activities include the acquisition and New Construction or acquisition and Rehabilitation of single family housing. Single family housing units assisted with HOME funds must comply with the required affordability requirements as defined at 24 CFR §92.254.

(b) This Program Activity is a CHDO-eligible activity.

(c) The Household's income must not exceed 60% AMFI and the Household must complete a homebuyer counseling program/class.

(d) Each unit must meet the following design and quality requirements:

(1) For New Construction and Reconstruction, current applicable International Residential Code, local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the 24 CFR §92.251(a);

(2) Include the following amenities: Wired with RG-6 COAX or better and CAT3 phone cable or better to each bedroom and living room; Blinds or window coverings for all windows; Disposal and Energy-Star or equivalently rated dishwasher (must only be provided as an option to each Household); Oven/Range; Exhaust/vent fans (vented to the outside) in bathrooms; Energy-Star or equivalently rated lighting in all rooms, which may include compact florescent bulbs. The living room and each bedroom must contain at least one ceiling

lighting fixture and wiring must be capable of supporting ceiling fans; and Paved off-street parking for each unit to accommodate at least one mid-sized car and access to on-street parking for a second car;

(3) Contain no less than two bedrooms. Each unit must contain complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation;

(4) Each bedroom must be no less than 100 square feet; have a length or width no less than 8 feet; be self contained with a door; have at least one window that provides exterior access; and have at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to contain at least 5 feet of hanging space; and

(5) Be no less than 800 total net square feet for a two bedroom home; no less than 1,000 total net square feet for a three bedroom and two bathroom home; and no less than 1,200 total net square feet for a four bedroom and two bathroom home.

(e) The total hard construction costs are limited as follows:

(1) Reconstruction and New Construction of site-built housing: The hard construction costs are limited to $73.00 per square foot and $80,000 or for Households of 6 or more Persons $85,000; and

(2) Rehabilitation that is not Reconstruction: $30,000.

(f) Developer fees (including consulting fees) are limited to 15% of the total hard construction costs.

(g) Construction period financing for each unit shall be structured as a 0% interest loan with a six (6) month term. The maximum construction loan amount may not exceed the total sales price less developer fees/profit, homebuyer closing costs, and other ineligible Project costs. Prior to construction loan closing, a sales contract must be executed with a qualified homebuyer.

(h) The HOME assistance to the homebuyer shall be structured as a first and/or second lien loan(s) as follows:

(1) The downpayment assistance is limited to $15,000 and shall be structured as a fifteen (15) year deferred, forgivable loan with a subordinate lien; and

(2) A first lien conventional mortgage not provided by the Department must meet the mortgage financing requirements applicable to §53.41(d) of this chapter. If the Department is providing the first lien mortgage with HOME financing, the loan will be fully amortizing with a thirty (30) year term and the Department will require a debt to income ratio (back-end ratio) not to exceed 45%. The total estimated housing payment (including principal, interest, property taxes, and insurance) shall be no less than 25% and no greater than 30% of the Household's gross monthly income. Should the estimated housing payment be less than 25%, the Department shall reduce the amount of downpayment assistance and/or charge an interest rate to the homebuyer such that the total estimated housing payment is no less than 25% of the homebuyer's gross income. In no instance shall the interest rate charged to the homebuyer exceed 5%. The Department shall use to the Household's income certification to make this determination.

(i) Earnest money is limited to no more than $500, which will be credited to the homebuyer at closing. HOME funds may be used to pay other reasonable and customary closing costs that are HOME eligible costs.

(j) If a Household should become ineligible or otherwise cease participation and a replacement Household is not located within ninety (90) days of the end of the construction period, all additional funding closings and draws on the award will cease and the Department will require the Applicant to repay any outstanding construction debt in full.

(k) The Division Director may approve the use of alterative floorplans or lots from those included in the approved Application, provided the requirements of this section can still be met and such changes do not materially affect the total budget.

§53.72. Single Family Development (SFD) Administrative Requirements.

(a) Commitment or Reservation of Funds. The CA or RSP must submit the following with a request for the Commitment or Reservation of Funds:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition cost, construction costs, developer fees. A maximum of 5% of hard construction costs for contingency items, Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application, which must include:

(A) Household composition including name, date of birth, relationship to head of Household, gender, and social security number for each Household member;

(B) Identification and resolution of potential and/or existing conflicts of interest;

(C) Identification of amounts of housing assistance or insurance proceeds previously received from other sources;

(D) Identification if any Household member owes a debt to the State of Texas;

(E) Identification that the housing unit is located or proposed to be located outside of the 100-year floodplain;

(F) Identification of head of Household's race and ethnicity;

(G) Household special needs status, if applicable;

(H) Names of Household members who are temporarily absent and reason for absence, if applicable;

(I) Future Household members and explanation, if applicable;

(J) Income sources and gross amounts for all Household members;

(K) Full-time student status of Household members over age 18, if applicable;

(L) Type and source of all assets owned by Household members including cash value and annual asset income;

(M) Year in which property to be assisted was built;

(N) Household's occupancy requirements including number of bedrooms being requested;

(O) Household expense information including current rent, phone, medical expenses, credit card payments, utilities, car payments, cable television, insurance including Medicare if applicable, loan payments, child care for children under age 13, and other expenses; and

(P) Signatures of all Household members age 18 or over;

(5) Certification of the income eligibility of the Household signed by the CA, RSP, or Development Owner, and all Household members age 18 or over, and including the date of the income eligibility determination. For TBRA and in instances the total Household income is within $3,000 of the 80% AMFI, all documentation used to determine the income of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) Executed sales contract and documentation that the first lien mortgage meets the eligibility requirements;

(8) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, duplication of benefit, or floodplain mitigation; and

(9) Any other documentation necessary to evidence that the Activity meets the program requirements.

(b) Loan closing. The CA, RSP or Development Owner must submit the following with a request for the preparation of loan closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment to issue a title policy not older than ninety (90) days when submitted for a Commitment of Funds that evidences the property will transfer with no tax lien, child support lien, mechanic's or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close;

(2) Within ninety (90) days after the loan closing date, the Contract Administrator or Development Owner must submit to the Department the original recorded deed of trust and transfer of lien, if applicable. Failure to submit these documents within ninety (90) days after the Loan closing date will result in the Department withholding payment for disbursement requests; and

(3) A draft settlement statement that is consistent with the executed sales contract, the first lien mortgage loan requirements (as applicable), and the terms of this Contract will be provided to Department.

(c) Disbursement of funds. The CA or RSP must comply all of the following requirements for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the CA's or RSP's compliance with following requirements may be required with a request for disbursement.

(1) For construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) If required or applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) Property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and CA, RSP, or Development Owner;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable loan documents containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request CA, RSP, or Development Owner to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to CA, RSP, or Development Owner as may be necessary or advisable for compliance with all Program Requirements;

(7) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated loan closing date. Such a request must include a draft settlement statement, title company payee identification information, the Development Owner's authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(8) Include the withholding of 10% of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction; and

(9) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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

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SUBCHAPTER H. MULTIFAMILY (RENTAL HOUSING) DEVELOPMENT (MFD) PROGRAM ACTIVITY

10 TAC §§53.80 - 53.82

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter H, §§53.80 - 53.82. The proposed new sections ensure compliance with

all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.80. Multifamily (Rental Housing) Development (MFD) Threshold and Selection Criteria.

All Applicants and Applications must submit or comply with the following:

(1) If the total of Department loans equals more than 50% of the total development cost, except for developments also financed with USDA funds, the Applicant must provide:

(A) Evidence of a line of credit or equivalent financing equal to at least 10% of the total development cost from a financial institution that is available for use during the proposed development activities; or

(B) A letter from a third party CPA verifying the capacity of the owner or developer to provide at least 10% of the total development cost as a short term loan for development; and

(C) A letter from the developer's or owner's bank(s) confirming funds amounting to 10% of the total development cost are available.

(2) Applications must comply with all of the current Qualified Allocation Plan and Rules in effect at the time of Application's submission at §49.9 or §50.9(h) of this title, excluding paragraphs (4)(A), (4)(J), (8)(A)(ii), (11), (12), (14)(G) and (15) and the requirements of §53.81 of this chapter, and all other federal and state rules.

(3) Match equal to 2% of the HOME award must be provided. Documentation of the Applicant's ability to meet this requirement shall be required in the Application in the form of a commitment from the organization providing the Match. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this subsection. Such incentive may be established in the form of a Threshold or Selection scoring criterion. Match in the form of a property tax abatement will only be accepted if a letter from the applicable appraisal district is provided and such letter documents a cash value and duration for such exemption sufficient to meet the HUD requirements for documentation of Match.

(4) The maximum HOME award may not exceed 90% of the total development costs ("TDC") unless a resolution of support for the development is made by the local unit of government in which the proposed development resides and/or the proposed development is located in an area where the HUD Fair Market Rents are equal to the respective HOME Rent Limit for a one-bedroom unit but will be limited as reflected in Figure: 10 TAC §53.80(4). The remaining percentage of total development cost must be in the form of permanent loans with a maturity of at least twenty (20) years, in-kind contributions or grants from third-party private or public entities. Developments with USDA or other government-sponsored loans that will remain as permanent financing may be used to satisfy this requirement from a public or private entity. Loans or grants from the Department will not satisfy this requirement.

Figure: 10 TAC §53.80(4)

(5) For Applications proposing New Construction, documentation sufficient to meet the Site and Neighborhood Standards required in 24 CFR §92.202.

§53.81. Multifamily (Rental Housing) Development (MFD) Program Requirements.

(a) Eligible activities include the acquisition or refinancing and New Construction or Rehabilitation of multifamily housing Developments. Housing assisted with HOME funds must meet all applicable codes and standards. Additionally, the Development must meet or exceed the requirements of the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(b) Developments involving New Construction will be limited to no more than 252 total units. This maximum unit limitation also applies to those Developments which involve a combination of Rehabilitation and New Construction. Developments that consist solely of acquisition and Rehabilitation or Rehabilitation only may exceed the maximum unit restrictions. The minimum number of units shall be 8 units.

(c) This Program Activity is a CHDO-eligible activity.

(d) A Development receiving funds under this section shall have a LURA filed and recorded at the time of Loan closing and prior to any disbursement of HOME funds. The Department may require that a second LURA be filed and recorded if the restrictions to be placed on the Development exceed those of the federal requirements. Such second LURA shall include all of the requirements that exceed the federally required restrictions.

(e) In addition to the federal restrictions, Developments receiving funds under this section must meet the following rent and income restrictions:

(1) At least 20% of the total number of units in the Development must be restricted as HOME units;

(2) At least 5% of the total number of units in the Development must be set-aside for households at or below 30% of AMFI and must have rent restrictions at 30% of AMFI; and

(3) Developments receiving funds under the Persons with Disabilities set-aside are not required to meet the requirements under paragraph (1) or (2) of this subsection but must restrict all HOME units at 50% of AMFI or below and at least 5% of the HOME units at 30% of AMFI or below.

(f) Project funds awarded to Developments under this section shall be structured in the form of a loan or loans as follows:

(1) The interest rate may be as low as 2% provided all requirements of this chapter and §1.32 of this title are met. To the extent that Match in an amount of 5% or more of the HOME funds is provided, an interest rate as low as 0% may be requested;

(2) Unless structured only as an interim construction or bridge loan, the loan term shall be no less than fifteen (15) years and no greater than forty (40) years and the amortization schedule shall be no less than twenty (20) years and no greater than forty (40) years;

(3) The loan shall be structured with a regular monthly payment beginning at the end of the construction period and continuing for the loan term. If the first lien mortgage is a federally insured HUD or FHA mortgage, the Department may approve a loan structure with annual payments payable from surplus cashflow provided that the debt coverage ratio, inclusive of the loan, continues to meet the requirements in §1.32 of this title. The Board may also approve, on a case-by-case basis, a cashflow loan structure provided it determines that the financial risk is outweighed by the need for the proposed housing; and

(4) The loan shall have a deed of trust with a lien position consistent with the principal amount of the loan in relation to the principal amounts of the other sources of financing. Notwithstanding the foregoing, the loan shall have a lien position that is superior to any other sources of financing that have soft repayment structures, non-amortizing balloon notes, are deferred forgivable loans or in which the lender has an Identity of Interest with any member of the development team. The Board may also approve, on a case-by-case basis, an alternative lien priority provided it determines that the financial risk is outweighed by the need for the proposed housing.

(g) Closing on the Loan shall be conditioned upon the occurrence of closing with any superior lien holders or any other sources of funds determined to be necessary for the long-term financial feasibility of the Development and all due diligence determined by the Department to be prudent and necessary to meet the Department's rules, the HOME Final Rule, and to secure the interests of the Department.

(h) When Department funds have a first lien position, assurance of completion of the development in the form of payment and performance bonds in the full amount of the construction contract will be required or equivalent guarantee in the sole determination of the Department. Such assurance of completion will run to the Department as obligee. Development Owners also utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA.

(i) All HOME units required under this section shall be restricted as "floating" HOME units in accordance with the meaning ascribed by HUD except for units receiving funds for the development of units for persons with disabilities in which case such units shall be designated "fixed" HOME units. Development Owner must use its best efforts to distribute units reserved for Low Income Families, Very Low Income Families and Extremely Low Income Families among unit sizes in proportion to the distribution of unit sizes in the Property and to avoid concentration of Low Income Families, Very Low Income Families and Extremely Low Income Families in any area or areas of the Property.

§53.82. Multifamily (Rental Housing) Development (MFD) Administrative Requirements.

(a) Loan closing. The Development Owner must submit the following with a request for the preparation of loan closing:

(1) Owner/General Contractor and owner/architect agreements;

(2) Survey of the property reflecting all planned improvements that includes a certification to the Department, Development Owner, title company, and other lenders;

(3) If layered with housing tax credits, a fully executed limited partnership agreement between the general partner and the tax credit investor entity (may be provided concurrent with closing);

(4) Documentation of acceptance of HOME loan by other lenders and financing participants;

(5) A budget that includes the amount of Project funds specifying the acquisition cost, construction costs, developer fees, other soft costs and Match to be provided. The sources of funds used to finance the Development. If the budget or sources of funds reflect material changes that may affect the financial feasibility of the Development, the Department may request additional documentation to ensure that the Development continues to meet the requirements of §1.32 of this title;

(6) Verification of environmental clearance; and

(7) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(b) Disbursement of funds. The Development Owner must comply all of the following requirements for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Development Owner's compliance with following requirements may be required with a request for disbursement.

(1) Except disbursements for acquisition and closing costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least thirty (30) days after the date of construction completion;

(2) For hard construction costs, documentation of the total construction costs incurred and costs incurred since the last disbursement of funds. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702 or G703;

(3) If applicable, up to 50% of Project funds for an Activity may be drawn before providing evidence of Match. Thereafter, each CA or RSP must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Development Owner's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable loan documents for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(6) Developer fee schedule. Disbursement of Developer fees will be conditioned as follows:

(A) For Developments in which the Loan is secured by a first lien deed of trust against the property, 75% shall be disbursed in accordance with percent of construction completed (i.e. 75% of the total allowable fee will be multiplied by the percent completion) as documented by the construction contract and as may be verified by an inspection by the Department and 25% shall be disbursed at the time that the property reaches an occupancy of 50% or at release of retainage, whichever is later; or

(B) For Developments in which the Loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits to finance development, Developer fees will not be reimbursed by the Department unless the other lenders and syndicator confirm in writing that they do not have an existing or planned agreement to govern the disbursement of Developer fees and expect that Department funds shall be used to fund Developer fees. Provided this requirement is met, developer fees shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(C) The Department may reasonably withhold any disbursement of developer fees if it is determined that is not progressing as necessary to meet Contract benchmarks or that cost overruns may put the Department's funds or completion within budget at risk. Once a reasonable alternative that is deemed acceptable by the Department has been provided, disbursement of the remaining fee may occur;

(7) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure requested. The Department may request Development Owner to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(8) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated loan closing date. Such a request must include a draft settlement statement, title company payee identification information, the Development Owner's authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) Include the withholding of 10% of hard construction costs for retainage. Retainage will be held until at least thirty (30) days after completion of construction, a final inspection is completed and clearance is issued by the Department, labor standards final wage compliance report, and receipt of certificates of occupancy for new construction or a certification of completion from the Development architect for rehabilitation; and

(10) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003748
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-3916

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SUBCHAPTER I. COMMUNITY HOUSING DEVELOPMENT ORGANIZATION (CHDO)

10 TAC §53.90, §53.91

The Texas Department of Housing and Community Affairs proposes new 10 TAC Chapter 53, Subchapter I, §53.90 and §53.91. The proposed new sections ensure compliance with all statutory requirements, incorporates public input from the recent HOME Program rule roundtables, removes duplicative federal and statutory requirements, formalizes existing policy and guidelines contained in HOME Program manuals, and includes recommendations for revisions of necessary policy and administrative changes to further enhance the efficient and effective operations of the HOME Program. The Board will address the final rules after public comment is received and compiled for presentation.

Mr. Michael Gerber, Executive Director, has determined that for the first five-year period the proposed new sections are in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections as proposed.

Mr. Gerber 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 new sections will be enhanced compliance with formalized policy, all contractual and statutory requirements. There will be no effect on small businesses or persons. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. The proposed sections will not impact local employment.

The public comment period will be held between June 28, 2010 to August 9, 2010 to receive input on these new sections, and a public hearing will be held. More information on the public hearing may be found at http://www.tdhca.state.tx.us. Written comments may be submitted to Texas Department of Housing and Community Affairs, TDHCA Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by e-mail to the following address: tdhcarulecomments@tdhca.state.tx.us, or by fax to (512) 475-0220. ALL COMMENTS MUST BE RECEIVED BY AUGUST 9, 2010.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306, which provide the Department the authority to adopt rules governing the administration of the Department and its programs.

The proposed new sections affect no other code, article or statute.

§53.90. Application Procedures for Certification of Community Housing Development Organization (CHDO).

(a) An Applicant requesting certification as a CHDO must submit an application for CHDO certification in a form prescribed by the Department. The CHDO Application must be submitted with an Application for HOME funding under the CHDO Set-Aside and the CHDO must be a sponsor, developer, or owner of the Development within the meaning ascribed by HUD for the Program Activity being performed. An Applicant shall not receive more than one award of CHDO operating funds during the same fiscal year of the Department regardless of the number of Applications submitted. Any such award is limited to $50,000. The Application must include documentation evidencing the requirements of 24 CFR Part 92 and this subsection:

(1) All Applications shall include the following documents as applicable which shall be reviewed for compliance with federal and state requirements:

(A) Bylaws with date of board approval;

(B) Charter; and

(C) Articles of Incorporation;

(2) The Applicant must be organized as a private nonprofit organization under the Texas Nonprofit Corporation Act or other state not-for-profit/nonprofit statute as evidenced by the documents required under paragraph (1) of this subsection;

(3) The Applicant must be registered with the Office of the Secretary of State to do business in the State of Texas;

(4) The Applicant must have the following tax status:

(A) A current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the Application and must continue to be effective while certified as a CHDO; or

(B) Classification as a subordinate of a central organization nonprofit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and a private nonprofit organization's pending application for §501(c)(3) or (4) status cannot be used to comply with the tax status requirement under this subparagraph;

(5) The Applicant must have among its purposes the provision of decent housing that is affordable to low and moderate income people as evidenced by the documents required in paragraph (1) of this subsection or a business plan which outlines the CHDO's plans for developing affordable housing, providing services to each of the areas included within the service area, and internal operations;

(6) The Applicant must have a clearly defined service area that may encompass an entire "community" as defined in 24 CFR §92.2 under Community Housing Development Organization. The service area must be delineated in the entity's organizational documents;

(7) An Applicant must have the following capacity and experience:

(A) Conforms to the financial accountability standards of 24 CFR §84.21, "Standards of Financial Management Systems" as evidenced by:

(i) A notarized statement by the Executive Director or chief financial officer of the organization in a form prescribed by the Department;

(ii) A certification from a Certified Public Accountant; or

(iii) A HUD-approved audit summary; and

(iv) A written narrative describing internal controls used to create financial duties and safe guard corporate assets; and

(v) A written narrative describing the conflict of interest policy governing employees and development activities and procurement; and

(vi) A written narrative describing the current corporation's financial structure can support housing development activities; and

(vii) A written narrative describing the organization's ability to manage additional rental development activities, if applicable;

(B) Demonstrated capacity for carrying out activities assisted with HOME funds, as evidenced by:

(i) Documentation that describes the experience of key staff members who have successfully completed projects similar to those to be assisted with HOME funds; or

(ii) Contract(s) with consultant firms or individuals who have housing experience similar to projects to be assisted with HOME funds, to train appropriate key staff of the organization;

(C) Has a history of serving the low income residents of the city or county in which housing to be assisted with HOME funds is to be located as evidenced by:

(i) Documentation of at least one year of experience providing services; or

(ii) For newly created organizations formed by local churches, service or community organizations, a statement that documents that its parent organization has at least one year providing services; and

(iii) The documentation provided in clause (i) or (ii) of this subparagraph must document and describe the organization's history (or its parent organization's history) of serving the city or county, such as, developing new housing, rehabilitating existing housing stock and managing housing stock, or delivering non-housing services that have had lasting benefits for those receiving services, such as counseling, food relief, or childcare facilities. The statement in the submission package must be signed by the president or other official of the organization;

(8) An Applicant must have an organizational structure that meets the federal requirements in 24 CFR §92.2. Compliance with this paragraph shall be evidenced by:

(A) A written provision or statement in the organizations Bylaws, Charter or Articles of Incorporation;

(B) An affidavit signed by the organization's Executive Director and notarized; and

(C) A current roster of all Board of Directors, including names and mailing addresses. The required one-third low-income residents or elected representatives must be marked on list as such;

(9) The Applicant must provide a formal process for low-income individuals, including potential program beneficiaries to advise

the organization in all of its decisions regarding the design, siting, development, and management of affordable housing projects. The formal process should include a system for community involvement in parts of the private nonprofit organization's service areas where housing will be developed, but which are not represented on its boards. Input from the low-income community is not met solely by having low-income representation on the board. The formal process must be in writing and approved or adopted by the private nonprofit organization, as evidenced by:

(A) An organization's Bylaws; or

(B) A written statement of operating procedures approved by the governing body. Statement must be original letterhead, signed by the Executive Director and evidence date of board approval; and

(C) A Resolution with evidence of date of board approval;

(10) If the CHDO's creation was sponsored by a for-profit organization the for-profit entity's primary purpose cannot include the development or management of housing, as evidenced in the for-profit organization's Bylaws. If an Applicant is associated or has a relationship with a for-profit entity or entities, the CHDO must prove it is not controlled, nor receives directions from individuals, or entities seeking profit as evidenced by the documentation required in paragraph (1) of this subsection or an memorandum of understanding or similar agreement; and

(11) CHDOs that are in partnership agreements associated with the Development must maintain effective Control and decision making control over the Development. All legally binding ownership and/or partnership agreements must clearly state the CHDO's role in the Development, as evidenced by an affidavit from the CHDO and any other developer, general partner, or special limited partner (except for entities related to a tax credit investor limited partner) that the CHDO will maintain effective Control and decision making control over the Development. In addition, the CHDO or entity wholly owned by the CHDO must receive at least 50% of the cashflow from the property (for multifamily developments) or 50% of the developer fee which must also be evidenced by the affidavit.

(b) An Application for CHDO Certification will only be accepted if submitted with an Application to the Department for HOME funds. If all requirements under this section are met, the Applicant will be certified as a CHDO upon the award of HOME funds by the Department. A new Application for CHDO certification must be submitted to the Department with each new Application for HOME funds under the CHDO Set-Aside.

§53.91. Recertification of Community Housing Development Organization (CHDO).

A CHDO must be recertified every twelve (12) months during the Contract Period of any Contract with a commitment of CHDO funds with the first recertification application submitted at least thirty (30) days prior to twelve (12) months from the beginning of the contract period. Failure to be recertified as a CHDO may result in the Department withholding any draws until the CHDO obtains the recertification. Such recertification application shall include:

(1) Submission of a CHDO Application to document compliance with this section; or

(2) An affidavit from the CHDO that it continues to meet all of the requirements of this section and that there have been no changes in the organizational structure or Board membership that would violate the federal requirements in 24 CFR Part 92; and

(3) A legal opinion from the CHDO's legal counsel that the organization continues to meet the federal definition of a CHDO in 24 CFR §92.2.

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 July 2, 2010.

TRD-201003749
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 161. GENERAL PROVISIONS

22 TAC §161.5

The Texas Medical Board (Board) proposes amendments to §161.5, concerning Meetings.

The amendment to §161.5 provides that adoption of committee minutes are to be approved by the full board rather than by the individual committees.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to comply with the Open Meetings Act and to provide minutes to the public directly after a board meeting rather than waiting until board committees convene again in two or three months to approve committee minutes.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §152.009, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§161.5. Meetings.

(a) The board shall meet at least four times a year. It shall consider such matters as may be necessary.

(b) Special meetings shall be called by the president or by resolution of the board or upon written request signed by five members of the board.

(c) An agenda for each board meeting and committee meeting shall be posted in accordance with law and copies shall be sent to the board members.

(d) Board and committee meetings shall be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless the board by rule adopts a different procedure.

(e) A quorum for transaction of business by the board shall be one more than half the board's membership at the time of the meeting.

(f) The board may act only by majority vote of its members present and voting, with each member entitled to one vote. No proxy vote shall be allowed.

(g) Meetings of the board and of the committees are open to the public unless such meetings are conducted in executive session pursuant to state law.

(h) In order that board and committee meetings may be conducted safely, efficiently, and with decorum, attendees may not engage in disruptive activity that interferes with board proceedings.

(i) Members of the public shall remain within those areas of the board offices and board meeting room designated as open to the public.

(j) Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.

(k) Journalists have the same right of access to board meetings conducted in open session as other members of the public and are subject to the same requirements.

(l) The board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in disruptive activity that interferes with board proceedings.

(m) Any person may record all or any part of the proceedings of a public board meeting in attendance by means of a tape recorder, video camera, or any other means of sonic or visual reproduction.

(1) The executive director shall direct any individual wishing to record or videotape as to equipment location, placement, and the manner in which the recording is conducted.

(2) The decision will be made so as not to disrupt the normal order and business of the board.

(n) Executive Session.

(1) The board may meet in executive session pursuant to law.

(2) An executive session of the board shall not be held unless a quorum of the board has first been convened in open meeting. If during such open meeting, a motion is passed by the board to hold an executive session, the presiding officer shall publicly announce that an executive session will be held.

(3) The presiding officer of the board shall announce the date and time at the beginning and end of the executive session.

(4) A certified agenda of the executive session shall be prepared.

(o) Committee minutes shall be approved by the full board with a quorum of the committee members present to vote on approval of the minutes.

This agency hereby certifies that the proposal has been reviewed by 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 6, 2010.

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 305-7016

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CHAPTER 163. LICENSURE

22 TAC §163.6

The Texas Medical Board (Board) proposes amendments to §163.6, concerning Examinations Accepted for Licensure.

The amendment to §163.6 clarifies that if an applicant takes multiple types of licensure examinations, attempts at comparable sections shall be combined to determine eligibility for licensure. Language is currently under a different subsection, and the language is being moved to be cleared on its application.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to establish standards for eligibility for licensure as it relates to passage of licensure examinations.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §155.056, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§163.6. Examinations Accepted for Licensure.

(a) (No change.)

(b) Examination Attempt Limit.

(1) An applicant must pass each part of an examination listed in subsection (a) of this section within three attempts. An applicant who attempts more than one type of examination must pass each part of at least one examination and shall not be allowed to combine parts of different types of examination. [~~Attempts at a comparable part of a different type of examination shall be counted against the three-attempt limit.~~]

(2) Notwithstanding paragraph (1) of this subsection, an applicant who, on September 1, 2005, held a Texas physician-in-training permit issued under §155.105 of the Act or had an application for that permit pending before the board must pass each part of the examination within three attempts, except that, if the applicant has passed all but one part of the examination within three attempts, the applicant may take the remaining part of the examination one additional time. However, an applicant is considered to have satisfied the requirements of this subsection if the applicant:

(A) passed all but one part of the examination approved by the board within three attempts and passed the remaining part of the examination within six attempts;

(B) is specialty board certified by a specialty board that:

(i) is a member of the American Board of Medical Specialties; or

(ii) is approved by the American Osteopathic Association; and

(iii) has completed in this state an additional two years of postgraduate medical training approved by the board.

(3) The limitation on examination attempts by an applicant under paragraph (1) of this subsection does not apply to an applicant who:

(A) is licensed and in good standing as a physician in another state;

(B) has been licensed for at least five years;

(C) does not hold a medical license in the other state that has any restrictions, disciplinary orders, or probation; and

(D) passed all but one part of the examination approved by the board within three attempts and:

(i) passed the remaining part of the examination within one additional attempt; or

(ii) passed the remaining part of the examination within six attempts if the applicant:

(I) is specialty board certified by a specialty board that:

(-a-) is a member of the American Board of Medical Specialties; or

(-b-) is approved by the American Osteopathic Association; and

(II) has completed in this state an additional two years of postgraduate medical training approved by the board.

(4) Attempts at a comparable part of a different type of examination shall be counted against the three attempt limit.

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

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

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
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CHAPTER 165. MEDICAL RECORDS

22 TAC §165.1

The Texas Medical Board (Board) proposes amendments to §165.1, concerning Medical Records.

The amendment to §165.1 provides that physicians who receive medical records from other practitioners in relation to the treatment of a specific patient, must only keep those records that are salient to the patient's treatment.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to ensure that physicians maintain appropriate and relevant records for their patients.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§165.1. Medical Records.

(a) Contents of Medical Record. Each licensed physician of the board shall maintain an adequate medical record for each patient that is complete, contemporaneous and legible. For purposes of this section, an "adequate medical record" should meet the following standards:

(1) The documentation of each patient encounter should include:

(A) reason for the encounter and relevant history, physical examination findings and prior diagnostic test results;

(B) an assessment, clinical impression, or diagnosis;

(C) plan for care (including discharge plan if appropriate); and

(D) the date and legible identity of the observer.

(2) Past and present diagnoses should be accessible to the treating and/or consulting physician.

(3) The rationale for and results of diagnostic and other ancillary services should be included in the medical record.

(4) The patient's progress, including response to treatment, change in diagnosis, and patient's non-compliance should be documented.

(5) Relevant risk factors should be identified.

(6) The written plan for care should include when appropriate:

(A) treatments and medications (prescriptions and samples) specifying amount, frequency, number of refills, and dosage;

(B) any referrals and consultations;

(C) patient/family education; and,

(D) specific instructions for follow up.

(7) any written consents for treatment or surgery requested from the patient/family by the physician.

(8) Billing codes, including CPT and ICD-9-CM codes, reported on health insurance claim forms or billing statements should be supported by the documentation in the medical record.

(9) Any amendment, supplementation, change, or correction in a medical record not made contemporaneously with the act or observation shall be noted by indicating the time and date of the amendment, supplementation, change, or correction, and clearly indicating that there has been an amendment, supplementation, change, or correction.

(10) Salient records [~~Records~~] received from another physician or health care provider involved in the care or treatment of the patient shall be maintained as part of the patient's medical records.

(11) The board acknowledges that the nature and amount of physician work and documentation varies by type of services, place of service and the patient's status. Paragraphs (1) - (11) of this subsection may be modified to account for these variable circumstances in providing medical care.

(b) Maintenance of Medical Records.

(1) A licensed physician shall maintain adequate medical records of a patient for a minimum of seven years from the anniversary date of the date of last treatment by the physician.

(2) If a patient was younger than 18 years of age when last treated by the physician, the medical records of the patient shall be maintained by the physician until the patient reaches age 21 or for seven years from the date of last treatment, whichever is longer.

(3) A physician may destroy medical records that relate to any civil, criminal or administrative proceeding only if the physician knows the proceeding has been finally resolved.

(4) Physicians shall retain medical records for such longer length of time than that imposed herein when mandated by other federal or state statute or regulation.

(5) Physicians may transfer ownership of records to another licensed physician or group of physicians only if the physician provides notice consistent with §165.5 of this chapter and the physician who assumes ownership of the records maintains the records consistent with this chapter.

(6) Medical records may be owned by a physician's employer, to include group practices, professional associations, and nonprofit health organizations, provided records are maintained by these entities consistent with this chapter.

(7) Destruction of medical records shall be done in a manner that ensures continued confidentiality.

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

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Mari Robinson, J.D.
Executive Director
Texas Medical Board
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CHAPTER 174. TELEMEDICINE

22 TAC §§174.2, 174.7, 174.9, 174.11

The Texas Medical Board (Board) proposes amendments to §174.2 and proposes new §§174.7, 174.9 and 174.11, concerning Telemedicine.

The amendment to §174.2, concerning Definitions, defines distant site provider, established medical site, face-to-face visit, patient site location, patient site presenter; amends the definitions for physician-patient e-mail, telemedicine medical services; and deletes the definition for telepresenter.

New §174.7, concerning Telemedicine Medical Services Provided at Sites other than an Established Medical Site, establishes under what conditions a distant site provider may provide telemedicine medical services at sites other than an established medical site, such as a patient's home.

New §174.9, concerning Technology and Security Requirements, establishes requirements relating to technology and security regarding the provision of telemedicine medical services and physician-patient communications through e-mail.

New §174.11, concerning On-call Services, establishes that physicians in the same specialty who provide reciprocal services may provide on-call telemedicine medical services for each other's patients.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the proposals will be:

Section 174.2 - to establish uniform definitions for those who practice telemedicine in Texas.

Section 174.7 - to establish standards for the use of telemedicine medical services at non-medical sites. The proposed rules will accommodate the developing trends in health care delivery not authorized under existing rules as well as changes in the Health and Human Services Commission's (HHSC) rules for Medicaid telemedicine reimbursement. Also the proposed changes expand the current rules to authorize a majority of the types of telemedicine that are currently being practiced in Texas in both rural and urban areas.

Section 174.9 - to establish standards for the provision of telemedicine medical services at established medical sites.

Section 174.11 - to allow for the use of telemedicine medical services through on-call services when a patient's distant site provider is not available.

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with the rules as proposed is undetermined, and depends on an in-

dividual's current use of unlicensed patient site presenters; use of distant site providers that are not physicians, physician assistants, or advanced practice nurses; and any additional technological infrastructure that would need to be added to be in compliance with the rules. The effect on small or micro businesses is undetermined based on the same factors.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment and new rules are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment and new rules are also authorized by §157.001, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§174.2. Definitions.

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

(1) Distant site provider--a physician or a physician assistant or advanced practice nurse who is supervised by and has delegated authority from a licensed Texas physician, who uses telemedicine to provide health care services to a patient in Texas. Distant site providers must be licensed in Texas.

(2) Established medical site--a location where a patient will present to seek medical care where there is a patient site presenter and sufficient technology and medical equipment to allow for an adequate physical evaluation, as appropriate for the patient's presenting complaint. It requires a defined physician-patient relationship. A patient's private home is not considered an established medical site.

(3) Face-to-face visit--an evaluation performed on a patient where the provider and patient are both at the same physical location or where the patient is at an established medical site.

(4) In-person evaluation--A patient evaluation conducted by a provider who is at the same physical location as the location of the patient.

[~~(1) Medical practice site--A patient-specific Internet site, access to which is limited to licensed physicians, associated medical personnel and patients. It is an interactive site and thus qualifies as a practice location. It requires a defined physician-patient relationship.~~]

(5) [~~(2)~~] Medium--Any mechanism of information transfer including electronic means.

(6) Patient site location--The patient site location is where the patient is physically located.

(7) Patient site presenter--The patient site presenter is the individual at the patient site location who introduces the patient to the distant site physician for examination and to whom the distant site physician may delegate tasks and activities. A patient site presenter must be:

(A) licensed or certified in this state to perform health care services or a qualified mental health professional-community services (QMHP-CS) as defined in 25 TAC §412.303(48); and

(B) delegated only tasks and activities within the scope of the individual's licensure or certification.

(8) [~~(3)~~] Person--An individual unless otherwise expressly made applicable to a partnership, association, or corporation.

(9) [~~(4)~~] Physician-patient e-mail--An interactive [~~A computer-based~~] communication via an interactive electronic text messaging system between a physician (or their medical staff [~~personnel~~]) and patients within a professional relationship in which the physician has taken on an explicit measure of responsibility for the patient's care.

(10) [~~(5)~~] Telemedicine medical service--The practice of medical care delivery, initiated by a distant site provider, who is physically located at a site other than the site where the patient is located, for the purposes of evaluation, diagnosis, consultation, or treatment which requires the use of advanced telecommunications technology that allows the distant site provider to see and hear the patient in real time. [~~A health care service initiated by a physician or provided by a health professional acting under physician delegation and supervision, for purposes of assessment by a health professional, diagnosis or consultation by a physician, treatment, or the transfer of medical data, that requires the use of advanced telecommunications other than by telephone or facsimile as described in §57.042 of the Utilities Code.~~]

[~~(6) Telepresenter--a remote site provider, as defined in 1 TAC §354.1430, who is not a physician, registered nurse, advanced practice nurse or physician assistant, unless such physician, registered nurse, advanced practice nurse or physician assistant is a qualified mental health professional as defined in §531.02175(a) of the Government Code.~~]

§174.7. Telemedicine Medical Services Provided at Sites other than Established Medical Site.

(a) A distant site provider who provides telemedicine medical services at a site other than an established medical site for a patient's previously diagnosed condition must either:

(1) see the patient one time in a face-to-face visit before providing telemedicine medical care; or

(2) see the patient without an initial face-face to visit, provided the patient has received an in-person evaluation by another physician who has referred the patient for additional care and the referral is documented in the medical record.

(b) Patient site presenters are not required for pre-existing conditions previously diagnosed by a physician through a face-to-face visit.

(c) All patients must be seen by a physician for an in-person evaluation at least once a year.

(d) Telemedicine medical services may not be used to treat chronic pain with scheduled drugs at sites other than medical practice sites.

(e) A distant site provider may treat an established patient's new symptoms which are unrelated to a patient's preexisting condition provided that the patient is advised to see a physician in a face-to-face visit within 72 hours. A distant site provider may not provide continuing telemedicine medical services for these new symptoms to a patient who is not seen within 72 hours. If a patient's symptoms are resolved within 72 hours, such that continuing treatment for the acute symptoms is not necessary, then a follow-up face-to-face visit is not required.

§174.9. Technology and Security Requirements.

(a) At a minimum, advanced communication technology must be used for all patient evaluation and treatment conducted via telemedicine.

(b) Adequate security measures must be implemented to ensure that all patient communications, recordings and records remain confidential.

(c) Electronic Communications.

(1) Written policies and procedures must be maintained when using electronic mail for physician-patient communications. Policies must be evaluated periodically to make sure they are up to date. Such policies and procedures must address:

(A) privacy to assure confidentiality and integrity of patient-identifiable information;

(B) health care personnel, in addition to the physician, who will process messages;

(C) hours of operation and availability;

(D) types of transactions that will be permitted electronically;

(E) required patient information to be included in the communication, such as patient name, identification number and type of transaction;

(F) archival and retrieval; and

(G) quality oversight mechanisms.

(2) All relevant patient-physician e-mail, as well as other patient-related electronic communications, must be stored and filed in the patient's medical record.

(3) Patients must be informed of alternative forms of communication for urgent matters.

§174.11. On-call Services.

Physicians, who are of the same specialty and provide reciprocal services, may provide on-call telemedicine medical services for each other's active patients.

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

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Texas Medical Board
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CHAPTER 175. FEES AND PENALTIES

22 TAC §175.1

The Texas Medical Board (Board) proposes amendments to §175.1, concerning Application Fees.

The amendment to §175.1 eliminates application fees for regular temporary licenses and distinguished professor temporary licenses and adds the fee amount for a regular temporary license to the application fee for full licensure, provisional licenses, telemedicine licenses, reissuance of licenses following revocation, and administrative license.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the proposal will be to ensure that the board does not lose revenue for the state as it eliminates the need for temporary licenses.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. The effect to individuals required to comply with the rule as proposed will be a cost of $107 for applicants who apply for provisional licenses, but for those who would have applied for a temporary license, there is no additional cost to them. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §155.0031, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§175.1. Application Fees.

The board shall charge the following fees for processing an application for a license or permit:

(1) Physician Licenses:

(A) Full physician license (includes surcharge of $205)--$992 [~~$885~~].

(B) Telemedicine license (includes surcharge of $205)--$992 [~~$885~~].

(C) Administrative medicine license (includes surcharge of $205)--$992 [~~$885~~].

(D) Reissuance of license following revocation (includes surcharge of $205)--$992 [~~$885~~].

(E) Temporary license:

[(i) ~~Distinguished professor--$50.~~]

(i) [~~(ii)~~] State health agency--$50.

(ii) [~~(iii)~~] Visiting physician--$-0-.

(iii) [~~(iv)~~] Visiting professor--$167.

(iv) [~~(v)~~] National Health Service Corps--$-0-.

(v) [~~(vi)~~] Faculty temporary license (includes surcharges of $280)--$737.

(vi) [~~(vii)~~] Postgraduate Research Temporary License--$-0-.

(vii) Provisional license--$107.

[(viii) ~~Regular--$107.~~]

(F) Licenses and Permits relating to Medical Education:

(i) Initial physician in training permit (includes surcharge of $5)--$202.

(ii) Physician in training permit for program transfer (includes surcharge of $4)--$131.

(iii) Evaluation or re-evaluation of postgraduate training program--$250.

(iv) Physician in training permit for applicants performing rotations in Texas (includes surcharge of $3)--$120.

(2) Physician Assistants:

(A) Physician assistant license (includes surcharge of $5)--$205.

(B) Reissuance of license following revocation (includes surcharge of $5)--$205.

(C) Temporary license--$107.

(3) Acupuncturists/Acudetox Specialists/Continuing Education Providers:

(A) Acupuncture licensure (includes surcharge of $5)--$305.

(B) Temporary license for an acupuncturist--$107.

(C) Acupuncturist distinguished professor temporary license--$50.

(D) Acudetox specialist certification (includes surcharge of $2)--$52.

(E) Continuing acupuncture education provider--$50.

(F) Review of a continuing acupuncture education course--$25.

(G) Review of continuing acudetox acupuncture education courses--$50.

(4) Non-Certified Radiologic Technician permit (includes surcharge of $2)--$52.

(5) Non-Profit Health Organization initial certification--$2,500.

(6) Surgical Assistants:

(A) Surgical assistant licensure--$300.

(B) Temporary license--$50.

(7) Criminal History Evaluation Letter--$100.

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

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CHAPTER 177. CERTIFICATION OF NON-PROFIT HEALTH ORGANIZATIONS

22 TAC §177.13

The Texas Medical Board (Board) proposes amendments to §177.13, concerning Complaint Procedure Notification.

The amendment to §177.13 updates the name of the Texas Medical Board as used in this chapter.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to have nonprofit health organizations provide proper notice to the public on how to file complaints with the Texas Medical Board.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§177.13. Complaint Procedure Notification.

(a) Method of Notification. For the purpose of directing complaints to the board regarding health-care delivery by licensees of the board practicing through non-profit health organizations certified pursuant to the Medical Practice Act, §162.001, the non-profit health organizations which are certified or otherwise approved pursuant to the Medical Practice Act, §162.001(b) and (c), shall provide notification to the public of the name, mailing address, and telephone number of the board by displaying in a prominent location at each site of health-care delivery and readily visible to patients or potential patients, signs in English and Spanish of no less than 8 1/2 inches by 11 inches in size with the board-approved notification statement printed alone and in its entirety in black on white background in type no smaller than standard 24-point Times Roman print with no alterations, deletions, or additions to the language of the board-approved statement.

(b) Approved English Notification Statement. The following notification statement in English is approved by the board for purposes of these rules:
Figure: 22 TAC §177.13(b) (No change.)

(c) Approved Spanish Notification Statement. The following notification statement in Spanish is approved by the board for purposes of these rules:
Figure: 22 TAC §177.13(c)

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

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CHAPTER 179. INVESTIGATIONS

22 TAC §179.4

The Texas Medical Board (Board) proposes amendments to §179.4, concerning Requests for Information and Records from Physicians.

The amendment to §179.4 clarifies that this section applies in all respects to licensure applicants.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to have consistency in Board rules to enable the Medical Board to properly enforce its rules.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §154.056, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§179.4. Request for Information and Records from Physicians.

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

(c) Impaired licensees/applicants.

(1) Pursuant to §164.056 of the Medical Practice Act, the Board is required to adopt guidelines to enable the Board to evaluate circumstances in which a physician or an applicant may be required to submit to an examination for mental or physical heath conditions, alcohol and substance abuse, or professional behavior problems.

(2) A licensee shall report to the board if the licensee is aware of another licensee who poses a continuing threat to the public welfare because the said licensee is unable to practice medicine with reasonable skill and safety to patients because of illness; drunkenness; excessive use of drugs, narcotics, chemicals, or another substance; or a mental or physical condition.

(3) If the board has probable cause to believe that a licensee/applicant is impaired, the board shall require a licensee/applicant to submit to a mental and/or physical examination by a physician or physicians designated by the board. Under the Act, an impaired licensee/applicant is considered to be one who is unable to practice within his field with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material; or as a result of any mental or physical condition. Probable cause may include, but is not limited to, any one of the following:

(A) sworn statements from two people, willing to testify before the board, that a certain licensee/applicant is impaired;

(B) a sworn statement from a representative of the Texas Medical Association's or the Texas Osteopathic Medical Association's impaired physician program, stating that the representative is willing to testify before the board that a certain licensee/applicant is impaired;

(C) evidence that a licensee/applicant left a treatment program for alcohol or chemical dependency before a completion of that program;

(D) evidence that a licensee/applicant has engaged in the intemperate use of drugs or alcohol at a time and under circumstances that would lead a reasonable person to believe that the licensee is impaired;

(E) evidence of repeated arrests of a licensee/applicant for intoxication or drug use;

(F) evidence of recurring temporary commitments to a mental institution of a licensee/applicant;

(G) medical records showing that a licensee/applicant has an illness or condition that results in the inability to function properly in his or her practice; or

(H) actions or statements by a licensee/applicant at a hearing conducted by the Board that gives the Board reason to believe that the licensee has an impairment.

(4) Upon presentation to the Executive Director of probable cause, the Board authorizes the Executive Director to write the licensee/applicant requesting that the licensee/applicant submit to a physical or mental examination within 30 days of the receipt of the letter from the Executive Director. The letter shall state the reasons for the request for the mental or physical examination, the physician or physicians the Executive Director has approved to conduct such examinations, and the date by which the examination and the results are to be received by the Board.

(5) If the licensee/applicant to whom a letter requiring a mental or physical examination is sent refuses to submit to the examination, the Board, through its Executive Director, shall issue an order requiring the licensee/applicant to show cause why the licensee/applicant should not be required to submit to the examination and shall schedule a hearing on the order not later than the 30 days after the date on which the notice of the hearing is provided to the licensee. The licensee/applicant shall be notified by either personal service or certified mail with return receipt requested.

(6) At the show cause hearing provided in for in paragraph (5) of this subsection, a panel of the Board's representatives shall determine whether the licensee/applicant shall submit to an evaluation or that the matter shall be closed with no examination required.

(A) At the hearing, the licensee/applicant and the licensee/applicant's attorney, if any, are entitled to present testimony and other evidence showing that the licensee/applicant should not be required to submit to the examination.

(B) If, after consideration of the evidence presented at the show cause hearing, the panel determines that the licensee/applicant shall submit to an examination, the Board's representatives shall, through its Executive Director, issue an order requiring the examination within 60 days after the date of the entry of the order requiring examination. A licensee is entitled to cross-examine an expert who offers testimony at hearing before the Board.

(C) If the panel determines that no such examination is necessary, the panel will withdraw the request for examination.

(D) The results of any Board-ordered mental or physical examination are confidential shall be presented to the Board under seal for it to take whatever action is deemed necessary and appropriate based on the results of the mental or physical examination. A licensee shall be provided the results of an examination and given the opportunity to provide a response at least 30 days before the Board takes action.

(7) In fulfilling its obligations under §164.056 of the Act, the Board shall refer the licensee/applicant to the most appropriate medical specialist for evaluation. The Board may not require a licensee/applicant to submit to an examination by a physician having a specialty specified by the Board unless medically indicated. The Board may not require a licensee/applicant to submit to an examination to be conducted an unreasonable distance from the person's home or place of business unless the licensee/applicant resides and works in an area in which there are a limited number of physicians able to perform an appropriate examination.

(8) The guidelines adopted under this subsection do not impair or remove the Board's power to make an independent licensing or disciplinary decision unless a temporary suspension is convened.

(d) - (e) (No change.)

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

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CHAPTER 180. TEXAS PHYSICIAN HEALTH PROGRAM AND REHABILITATION ORDERS

22 TAC §§180.2 - 180.4

The Texas Medical Board (Board) proposes amendments to §§180.2 - 180.4, concerning Texas Physician Health Program and Rehabilitation Orders.

The amendment to §180.2, concerning Definitions, adds that the Texas Physician Health and Rehabilitation Committee shall also be referred to as the TXPHP Advisory Committee.

The amendment to §180.3, concerning Texas Physician Health Program (PHP), amends language to be consistent with the proposed amendments to §180.2.

The amendment to §180.4, concerning Operation of Program, provides that the drug vendor used by the PHP must be approved by the Texas Medical Board, and establishes standards for processing referrals, requiring evaluations, settings terms for agreements with participants, and facilitating interventions.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the proposal will be to avoid confusion with physician health rehabilitation committees that are associated with county medical societies and to ensure that there are minimum standards for the operation of the PHP.

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments are also authorized by §153.001 and §167.006, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§180.2. Definitions.

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

(1) Acupuncture Board--Texas State Board of Acupuncture Examiners.

(2) Agency--the medical board, physician assistant board, and acupuncture board collectively.

(3) Committee--TXPHP Advisory Committee, also referred to as the Physician Health and Rehabilitation Advisory Committee under Texas Occupations Code §167.004.

(4) Governing board--the governing board of the program.

(5) License--includes the whole or part of any board permit, certificate, approval, registration or similar form of permission authorized by law.

(6) Medical Board--the Texas Medical Board.

(7) Medical director--a physician licensed by the board who has expertise in a field of medicine relating to disorders commonly affecting physicians or physician assistants, including substance abuse disorders, and who provides clinical and policy oversight for the program.

(8) PA Board--the Texas Physician Assistant Board.

(9) Program--the Texas Physician Health Program.

(10) Program participant--a physician, physician assistant, acupuncturist, or surgical assistant who is licensed or who has applied for licensure and who receives services under the program.

§180.3. Texas Physician Health Program.

(a) (No change.)

(b) TXPHP [~~Physician Health and Rehabilitation~~] Advisory Committee.

(1) Appointments.

(A) The governing board shall appoint physicians and mental health care providers actively licensed in Texas with at least five years experience in disorders commonly affecting program participants to the TXPHP [~~Physician Health and Rehabilitation~~] Advisory Committee.

(B) Appointees shall serve at the pleasure of the Governing Board.

(C) If there is a vacancy on the committee, the Governing Board with the advice of the president of the Medical Board and the presiding officer of the PA Board may appoint a new committee member.

(2) Responsibilities of the Committee. The committee shall provide opinions upon request of the governing board or program staff.

(3) Conflicts of Interest.

(A) A committee member should avoid conflicts of interest. If a conflict of interest should unintentionally occur, the committee member should recuse himself or herself from participating in any matter that could be affected by the conflict.

(B) A committee member must request to be recused in any decision relating to a program participant that the committee member had treated or is currently treating.

(c) (No change.)

§180.4. Operation of Program.

(a) Referrals.

(1) The program shall accept a self-referral from a licensure applicant or licensee, or a referral from an individual, a physician health and rehabilitation committee, a physician assistant organization, a state physician health program, a state acupuncture program, a hospital or hospital system licensed in this state, a residency program, the medical board, physician assistant board, or the acupuncture board.

(2) In addition to confidential referrals to the program, the medical board, physician assistant board, and acupuncture board may publicly refer an applicant or licensee to the program after a contested case hearing or through an agreed order. Unless good cause is found, an applicant or licensee that has been subject to disciplinary action in another state based on alcohol or substance abuse related violations shall be referred to the program through a public referral.

(b) Eligible Program Participants. An individual who has or may have mental or physical impairment or an alcohol/substance use disorder is eligible to participate in the program unless the person:

(1) has violated the standard of care as a result of drugs or alcohol;

(2) committed a boundary violation with a patient or a patient's family; or

(3) has been convicted of, placed on deferred adjudication community supervision or deferred disposition for a felony.

(c) Drug Testing.

(1) The program's drug testing shall be provided under contract for services with the vendor approved [~~used~~] by the Texas Medical Board.

(2) The program shall adopt policies and protocols for drug-testing that are consistent with those of the agency in effect on December 31, 2009, or as approved by the Texas Medical Board.

(3) The agency may monitor the test results for all program participants, provided that the identities of the program participants are not disclosed to the agency.

(d) Reports to the Agency.

(1) If an individual who has been referred by the agency or a third party to the program and does not enter into an agreement for services or is found to have committed a substantive violation of an agreement, the governing board shall report that individual to the agency for possible disciplinary action.

(2) A positive drug screen that is not attributed to a prescription by a physician, shall be determined to be substantive violation of an agreement by the program participant.

(3) After receiving the report, the agency may refer the individual back to the program or may pursue disciplinary action through the agency's disciplinary process.

(e) Fees.

(1) Program participants shall pay an annual fee of $1,200. This fee is in addition costs owed by program participants for medical care, primary treatment, continuing care, and required evaluations to include costs for drug testing associated with a program participant's Physician Health Program agreement.

(2) The governing board may waive the annual fee for an applicant upon a showing of good cause.

(f) Process.

(1) Upon receipt of a referral as described in subsection (a) of this section, the applicant or licensee shall be invited to meet in person with the TXPHP medical director or a member of the advisory committee designated by the medical director for an interview to determine eligibility for the PHP. The interview may be conducted by telephone if the individual is out of state or not physically able to meet in person. An interview may be waived if the medical director determines that good cause exists. Advisory committee members are to be given records only in relation to those individuals that they have been assigned to review.

(2) After the requirements in paragraph (1) of this subsection have been completed, the applicant or licensee shall be offered an agreement, be determined ineligible for the program, or be found to not need the services of the PHP.

(3) Agreements are effective upon signature by the program participant.

(4) All agreements are subject to review by the Governing Board.

(g) Evaluations. The PHP may request that an applicant or licensee undergo a clinically appropriate evaluation after the person has been interviewed. The evaluation shall be considered a term of an agreement and the person will be considered a program participant at that time. If an individual refuses to undergo an evaluation, he or she may be referred to the agency as described in subsection (d) of this section.

(h) Agreements. Agreements between program participants and the PHP may include but are not limited to the following terms and conditions:

(1) abstinence from prohibited substances and drug testing;

(2) agreement to not treat one's own family, except under emergency situations;

(3) agreement not to manage one's own medical care;

(4) participation in self-help groups such as Alcoholics Anonymous;

(5) participation in support groups for recovering professionals;

(6) worksite monitor;

(7) worksite restrictions; and

(8) treatment by an appropriate health care provider.

(i) Interventions. Upon receipt of credible information, the medical director may investigate and, if indicated, initiate, or otherwise facilitate, an intervention for the purpose of assisting an individual in obtaining treatment for a mental or physical condition or substance use problem. All information obtained as a part of the intervention process shall be considered confidential.

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

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Mari Robinson, J.D.
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Texas Medical Board
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CHAPTER 187. PROCEDURAL RULES

The Texas Medical Board (Board) proposes amendments to §187.27, concerning Written Answers in SOAH Proceedings and Default Orders, and §187.81, concerning Reports on Imposition of Administrative Penalty.

The amendment to §187.27 corrects an incorrect citation.

The amendment to §187.81 requires that disciplinary orders that impose administrative penalties related to the delivery of health care services must be reported to the National Practitioner Data Bank.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the proposal will be to have Board rules that are compliant with state law and to appropriately report disciplinary orders to the National Practitioner Data Bank

Ms. Leshikar has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses.

Comments on the proposals may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

SUBCHAPTER C. FORMAL BOARD PROCEEDINGS AT SOAH

22 TAC §187.27

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.27. Written Answers in SOAH Proceedings and Default Orders.

(a) Written Answers in SOAH Proceedings. As authorized by SOAH rules, a respondent is required to file a written answer to the Complaint within 20 days after the date that service of the Complaint is complete, as provided in §187.26(c) [~~(b)~~] of this title (relating to Service in SOAH Proceedings), the respondent shall file a written answer with the State Office of Administrative Hearings and with the Hearings Coordinator of the board.

(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.

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SUBCHAPTER H. IMPOSITION OF ADMINISTRATIVE PENALTY

22 TAC §187.81

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by this proposal.

§187.81. Reports of Imposition of Administrative Penalty.

(a) An imposition of an administrative penalty shall be a public record.

(b) The imposition of an administrative penalty shall not be considered a restriction or limitation on the license, nor shall an administrative penalty be imposed under this subchapter be considered an action connected with the delivery of health care services. Further, the imposition of the administrative penalty under this subchapter [~~of the licensee and~~] shall not be reported to the National Practitioner Data Bank. The board's newsletter and any press release shall include only the number of administrative penalties imposed.

(c) The complaint, Notice of Intention to Impose an Administrative Penalty, a written response or request for personal appearance by the licensee, any information provided to and any report of a panel

of board representatives or the DPRC, shall remain confidential, in accordance with §164.007(c), Occupations Code.

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

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CHAPTER 190. DISCIPLINARY GUIDELINES
SUBCHAPTER B. VIOLATION GUIDELINES

22 TAC §190.8

The Texas Medical Board (Board) proposes amendments to §190.8, concerning Violation Guidelines.

The amendment to §190.8 provides that (1) a physician-patient relationship is not necessary when a physician prescribes medications to a patient's family members if the patient has an illness determined to be pandemic; and (2) unprofessional conduct includes contacting a member of a peer review body for purposes of intimidation in relation to a board investigation.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the proposal will be to allow physicians to more easily prescribe medications in cases of pandemics and to prevent inappropriate retaliation against persons who appropriately report alleged violations to the Board.

Ms. Leshikar has also determined that for the first five-year period the section is in effect thee will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §153.001 and §164.052(a)(5), Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§190.8. Violation Guidelines.

When substantiated by credible evidence, the following acts, practices, and conduct are considered to be violations of the Act. The following shall not be considered an exhaustive or exclusive listing.

(1) Practice Inconsistent with Public Health and Welfare. Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to:

(A) failure to treat a patient according to the generally accepted standard of care;

(B) negligence in performing medical services;

(C) failure to use proper diligence in one's professional practice;

(D) failure to safeguard against potential complications;

(E) improper utilization review;

(F) failure to timely respond in person when on-call or when requested by emergency room or hospital staff;

(G) failure to disclose reasonably foreseeable side effects of a procedure or treatment;

(H) failure to disclose reasonable alternative treatments to a proposed procedure or treatment;

(I) failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's behalf before performing tests, treatments, or procedures;

(J) termination of patient care without providing reasonable notice to the patient;

(K) prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine) or, that is either not approved by the Food and Drug Administration (FDA) for use in human beings or does not meet standards for off-label use, unless an exemption has otherwise been obtained from the FDA;

(L) prescription of any dangerous drug or controlled substance without first establishing a proper professional relationship with the patient.

(i) A proper relationship, at a minimum requires:

(I) establishing that the person requesting the medication is in fact who the person claims to be;

(II) establishing a diagnosis through the use of acceptable medical practices such as patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing. An online or telephonic evaluation by questionnaire is inadequate;

(III) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and

(IV) ensuring the availability of the licensee or coverage of the patient for appropriate follow-up care.

(ii) A proper professional relationship is also considered to exist between a patient certified as having a terminal illness and who is enrolled in a hospice program, or another similar formal program which meets the requirements of subclauses (I) through (IV) of this clause, and the physician supporting the program. To have a terminal condition for the purposes of this rule, the patient must be certified as having a terminal illness under the requirements of 40 TAC §97.403 and 42 CFR 418.22.

(iii) Notwithstanding the provisions of this subparagraph, establishing a professional relationship is not required for:

(I) a physician to prescribe medications for sexually transmitted diseases for partners of the physician's established patient, if the physician determines that the patient may have been infected with a sexually transmitted disease; or[.]

(II) a physician to prescribe medications to a patient's family members if the patient has an illness determined to be pandemic.

(M) inappropriate prescription of dangerous drugs or controlled substances to oneself, family members, or others in which there is a close personal relationship that would include the following:

(i) prescribing or administering dangerous drugs or controlled substances without taking an adequate history, performing a proper physical examination, and creating and maintaining adequate records; and

(ii) prescribing controlled substances in the absence of immediate need. "Immediate need" shall be considered no more than 72 hours.

(N) providing on-call back-up by a person who is not licensed to practice medicine in this state or who does not have adequate training and experience.

(2) Unprofessional and Dishonorable Conduct. Unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure the public within the meaning of the Act includes, but is not limited to:

(A) violating a board order;

(B) failing to comply with a board subpoena or request for information or action;

(C) providing false information to the board;

(D) failing to cooperate with board staff;

(E) engaging in sexual contact with a patient;

(F) engaging in sexually inappropriate behavior or comments directed towards a patient;

(G) becoming financially or personally involved with a patient in an inappropriate manner;

(H) referring a patient to a facility without disclosing the existence of the licensee's ownership interest in the facility to the patient;

(I) using false, misleading, or deceptive advertising;

(J) providing medically unnecessary services to a patient or submitting a billing statement to a patient or a third party payer that the licensee knew or should have known was improper. "Improper" means the billing statement is false, fraudulent, misrepresents services provided, or otherwise does not meet professional standards;

(K) behaving in an abusive or assaultive manner towards a patient or the patient's family or representatives that interferes with patient care or could be reasonably expected to adversely impact the quality of care rendered to a patient;

(L) failing to timely respond to communications from a patient;

(M) failing to complete the required amounts of CME;

(N) failing to maintain the confidentiality of a patient;

(O) failing to report suspected abuse of a patient by a third party, when the report of that abuse is required by law;

(P) behaving in a disruptive manner toward licensees, hospital personnel, other medical personnel, patients, family members or others that interferes with patient care or could be reasonably expected to adversely impact the quality of care rendered to a patient;

(Q) entering into any agreement whereby a licensee, peer review committee, hospital, medical staff, or medical society is restricted in providing information to the board; and

(R) commission of the following violations of federal and state laws whether or not there is a complaint, indictment, or conviction:

(i) any felony;

(ii) any offense in which assault or battery, or the attempt of either is an essential element;

(iii) any criminal violation of the Medical Practice Act or other statutes regulating or pertaining to the practice of medicine;

(iv) any criminal violation of statutes regulating other professions in the healing arts that the licensee is licensed in;

(v) any misdemeanor involving moral turpitude as defined by paragraph (6) of this section;

(vi) bribery or corrupt influence;

(vii) burglary;

(viii) child molestation;

(ix) kidnapping or false imprisonment;

(x) obstruction of governmental operations;

(xi) public indecency; and

(xii) substance abuse or substance diversion.

(S) contacting or attempting to contact a complainant, [or] witness, medical peer review committee member, or professional review body as defined under §160.001 of the Act regarding statements used in an active investigation by the board for purposes of intimidation. It is not a violation for a licensee under investigation to have contact with a complainant, [or] witness, medical peer review committee member, or professional review body if the contact is in the normal course of business and unrelated to the investigation.

(3) - (6) (No change.)

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

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CHAPTER 193. STANDING DELEGATION ORDERS

22 TAC §193.6

The Texas Medical Board (Board) proposes amendments to §193.6, concerning Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses.

The amendment to §193.6 clarifies that certified registered nurse anesthetists (CRNAs) who only sign or carry out prescription drug orders are not required to register with the Board.

Nancy Leshikar, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the proposal will be to require registration of only of those CRNAs as set out in Medical Practice Act.

Ms. Leshikar has also determined that for the first five-year period the section is in effect there will be no fiscal implication to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Jennifer Kaufman, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendment is also authorized by §§153.001, 157.0511, 157.058, Texas Occupations Code.

No other statutes, articles or codes are affected by this proposal.

§193.6. Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses.

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

(f) Documentation of supervision.

(1) A physician shall document any delegation of prescriptive authority to a physician assistant or advanced practice nurse by a protocol, as defined in this section. The physician shall also maintain a permanent record of all protocols the physician has signed, showing to whom the delegation was made and the dates of the original delegation, each annual review, and termination.

(2) If the physician assistant or advanced practice nurse is located at a site other than the site where the physician spends the majority of the physician's time, physician supervision shall be further documented by a permanent record showing the names or identification numbers of patients discussed during the daily status reports, the times when the physician is on site, and a summary of what the physician did while on site. The summary shall include a description of the quality assurance activities conducted and the names of any patients seen or whose case histories were reviewed with the physician assistant or advanced practice nurse. The supervising physician shall sign the documentation at the conclusion of each site visit. Documentation is not required if the physician assistant or advanced practice nurse is permanently located with the physician at a site where the physician spends the majority of the physician's time.

(3) Physicians that delegate the carrying out or signing of a prescription drug order must register with the board the name and license number of the physician assistant or advanced practice nurse to whom the delegation is made. Certified registered nurse anesthetists who sign or carry out medication orders as defined in Texas Occupations Code §551.003(24) are not required to register with the board.

(g) - (n) (No change.)

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

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING RULES

The Texas Board of Professional Geoscientists (Board) proposes amendments to §851.10; the repeal of §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80, 851.101 - 851.110, 851.151 - 851.158, and 851.201 - 851.243; and new §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80, 851.101 - 851.114, 851.151 - 851.153, 851.156 - 851.158, and 851.201 - 851.243, concerning the licensure and regulation of Professional Geoscientists.

BACKGROUND AND PURPOSE

The Board proposes the amendments, repeals and new rules to reorganize, specify and clarify the requirements for examination and licensure, firm registration and certification as a Geoscientist-in-Training, clarify the application procedures, clarify the distinction between the license and the license certificate, clarify license, registration, and certification renewal requirements and procedures, define the role of the authorized official of a firm, strengthen the professional code of conduct and apply relevant portions of it to registered firms, the authorized official of a firm, and Geoscientists-in-Training, clarify complaint procedures and the actions the Board may impose on a Professional Geoscientist, a registered firm, an authorized official of a firm, a Geoscientist-in-Training, an unlicensed individual and an unregistered firm, correct minor errors, improve the definitions and rules, and ensure that the rules reflect current legal, policy, and operational considerations. This set of proposed revisions is a result of the review of the entire chapter in accordance with the Texas Government Code §2001.039.

SECTION BY SECTION SUMMARY

An amendment to Subchapter A is proposed to change the title to "Definitions" and separate §851.10, relating to definitions, to make it clear that the definitions in §851.10 apply to the entire chapter. Amendments to §851.10 are proposed to improve the definitions of Act, advertising or advertisement, applicant, application, complainant, discipline, filed date, geology, geophysics,

geoscience, license, licensee and professional geoscience service; add definitions for accredited institutions or programs, address of record, authorized official of a firm, certificant, complaint, default, geoscience firm, license certificate, license status, current license, expired license, permanently expired license, Professional Geoscientist, practice for the public, the public, registered firm, registrant, respondent, and sole-proprietorship; and delete the definition of firm. The definitions will be renumbered accordingly.

The Board proposes the repeal of §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, and 851.80 and replace them with new §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, and 851.80 under Subchapter B which is now entitled "P.G. Licensing, Firm Registration, and GIT Certification." The Board also proposes the repeal of §§851.101 - 851.110 and replace them with new §§851.101 - 851.114 under Subchapter C which is now entitled "Code of Professional Conduct;" the repeal of §§851.151 - 851.158 and replace them with new §§851.151 - 851.153 and §§851.156 - 851.158, under Subchapter D which is now entitled "Compliance and Enforcement;" the repeal of §§851.201 - 851.243 and replace them with new §§851.201 - 851.243 under Subchapter E, entitled "Hearings--Contested Cases."

Proposed new §851.20 will specify the requirements for licensure as a Professional Geoscientist to be consistent with the Texas Occupations Code §1002.255 and §1002.256, specifically the requirements related to examination, qualifying work experience, moral character, academic requirements, and provision of supporting documentation of any licensure requirement as determined by TBPG staff related to criminal convictions, substance abuse issues and relating to issues surrounding reasons the Board may deny a license; specify that the Board may accept qualifying work experience in lieu of the education requirement; specify the requirements and examination request procedure for the National Association of State Boards of Geology (ASBOG) Fundamentals of Geology examination, the ASBOG Practice of Geology examination, and the Texas Geophysics Examination; specify that the procedure for taking the Council of Soil Science Examiners' (CSSE) Fundamentals of Soil Science and Practice of Soil Science examinations is to apply directly with, submit examination fees to, and follow the procedures of the CSSE; specify the Professional Geoscientist application procedure; specify the procedures followed by the agency staff to issue a license once all required materials and fees required for licensure have been submitted to the agency; specify the length of an initial Professional Geoscientist license; specify that a license certificate, license expiration card, and wallet license expiration card shall be provided upon initial licensure as a Professional Geoscientist; specify the procedure for an applicant to request licensure by waiver of a license requirement and specify that the Board may waive any license requirement, except for a fee; specify that an application is active for one year and that an application expires after one year; specify that obtaining or attempting to obtain a license by fraud is grounds for an administrative sanction or penalty; specify that an application is not reviewed until the application and fee have been received in the TBPG office and specify that applicant is initially notified of any deficiencies in the application approximately thirty (30) days after receipt of the application and fee; specify that an applicant should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies and that if an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active; specify that an original license is valid for a period of one year from the date it is issued, and that upon the first timely renewal of a license, the renewal period shall be from the date the license is renewed until the last day of the next birth month for the licensee; specify that the fee for the first renewal period shall be prorated; specify that the second timely renewal and every subsequent timely renewal period shall be the one year period following the expiration date of the license; specify that a license that is renewed late (one day after the expiration date of the license through the end of the 36th month past the expiration date of the license) is renewed in accordance to the rules set forth in §851.28 of the Board's rules; remove previous subsections (a) - (d) of this section since the new rules address the application procedures and rules addressed in the removed subsections; specify that the Professional Geoscientist license is the legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and these rules; specify that when a license is issued, a license certificate, the first license certificate expiration card, and the first wallet license card is provided to the new licensee; specify that the license certificate shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the person is licensed, and the date the license was originally issued; specify that the license certificate is not valid proof of licensure unless the license certificate expiration card is accompanying the license certificate and the date on the license certificate card is not expired; specify that the license certificate expiration card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, and the date the license will expire unless it is renewed; and specify that the wallet license card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the date the license was originally issued, the discipline in which the person is licensed, and the date the license will expire unless it is renewed.

Proposed new §851.21 will remove language that previously allowed an applicant to take an examination in a language other than English if the applicant paid the translation costs; and specify that an applicant for the Geophysics discipline must pass the Texas Geophysics Examination.

Proposed new §851.23 will improve language and clarify that an applicant's experience record must demonstrate evidence of the applicant's competency to be placed in responsible charge of a geoscience work of similar character.

Proposed new §851.24 will specify that professional references provided by an applicant shall include not fewer than three that are from Professional Geoscientists or other professionals acceptable to the Board who have knowledge of the applicant's relevant work experience, unless more letters of reference are required to meet the requirements; and to improve language.

Proposed new §851.25 will specify that an applicant must have graduated from an accredited university or program; add petroleum geology as a sub discipline of geology; specify that degrees and coursework earned at foreign universities shall be acceptable if the degree conferred and coursework has been determined by a member of the National Association of Credential Evaluation Services (NACES) to be equivalent to a degree conferred by or coursework completed in an accredited institution or program and that it is the applicant's responsibility to have degrees and coursework so evaluated; specify that the commercial evaluation of a degree will not be accepted in lieu of an offi-

cial transcript; specify that the relevance to the licensing requirements of academic courses, the titles of which are not self-explanatory, must be substantiated through course descriptions in official school catalogs, bulletins, syllabi, or by other means; specify that the Board shall accept no coursework which an applicant's transcript indicates was not completed with a passing grade or for credit; and specify that in evaluating two or more sets of transcripts from a single applicant, the Board shall consider a quarter hour of academic credit as two-thirds of a semester hour.

Proposed new §851.27 will change the title of the section to Replacement License Certificate or License Expiration Cards; specify that a new or duplicate license certificate, a new or duplicate license certificate expiration card, or a new wallet license expiration card to post in a secondary work location or to replace one lost, destroyed, or mutilated, may be issued, subject to the rules of the Board, on payment of the established fee; and specify that a licensee need not destroy his or her current license certificate, but shall remain responsible for its care and custody, including any misuse of the certificate, removing the requirement to destroy a previous certificate and filing a signed statement setting out the reasons for the request so that the Board records will reflect the reason for issuance of a new license.

Proposed new §851.28 will change the title of the section to Professional Geoscientist License Renewal and Reinstatement; specify that a licensee may renew a current license up to sixty (60) days in advance of its expiration online by accessing the online renewal link from the Board's website and that a licensee may also renew by paper application for renewal by accessing the form on the agency website or calling for a copy of the form up to ninety (90) days in advance of the expiration of the license through up to but not including three years after the expiration of the license; specify that the first renewal period shall be set no more than twelve (12) months from the first renewal date and the expiration of the first renewal term shall be set to coincide with the last day of the licensee's birth month; specify that the first year renewal fee shall be prorated for the number of months in the first renewal period; specify that every subsequent expiration date shall be set for one year past the previous renewal date; specify that a late fee of $50 will be charged for each renewal application received sixty-one (61) days after the licensee's expiration date, unless the renewal is received by mail or courier and is postmarked on or before sixty (60) days after the date of expiration; specify the fee for a license that is renewed within the first sixty (60) days of expiration is the fee that was or is in place at the time the license expired; remove language that uses the term "lapsed" to describe a license that is expired for more than sixty (60) days; provide that a licensee who renews a license that has been expired for more than sixty (60) days must submit a signed affirmation indicating whether the licensee practiced as a P.G. when their license was expired; specify that the fee for a license that is renewed within the first year of expiration is the fee that was or is in place at the time the license expired; specify that a license that has expired for more than one year but less than three years after the original expiration date may be renewed by submitting to the Board an annual renewal application and fee, plus the annual renewal fee that was in place at each expiration/renewal that would have occurred if the license had been renewed on time each year since it expired, the late fee which would have applied after every scheduled license renewal was delinquent for sixty (60) days and proof of having met the continuing education requirements as required in §851.32(o) of the Board's rules and that the licensee must also submit a signed affirmation indicating whether the licensee practiced as a P.G. when the license was expired; specify that if an applicant for renewal who has met the requirements for renewal has practiced as a P.G. with the license expired, unless certain allegations of misconduct are present, the license shall be renewed and that information regarding unlicensed practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board; specify that a license that is allowed to expire for a period of three years after the original expiration date is permanently expired and may not be renewed; specify that a former license holder may re-apply for a new license as provided by the Act and applicable Board rules and will have to meet all licensure requirements in the Act and rules at the time of re-application; specify that the application fee is non refundable; improve language and to renumber the section accordingly.

Proposed new §851.29 will change the title of the section to "Licensure by Endorsement, Licensure Under a Reciprocal Agreement, and Reciprocal Licensure by Similar Examination"; remove current subsections (a) and (b) because a reciprocal license by similar examination is addressed in new subsection (c) of this section; add a subsection that specifies that an applicant for a Professional Geoscientist license who is currently or has been licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, or the District of Columbia may be eligible to demonstrate having met all or some of the qualifications for licensure through endorsement; specify that licensure by endorsement is the process whereby the Board issues a license based on review of evidence of an applicant's completion of all or part of the requirements for licensure in Texas based on documentation of having met the same or a similar requirement in another Professional Geoscientist licensing jurisdiction in the successful application for a license in that jurisdiction; specify that the Board will only accept documentation provided to the Board directly from a licensing authority that has issued a license to the applicant; specify that it is the responsibility of the applicant to ensure that the licensing authority provide information to the Board; specify that any cost associated with the transmission of information to the Board is the responsibility of the applicant; specify that in order for the Board to consider evidence, the applicant must ensure that his or her licensing authority provide verification of the license acceptable to the Board and verification of the specific qualifications that were met in order to become licensed; specify that verification of the specific qualifications that were met in order to become licensed may be in the form of a letter signed by an authorized agent of the authority indicating the specific qualifications that were met in order to become licensed and/or copies of specific documents that were submitted to the licensing authority to document having met a specific requirement; specify that the Board may accept, deny or grant partial credit for requirements completed in a different jurisdiction; specify that licensure by reciprocity agreement is the process whereby an applicant for licensure as a Professional Geoscientist in Texas who is currently licensed as a Professional Geoscientist (or equivalent license) in another United States jurisdiction (state, commonwealth or territory) becomes licensed in Texas and the process whereby an applicant currently licensed as a Professional Geoscientist in Texas applying for licensure as a Professional Geoscientist (or equivalent license) in the other jurisdiction becomes licensed in the other jurisdiction under the terms of a formal reciprocity agreement between the two jurisdiction's Boards; specify that an applicant who holds a current license in a jurisdiction with which the TBPG has a reciprocity agreement may apply for licensure under the terms of the spe-

cific reciprocity agreement between the two Boards; specify that the Board shall maintain a list of each state or foreign country in which the requirements and qualifications for licensure or registration are comparable to those established in this state and with which a reciprocity agreement exists; specify that a person who is licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, the District of Columbia, or a foreign country may apply to the Executive Director for licensure without meeting the examination requirements and that a person applying for licensure under this subsection must submit proof of passage of an examination or examinations that are substantially similar to the applicable §851.21 of the Board's rules; and to improve language.

Proposed new §851.30 will specify that unless an exemption applies, as outlined in Texas Occupations Code §1002.351(b), a firm or corporation may engage in the public practice of geoscience only if the firm is currently registered with the Board and the geoscientific work is performed by, or under the supervision of, a Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records or the business of the firm or corporation includes the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a Professional Geoscientist and has overall supervision and control of the geoscientific work performed; specify that for the purpose of fees, Geoscience Firms are categorized as either an unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience or any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience; specify that unless registered by the Board or exempt from registration, a individual, firm or cooperation may not represent to the public that the entity is a Professional Geoscientist or able to perform geoscience services or produce work for which a P.G.'s seal is required; specify the registration requirements for a firm to become a registered as a Geoscience Firm with the Board, including affirmation and demonstration that the entity offers or performs work that includes the public practice of geoscience, identification of an authorized official of the firm who shall be responsible for certain duties relative to the firms compliance with laws and rules and communicating with the Board, that they operate under a business model consistent with Texas Occupations Code §1002.351, provide certain information to the Board upon application and comply with other certain requirements; specify the steps and rules governing the firm registration initial and renewal application processes; specify rules regarding certificates and renewal cards issued by the Board; specify that in order to renew an expired firm registration, the firm must affirm whether geoscience services were offered or provided while the firm's registration was expired; specify that the Board may initiate a complaint against a firm that practiced geoscience while its registration was expired; improve language and to reorder and renumber the section accordingly.

Proposed new §851.31 and §851.32 will improve language.

Proposed new §§851.40 - 851.46 and §851.80 are consistent with existing rule.

Proposed new §851.101 will specify that any person or entity who holds a Professional Geoscientist license and/or is the authorized official of a Geoscience Firm, is a Geoscience Firm, or who holds a certificate as a Geoscientist-in-Training is responsible for understanding and complying with the Act, rules adopted by the Board and any other law or rule pertaining to the professional practice of geoscience; specify that any person under application for, currently holding, or eligible to renew a license, registration, or certification issued by the Board is bound by the provisions of the Act and rules adopted by the Board; specify that a Professional Geoscientist, an authorized official of a Geoscience Firm, or a person who holds a certificate as a Geoscientist-in-Training having knowledge of any alleged violation of the Act and/or Board rules shall cooperate with the Board in furnishing such information as may be required; specify that a Professional Geoscientist, an authorized official of a Geoscience Firm, or a person who holds a certificate as a Geoscientist-in-Training shall promptly answer all inquiries concerning matters under the jurisdiction of the Board, and shall fully comply with final decisions and orders of the Board; specify that failure to comply with these matters shall constitute a separate offense of misconduct subject to the penalties provided under the Act; specify that relevant rules of conduct apply to P.G.s, Geoscience Firms, and Geoscientists-in-Training; improve language and renumber accordingly.

Proposed new §851.102 will change the title from Competence to Competence/Negligence, specify that relevant subsections are applicable to Geoscience Firms, and to improve language.

Proposed new §851.103 will specify that relevant subsections are applicable to Geoscience Firms and to improve language.

Proposed new §851.104 will specify that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training, specify that a P.G., Geoscience Firm and Geoscientist-in-Training shall not make any false, misleading, deceptive, fraudulent or exaggerated claims or statements about the services of an organization or agency, including, but not limited to, the effectiveness of geoscientific services, qualifications, or products and to improve language; specify that if a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm learns that any false, misleading, deceptive, fraudulent or exaggerated claims or statement about the geoscientific services, qualifications or products have been made, the licensee shall take reasonable steps to correct the inappropriate claims. As appropriate, the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm may notify the Board in writing about these claims; specify that Professional Geoscientists and Geoscience Firms shall issue statements in an objective and truthful manner; specify that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms should strive to make affected parties aware of the concerns regarding particular actions or projects, and of the consequences of geoscientific decisions or judgments that are overruled or disregarded; specify that all advertisements or announcements of professional services which a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm offers, including telephone directory listings, business cards, etc. shall clearly state the person's or firm's licensure, registration or certification designation; specify that information used by a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in any advertisement or announcement shall not contain information which is false, inaccurate, misleading, incomplete, out of context, deceptive or not readily verifiable; specify that advertising includes, but is not limited to, any announcement of services, letterhead, signage, business cards, commercial products, and billing statements; specify that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm who retains

or hires others to advertise or promote the licensee's practice remains responsible for the statements and representations made; specify that a Professional Geoscientist shall use the identification "Professional Geoscientist" or the initials, "P.G." in the professional use of the license holder's name, whether P.G. is in an exempt or non-exempt professional geoscience setting and in connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification; specify that a Geoscientist-in-Training shall use the identification "Geoscientist-in-Training" or the initials, "GIT" in the professional use of the license holder's name and in connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification; and to improve language.

Proposed new §851.105 will specify that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training and to improve language.

Proposed new §851.106 will change the title of the section to "Responsibility to the Regulation of the Geoscience Profession and Public Protection;" specify that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the health, safety, and welfare of the public in the practice of their profession; specify that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training; specify that a Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscientific services provided to the public for no less than five (5) years following the completion and final delivery of the service; specify what adequate records shall include, but not be limited to; specify that Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms should strive to adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions; and improve language.

Proposed new §851.107 will specify that relevant subsections are applicable to Geoscience Firms and Geoscientists-in-Training; specify that a Geoscience Firm that fails to renew its Geoscience Firm registration prior to its annual expiration date shall not use the title "Geoscience Firm" and shall not engage or offer to engage in the public practice of geoscience as defined by the Texas Occupations Code §1002.002 until after the Geoscience Firm's registration has been properly renewed; specify that a Geoscientist-in-Training who fails to renew his/her certification prior to its annual expiration date shall not use the title "Geoscientist-in-Training" until after the Geoscientist-in-Training certification has been properly renewed; and improve language.

Proposed new §851.108 and §851.109 are consistent with existing rules, and proposed new §851.110 will improve language.

Proposed new §851.111 will specify that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order or when those confidences, if left undisclosed, would constitute a threat to the health, safety or welfare of the public; specify that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not use a confidence or private information regarding a client or employer to the disadvantage of such client or employer or for the advantage of a third party; and specify that a Professional Geoscientist or Geoscience Firm shall exercise reasonable care to prevent unauthorized disclosure or use of private information or confidences concerning a client or employer by the Professional Geoscientist's or Geoscience firm's employees and associates.

Proposed new §851.112 will specify that a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall make written reports to the Board office within thirty (30) days of the following, as applicable: (1) a change of mailing address, (2) a change or additional place of full or part-time employment, (3) the initiation of independent practice as an unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience, (4) the initiation of practice as any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience, (5) The notification in paragraphs (1) - (4) of this subsection shall include full legal trade or business name of the association or employment, physical location and mailing address of the business, status of business (corporation, assumed name, partnership, or self-employment through use of own name), legal relationship and position of responsibility within the business, telephone number of the business office, effective date of this change, and reason for this notification (changed employment or retired; firm went out of business or changed its name or location, etc.) and information regarding areas of practice within each employment or independent sole practitioner practice setting, a change of business phone number, an additional business phone number, or a change in the home phone number, (6) a change of business phone number, an additional business phone number, or a change in the home phone number, (7) a criminal conviction, other than a Class C misdemeanor traffic offense, of the licensee, Geoscientist-in-Training, or authorized official, (8) the settlement of or judgment rendered in a civil lawsuit filed against the licensee or firm and relating to the Professional Geoscientist's or Geoscience Firm's professional practice, or (9) final actions against the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm done by a licensing or certification body related to the practice of geoscience when known by the licensee; specify that information received under this rule may be used by the Board to determine whether disciplinary action should be taken against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm; and specify that failure to make a report as required by this rule is grounds for disciplinary action by the Board.

Proposed new §851.113 will specify that an independent practice by a Professional Geoscientist may be incorporated in accordance with the Professional Corporation Act, or other applicable law; specify that when an assumed name is used in any practice of geoscience, the name of the Professional Geoscientist must be listed in conjunction with the assumed name; and specify that an assumed name used by a Professional Geoscientist must not be false, deceptive, or misleading.

Proposed new §851.114 will specify that a Professional Geoscientist: (a) Shall display the license certificate issued by the Board in a prominent place at each location of practice, (b) Shall display only an original of the license certificate issued by the Board, (c) Shall not make any alteration to a license certificate issued by the Board, (d) Shall not display a license certificate issued by the Board, which has been reproduced or is expired, suspended, or revoked, and (e) Who elects to copy or allows to be copied a license certificate issued by the Board takes full responsibility for the use or misuse of the reproduced license.

Proposed new §851.151 will specify that the Board may impose appropriate sanctions against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm for: (1) the practice of fraud or deceit in obtaining a Professional Geoscientist license, Geoscientist-in-Training certification, or Geoscience Firm registration, (2) incompetence, misconduct, fraud, gross negligence, or repeated incidents of negligence in the public practice of geoscience, (3) conviction of a license holder or authorized official of a crime involving moral turpitude or a felony, (4) the imposition of an administrative or civil penalty or a criminal fine, or imprisonment or probation instead of a fine, for a misdemeanor relating to or arising out of the public practice of geoscience, (5) the issuance of a cease and desist order or a similar sanction relating to or arising out of the public practice of geoscience, (6) using the seal of another license holder or using or allowing the use of the license holder's seal on geoscientific work not performed by or under the supervision of the license holder, (7) aiding or abetting a person or firm in a violation of this chapter, (8) the revocation or suspension of a license or firm registration, the denial of renewal of a license or registration, or other disciplinary action taken by a state agency, Board of registration, or similar licensing agency for Professional Geoscientists, Geoscientists-in-Training, Geoscience Firms, or a profession or occupation related to the public practice of geoscience, (9) practicing or offering to practice geoscience or representing to the public that the person or the person's firm or corporation is licensed or registered or qualified to practice geoscience if the person or firm is not licensed or registered under this chapter or the person's firm or corporation does not employ a Professional Geoscientist as required under this chapter, or (10) violating this chapter, a rule adopted under this chapter, including the code of professional conduct, or a comparable provision of the laws or rules regulating the practice of geoscience in another state or country; and improve language.

Proposed new §851.152 will remove existing subsections (a) and (b) because the content of the subsections is moved to or are otherwise addressed in existing language or in proposed new §851.30; specify that a Geoscience Firm shall ensure that all geoscience work is done by or under the supervision of a Professional Geoscientist; specify that a Geoscience Firm that obtains a new certificate of authority from the Office of the Secretary of State or files a new Assumed Name Certificate with the County Clerk must provide the new instrument number to the Board within 30 days of the action; specify that all geoscience documents released, issued, or submitted by or for a Geoscience Firm, including preliminary documents, must clearly indicate the firm name and registration number; specify that the Board may revoke or suspend a Geoscience Firm's registration, place on probation a firm whose registration has been suspended, reprimand a Geoscience Firm, or assess an administrative penalty against a Geoscience Firm for a violation of any provision of these rules or the Act by the firm or any employee of the firm; specify that the Board also may take action against an applicant pursuant to §851.110 of the Board's rules (relating to Effect of Enforcement Proceedings on Application); specify that upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions against a Geoscience Firm: (1) the seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public, (2) the economic damage or potential damage to property caused by the misconduct, (3) the respondent's history concerning previous grounds for sanction, (4) the sanction necessary to deter future misconduct, (5) efforts to correct the misconduct, and (6) any other matter justice may require; and improve language.

Proposed new §851.153 will change the title of the section to "Professional Geoscientist Compliance" and improve language.

Section 851.154 and §851.155 are proposed to be repealed because the requirements in those sections will be incorporated into proposed new §851.112.

Proposed new §851.156 will change the title of the section to "Professional Geoscientist's Seals;" specify that a license holder is not required to use a seal for a work product for which the license holder is not required to hold a license under Texas Occupations Code Chapter 1002; specify that all geoscience documents released, issued, or submitted by a licensee shall clearly indicate the Geoscience Firm name and registration number by which the Professional Geoscientist is employed; specify that if the Professional Geoscientist is employed by a local, State, or Federal Government agency or a firm that is exempt from the requirement of registration under Texas Occupations Code Chapter 1002, Subchapter H, then only the name of the agency shall be required; and improve language.

Proposed new §851.157 will change the title of the section to "Complaints and Disciplinary Actions;" specify that a complaint may be filed with the Board by a member of the public, a member of the Board or by agency staff. Complaints against a person or entity whose activities are regulated by the Board must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Board at the office of the Board in Austin; specify that a complaint may be filed against any person who: holds a Professional Geoscientist license issued by the Board and/or is the authorized official of a Geoscience Firm registered by the Board, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the Board; specify that a complaint may also be filed against a person or firm that is not licensed or registered with the Board alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas; specify that a complaint must be filed within two (2) years of the event giving rise to the complaint; specify that the event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent; specify that complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing; specify that complaints and investigations under this chapter are of two types: (1) complaints received from a member of the public and (2) complaints and investigations that are initiated by the Board as a result of information that becomes known to the Board or agency staff and that may indicate a violation; specify that the agency provides a complaint form which should be used to file a complaint; specify that a complaint from a member of the public must be in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer; specify that a complaint that is initiated by a member of the Board or agency staff must be made in writing and signed by the person who became aware of information that may indicate a violation; specify that the Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint and that complaint information is not confidential after the date formal charges are filed; specify that if a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential and that the information is not subject to discovery, subpoena, or other disclosure; specify that a complaint is considered to be frivolous if the Executive Director and investigator, with Board approval, determine that the complaint was made for the likely purpose of harassment, and does

not demonstrate apparent harm to any person; specify that the Board shall take disciplinary action against a Geoscience Firm or Geoscientist-in-Training; specify the disciplinary actions that may be imposed by the Board; remove subsections (d) and (e) which described disciplinary adjudication procedures that are no longer current and that would be maintained in agency procedures; and improve language.

Proposed new §851.158 will specify that a non-license holder who is assessed an administrative penalty may exercise due process rights under the Texas Occupations Code, Chapter 1002, Subchapter J; specify that the Board may also seek an injunction as provided under the Texas Occupations Code, Chapter 1002, Subchapter K; and to remove language which described investigation and disciplinary adjudication procedures that are no longer current and that would be maintained in agency procedures.

Proposed new §§851.201 - 851.208, 851.211 - 851.213, 851.215, 851.219 - 851.221, 851.229, 851.231, 851.234 - 851.236, and 851.238 - 851.243 will improve language.

Proposed new §§851.209, 851.210, 851.214, 851.216 - 851.218, 851.222 - 851.227, 851.230, 851.232, 851.233, and 851.237 are consistent with existing rule.

Proposed new §851.228 will change the title to "Prepared or Prefiled Testimony."

FISCAL NOTE

Charles Horton, Executive Director, has determined that for each fiscal year of the first five years the sections are in effect, there will be no fiscal implications to the state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Horton has also determined that there are no anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Horton has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is that the Board will be able to more effectively regulate the public practice of geoscience in Texas, all of which will protect and promote public health, safety, and welfare. There will be no effect on individuals as a result of these sections as proposed.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk 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 a state or a sector of the state. Although Professional Geoscientists and Registered Geoscience Firms play a key role in environmental protection for the state of Texas, this proposal is not specifically intended neither to protect the environment nor reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

Mr. Horton has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Comments on this proposal may be submitted in writing either in person or by courier to Molly Roman, Operations Manager, Texas Board of Professional Geoscientists, 333 Guadalupe Street, Austin, Texas 78701 or by mail to P.O. Box 13225, Austin, Texas 78711 or by e-mail to mroman@tbpg.state.tx.us. When e-mailing comments, please indicate "Comments on Proposed Rules" in the e-mail subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

SUBCHAPTER A. LICENSING

22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80

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

The proposed repeals are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Act; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; and §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training.

The proposed repeals affect Texas Occupations Code Chapter 1002.

§851.20. Licensing Requirements.

§851.21. Licensing Requirements-Examinations.

§851.23. Experience.

§851.24. References.

§851.25. Education.

§851.27. Replacement License.

§851.28. License Renewal and Reinstatement.

§851.29. Licensure by Endorsement (Reciprocal License).

§851.30. Firm Registration.

§851.31. Temporary License.

§851.32. Continuing Education Program.

§851.40. Geoscientist-in-Training Designation.

§851.41. Geoscientist-in-Training Qualifications.

§851.42. Geoscientist-in-Training Application and Certification.

§851.43. Renewal of a Geoscientist-in-Training Certification.

§851.44. Use of the Title "Geoscientist-in-Training".

§851.45. Relationship of Geoscientist-in-Training Certification to Licensure of Professional Geoscientists.

§851.46. Revocation of Certification.

§851.80. Fees.

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

Filed with the Office of the Secretary of State on July 1, 2010.

TRD-201003702
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 936-4405

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SUBCHAPTER B. CODE OF PROFESSIONAL CONDUCT

22 TAC §§851.101 - 851.110

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

The proposed repeals are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act; and §1002.154 which provides that Board shall enforce the Act.

The proposed repeals affect Texas Occupations Code Chapter 1002.

§851.101. General.

§851.102. Competence.

§851.103. Recklessness.

§851.104. Dishonest Practice.

§851.105. Conflicts of Interest.

§851.106. Responsibility to the Geoscience Profession.

§851.107. Prevention of Unauthorized Practice.

§851.108. Criminal Convictions.

§851.109. Substance Abuse.

§851.110. Effect of Enforcement Proceedings on Application.

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

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Charles Horton
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SUBCHAPTER C. COMPLIANCE AND ENFORCEMENT

22 TAC §§851.151 - 851.158

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

The proposed repeals are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that the Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and disposition; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The proposed repeals affect Occupations Code Chapter 1002.

§851.151. General.

§851.152. Firm Compliance.

§851.153. Geoscientist Compliance.

§851.154. Business Names.

§851.155. A License Holder's Responsibility to the Board.

§851.156. Geoscientist's Seals.

§851.157. Disciplinary Actions.

§851.158. Actions Against Non-License Holders.

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

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SUBCHAPTER D. HEARINGS--CONTESTED CASES

22 TAC §§851.201 - 851.243

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

The proposed repeals are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act; §1002.204 which provides for complaint investigation and disposition; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The proposed repeals affect Occupations Code Chapter 1002.

§851.201. State Office of Administrative Hearings.

§851.202. Board Responsibilities.

§851.203. Jurisdiction; Request for Hearing or Law Judge.

§851.204. Filings.

§851.205. Stipulations, Agreements.

§851.206. Service.

§851.207. Conduct and Decorum.

§851.208. Classification of Parties.

§851.209. Appearances in Person or by Representative; Waivers; Default.

§851.210. Classification of Pleadings.

§851.211. Form and Content of Pleadings.

§851.212. Discovery.

§851.213. Motions; Amendments.

§851.214. Prehearing Conferences and Orders.

§851.215. Notice of Hearing.

§851.216. Certificates of Registration.

§851.217. Conduct of Hearings.

§851.218. Formal Exceptions.

§851.219. Motions for Postponement, Continuance, Withdrawal, or Dismissal of Matters before the Board.

§851.220. Place and Nature of Hearings.

§851.221. Administrative Law Judge.

§851.222. Order of Proceedings.

§851.223. Reporters and Transcript.

§851.224. Telephone Hearings.

§851.225. Dismissal, Settlement without Hearing.

§851.226. Rules of Evidence.

§851.227. Documentary Evidence.

§851.228. Official Notice.

§851.229. Prepaid or Prefiled Testimony.

§851.230. Limitations on Number of Witnesses.

§851.231. Exhibits.

§851.232. Offer of Proof.

§851.233. Depositions.

§851.234. Subpoenas.

§851.235. Proposals for Decision.

§851.236. Filing of Exceptions, Briefs, and Replies.

§851.237. Form and Content of Briefs, Exceptions, and Replies.

§851.238. Oral Argument.

§851.239. Final Decisions and Orders.

§851.240. Administrative Finality.

§851.241. Motions for Rehearing.

§851.242. Rendering of Final Decision or Order.

§851.243. The Record.

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

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CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

SUBCHAPTER A. DEFINITIONS

22 TAC §851.10

The proposed amendments are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §1002.154 which provides that Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and disposition; §§1002.251 - 1002.264, 1002.301 and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The proposed amendments affect Texas Occupations Code Chapter 1002.

§851.10. Definitions.

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

(1) Act--Texas Occupations Code, Chapter 1002, cited as the [~~The~~] Texas Geoscience Practice Act.

(2) Accredited institutions or programs--An institution or program which holds accreditation or candidacy status from an accreditation organization recognized by the Council for Higher Education Accreditation (CHEA) or other appropriate accrediting entity accepted by the Board.

(3) Address of record--In the case of a person licensed, certified, or registered by the Board, the address which is filed by the licensee or registrant with the Board.

(4) [~~(2)~~] Advertising or Advertisement--Any non-commercial or commercial message, including, but not limited to verbal statements, bids, web pages, signage, provider listings, and paid advertisement which promotes the services of a licensee.

(5) [~~(3)~~] Agency or Board--Texas Board of Professional Geoscientists.

(6) [~~(4)~~] Applicant--A person making application for a geoscience license; a firm and/or the authorized official of the firm; or a person making application for the Geoscientist-in-Training (GIT) certification.

(7) [~~(5)~~] Application--The forms, information, attachments, and fees necessary to obtain a license as a Professional Geoscientist, the registration of a firm, or a certification as a Geoscientist-in-Training (GIT) [~~professional geoscientist~~].

(8) Authorized official of a firm--The person designated by a Geoscience Firm to be responsible for the process of submitting the application for the initial registration of the firm with the Board; ensuring that the firm maintains compliance with the requirements of registration with the Board; ensuring that the firm complies with all laws, codes, rules, and standards applicable to the public practice of geoscience; ensuring that the firm renews its registration status as long as the firm offers or provides public geoscientific services; and communicating with the Board regarding any matter.

(9) Certificant--An individual holding a certificate as a Geoscientist-in-Training.

(10) [~~(6)~~] Cheating--Attempting to obtain, obtaining, providing, or using answers to examination questions by deceit, fraud, dishonesty, or deception.

(11) Complainant--Any person who has filed a sworn, written complaint with the Secretary-Treasurer of the Board against any person whose activities are subject to the jurisdiction of the Board or the Executive Director, a staff member, or member of the Board who has filed a signed, written complaint after becoming aware of information that may indicate a violation.

(12) Complaint--An allegation or allegations of wrongful activity related to the practice or offering of geoscience services in Texas. A complaint is within the Board's jurisdiction if the complaint alleges a violation of statutes or rules applicable to the public practice of geoscience or the requirements of licensure of a Professional Geoscientist (P.G.) or registration by an individual, firm, or other legal entity. The Board maintains jurisdiction over a license, registration or certification it issues as long as the license, registration or certification is current or renewable.

(13) Default--The failure of the Respondent to appear in person or by legal representative on the day and at the time set for hearing in a contested case or informal conference, or the failure to appear by telephone, in accordance with the notice of hearing or notice of informal conference. Default results in the actions being taken that were described in the notice of the hearing for a contested case or informal conference in the event of a failure to appear.

(14) [~~(7)~~] Direct supervision--Critical watching, evaluating, and directing of geoscience activities with the authority to review, enforce, and control compliance with all geoscience criteria, specifications, and procedures as the work progresses. Direct supervision will consist of an acceptable combination of: exertion of significant control over the geoscience work, regular personal presence, reasonable geographic proximity to the location of the performance of the work, and an acceptable employment relationship with the supervised persons.

(15) [~~(8)~~] Discipline--One of three recognized courses of study under which a person may qualify for a license as a Professional Geoscientist. Geoscience is comprised of the following disciplines: geology, geophysics, and soil science.

(16) [~~(9)~~] Executive Director--The Executive Director of the Texas Board of Professional Geoscientists.

(17) [~~(10)~~] Filed date--The [~~a document is deemed to have been filed with the Board on the~~] date that the document has been received by the Board or, if the document has been mailed to the Board, the postmark date of the document.

[~~(11) Firm--Any entity that engages or offers to engage in the practice of professional geoscience in this state. This includes sole proprietorships, corporations, partnerships, or joint stock associations.~~]

(18) [~~(12)~~] Geology--The discipline of geoscience that addresses the science of the origin, composition, structure, and history of the earth and its constituent soils, rocks, minerals, fossil fuels, solids, fluids and gasses, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the earth, and is applied with judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of mankind. There are many subdivisions of geology, which include, but are not limited to the following: historical geology, physical geology, economic geology, mineralogy, paleontology, structural geology, mining geology, petroleum geology, physiography, geomorphology, geochemistry, hydrogeology, petrography, petrology, vulcanology, stratigraphic geology, engineering geology, and environmental geology.

(19) [~~(13)~~] Geophysics--Refers to that science which involves the study of the physical earth by means of measuring its natural and induced fields of force, including, but not limited to, electric, gravity and magnetic, and its responses to natural and induced energy or forces, the interpretation of these measurements, applied with judgment to benefit or protect the public.

(20) [~~(14)~~] Geoscience--The science of the earth and its origin and history, the investigation of the earth's environment and its constituent soils, rocks, minerals, fossil fuels, solids, and fluids, and the study of the natural and introduced agents, forces, and processes that cause changes in and on the earth as [~~is~~] applied with professional judgment to develop ways to utilize, economically, those natural and introduced agents, forces, and processes for the benefit of the public [~~mankind~~].

(21) Geoscience Firm--A firm, corporation, or other business entity registered by the Board to engage in the public practice of geoscience. Firms are recognized by the Board in one of the following categories:

(A) An unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; or

(B) Any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience.

(22) [~~(15)~~] License--The legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter. [~~these rules. Also, a certificate issued by the Board showing such authority.~~]

(23) License certificate--Any certificate issued by the Board showing that a license, registration, or certificate has been granted by the Board. A certificate is not valid unless it is accompanied by a card issued by the Board which shows the expiration date of the license, registration or certification.

(24) License status--The status of a Professional Geoscientist license is one of the following:

(A) Current license--A license that has not expired.

(B) Expired license--A license that has been expired for less than three years and is therefore renewable.

(C) Permanently expired license--A license that has been expired for more than three years and is no longer renewable.

(25) [~~(16)~~] Licensee--An individual holding a current Professional Geoscientist license in a discipline appropriate to the work performed under the Act and this chapter [~~these rules~~].

(26) [~~(17)~~] Person--Any individual, firm, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(27) [~~(18)~~] Professional geoscience--Professional service which may include consultation, investigation, evaluation, planning, designing, or direct supervision of construction, in connection with any public or private projects wherein the public welfare, or the safeguarding of life, health, and property is concerned or involved, when such professional service requires the application of geoscience principles and the interpretation of geoscience data.

(28) [~~(19)~~] Professional geoscience services (also geoscientific services)--Services which must be performed by or under the direct supervision of a Professional Geoscientist [~~licensed geoscientist~~] and which meet the definition of the practice of geoscience as defined in the Texas Occupations Code, §1002.002(3). A service shall be conclusively considered a professional geoscience service if it is delineated in that section; other services requiring a Professional Geoscientist [~~professional geoscientist~~] by contract, or services where the adequate performance of that service requires a geoscience education, training, or experience in the application of special knowledge or judgment of the geological, geophysical or soil sciences to that service shall also be conclusively considered a professional geoscience service.

(29) Professional Geoscientist or P.G.--A person who holds a license issued by the Board.

(30) [~~(20)~~] Protestant--Any party opposing an application or petition filed with the Board.

(31) Practice for the public--

(A) Providing professional geoscience services:

(i) For a governmental entity in Texas;

(ii) To comply with a rule established by the State of Texas or a political subdivision of the State of Texas; or

(iii) For the public or a firm or corporation in the State of Texas if the practitioner accepts ultimate liability for the work product; and

(B) Does not include services provided for the express use of a firm or corporation by an employee or consultant if the firm or corporation assumes the ultimate liability for the work product.

(32) The Public--Any individual(s), client(s), business or public entities, or any member of the general population whose normal course of life might reasonably include an interaction of any sort with or be impacted by geoscientific work.

(33) Registered firm--A firm that is currently registered with the Board.

(34) Registrant--A person whose sole-proprietorship is currently registered with the Board or a firm or the authorized official of a firm that is currently registered with the Board.

(35) Respondent--Any person, licensed or unlicensed, who has been charged with violating any provision of the Act or a rule or order issued by the Board.

(36) Responsible charge--The independent control and direction of geoscientific work or the supervision of geoscientific work by the use of initiative, skill, and independent judgment.

(37) [~~(21)~~] Soil Science--Soil science means the science of soils, their classification, origin and history, the investigation of physical, chemical, morphological, and biological characteristics of the soil including among other things, their ability to produce vegetation and the fate and movement of physical, chemical, and biological contaminants.

(38) Sole-proprietorship--A single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner.

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

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SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §§851.20, 851.21, 851.23 - 851.25, 851.27 - 851.32, 851.40 - 851.46, 851.80

The proposed new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Act; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure and license renewal; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training.

The proposed new rules affect Texas Occupations Code Chapter 1002.

§851.20. Professional Geoscientist Licensing Requirements and Application Procedure.

(a) Requirements for licensure:

(1) Passing score on an examination or examinations required by the Board covering the fundamentals and practice of the appropriate discipline of geoscience documented as specified in §851.21 of this chapter;

(2) A minimum of five years of qualifying work experience during which the applicant has demonstrated being qualified to assume responsible charge of geoscientific work documented as specified in §851.23 of this chapter and Texas Occupations Code §1002.256;

(3) Good moral character as demonstrated by the submission of a minimum of five reference letters submitted on behalf of the applicant attesting to the good moral and ethical character of the applicant as specified in §851.24 of this chapter or as otherwise determined by the Board;

(4) Academic requirements for licensure as specified in Texas Occupations Code §1002.255 and §851.25 of this chapter; and

(5) Supporting documentation of any license requirement, as determined by TBPG staff or the Board, relating to criminal convictions as specified in §851.108 of this chapter; relating to substance abuse issues as specified in §851.109 of this chapter; and relating to issues surrounding reasons the Board may deny a license as specified in the Geoscience Practice Act at Texas Occupations Code §1002.401 and §1002.402.

(b) The Board may accept qualifying work experience in lieu of the education requirement required by Texas Occupations Code §1002.255(a)(2).

(c) Examination requirements and examination procedure: A qualified person who has not passed qualifying licensing examination(s) as specified in §851.21 of this chapter may access one of the following procedures to sit for a qualifying examination(s) in the appropriate discipline:

(1) ASBOG Fundamentals of Geology examination:

(A) Requirements: Completion of the education qualifications for licensure as specified in Texas Occupations Code §1002.255 and §851.25 of this chapter or currently enrolled in a course of study that meets the education requirements for licensure and within two regular semesters of completion of the qualifying course of study.

(B) Procedure:

(i) The applicant shall complete and submit examination application form E and any required attachments to the Board, along with the appropriate fee by the deadline posted on the TBPG website for the examination date desired by the applicant.

(ii) The Board will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board will mail an ASBOG examination application form to the applicant.

(iii) The applicant shall submit the ASBOG examination application form and send the form, along with the examination fee to ASBOG. A copy of the examination application form shall be provided to the Board.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board shall notify the applicant of the results of the examination after the Board receives the results from ASBOG.

(2) ASBOG Practice of Geology examination:

(A) Requirements:

(i) Under application for licensure as a Professional Geoscientist with the TBPG.

(ii) Meet all qualifications for licensure in subsection (a) of this section, with the exception of the examination requirement.

(B) Procedure:

(i) The applicant shall complete and submit both Application for Professional Geoscientist (form A), in accordance with the application procedures specified in subsection (d) of this section, along with the appropriate fee and Application for Geology

examination (form E) along with the appropriate fee and any required attachments to the Board, by the deadline posted on the TBPG website for the examination date desired by the applicant.

(ii) The Board will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board will mail an ASBOG examination application form to the applicant.

(iii) The applicant shall submit the ASBOG examination application form and send the form, along with the examination fee to ASBOG. A copy of the examination application form shall be provided to the Board.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board shall notify the applicant of the results of the examination after the Board receives the results from ASBOG.

(3) Texas Geophysics Examination:

(A) Requirements:

(i) Under application for licensure as a Professional Geoscientist with the TBPG and meet all qualifications for licensure in subsection (a) of this section, with the exception of the examination requirement; or

(ii) Under application for certification as a Geoscientist-in-Training with the TBPG and meet all qualifications for certification as a Geoscientist-in-Training in §851.41 of this chapter with the exception of having passed the Texas Geophysics Examination.

(B) Procedure:

(i) The applicant shall complete and submit both Application for Professional Geoscientist (form A), in accordance with the application procedures specified in subsection (d) of this section, along with the appropriate fee and Application for Texas Geophysics Examination (form F) along with the appropriate fee and any required attachments to the Board.

(ii) The Board will review the application and inform the applicant of any deficiencies in the application. Upon determination that the requirements have been met, the Board will provide Texas Geophysics Examination scheduling and examination payment information to the applicant.

(iii) The applicant shall submit the required information, along with the examination fee to the TBPG.

(iv) The applicant shall follow all examination administration procedures and take the examination.

(v) The Board shall notify the applicant of the results of the examination.

(4) Council of Soil Science Examiners (CSSE) Fundamentals of Soil Science and Practice of Soil Science Examinations: An applicant who chooses to apply for licensure as a Professional Geoscientist under the discipline of soil science must meet the examination requirements of the CSSE; apply to take the required examinations directly with the CSSE and submit the required fees; follow all examination procedures of the CSSE; take and pass both parts of the examination; and follow CSSE procedures to ensure that the passing scores are forwarded to the Board.

(d) Professional Geoscientist application procedure.

(1) To be eligible for a Professional Geoscientist license under this chapter, an applicant must submit or ensure the transmission (as applicable) of the following to the Board:

(A) A completed, signed, notarized application for licensure as a Professional Geoscientist;

(B) Documentation of having passed an examination as specified in §851.21 of this chapter;

(C) Documentation of having met the experience requirements as specified in §851.23 of this chapter;

(D) A minimum of five (5) reference letters as specified in §851.24 of this chapter;

(E) Official transcript(s), as specified in §851.25 of this chapter, unless the applicant is applying for the license on the basis of subsection (b) of this section;

(F) The application/first year licensing fee as specified in §851.80(b) of this chapter;

(G) Verification of every licensure, current or expired, in any regulated profession in any jurisdiction; and

(H) Any written explanation and other documentation as required by instructions on the application or as communicated by Board staff, if applicable.

(2) Upon receipt of all required materials and fees and satisfying all requirements in this section, the applicant shall be licensed and a unique Professional Geoscientist license number shall be assigned to the license. A new license shall be set to expire at the end of the calendar month occurring one year after the license is issued. Board staff shall send a new license certificate, initial license expiration card, and an initial wallet license expiration card as provided in subsection (m) of this section.

(e) With the initial filing of an application or at anytime that the application remains open, an applicant may request, in writing, licensure by the waiver of one or more qualifications for licensure. Upon written request and a showing of good cause, if the Board determines that the applicant is otherwise qualified for a license, the Board may waive any licensure requirement except for the payment of required fees. An applicant's written request for a waiver of licensure requirements must include a detailed justification for why good cause exists to waive specific licensure requirements. An approval for a waiver request may be recommended to the full Board by an appropriate committee of the Board.

(f) An application is active for one year including the date that it is filed with the Board. After one year an application expires.

(g) Obtaining or attempting to obtain a license by fraud or false misrepresentation is grounds for an administrative sanction and/or penalty.

(h) Applications are not reviewed until the application and fee have been received in the TBPG office. Applicants are initially notified of any deficiencies in the application within approximately thirty (30) days after the receipt of the application and fee.

(i) An applicant should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies. If an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active.

(j) An original license is valid for a period of one year from the date it is issued. Upon the first timely renewal of a license, the renewal period shall be from the date the license is renewed until the last day of the next birth month for the licensee. The fee for the first renewal period shall be prorated. The second timely renewal and every sub-

sequent timely renewal period shall be the one year period following the expiration date of the license. A license that is renewed late (one day after the expiration date of the license through the end of the 36th month past the expiration date of the license) is renewed in accordance to the rules set forth in §851.28 of this chapter.

(k) A license number is not transferable.

(l) Any violation of the law or the rules and regulations resulting in disciplinary action for one license may result in disciplinary action for any other license.

(m) Altering a license certificate, certificate expiration card, or wallet expiration card in any way is prohibited and is grounds for a sanction and/or penalty.

(n) The Professional Geoscientist license is the legal authority granted the holder to actively practice geoscience upon meeting the requirements as set out in the Act and this chapter. When a license is issued, a license certificate, the first license certificate expiration card, and the first wallet license card is provided to the new licensee. The license certificate shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the discipline in which the person is licensed, and the date the license was originally issued. The license certificate is not valid proof of licensure unless the license certificate expiration card is accompanying the license certificate and the date on the license certificate card is not expired. The license certificate expiration card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, and the date the license will expire, unless it is renewed. The wallet license card shall bear the name of the licensee, the licensee's unique Professional Geoscientist license number, the date the license was originally issued, the discipline in which the person is licensed, and the date the license will expire, unless it is renewed.

(o) An applicant who is a citizen of another country and is physically present in this country shall show sufficient documentation to the Board to verify the immigration status for the determination of their eligibility for a professional license in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(p) All applications must be submitted on paper and on forms prescribed by the Board with original signatures, notaries, and seals.

(q) Any transcripts, reference statements, evaluations, experience records or other similar documents submitted to the Board in previous applications may be included in a current application provided the applicant requests its use in writing at the time the application is filed and the Executive Director authorizes its use.

(r) An application may be forwarded to the Board at the Executive Director's discretion.

(s) Once the requirements for licensure have been satisfied and the new license and license certificate has been issued, within sixty (60) days of notification the new licensee must then:

(1) Obtain a seal and place the seal imprint on a form provided by the Board and return it to the Board office;

(2) Register as a sole proprietor, if the licensee plans to engage in the independent practice of geoscience as an unincorporated sole proprietor, as described in §851.30 of this chapter on a full or part-time basis; and

(3) Provide to the Board the following information: the name of every firm, governmental agency, or other organization with which the licensee is employed on a full-time or part-time basis, if the employment includes the practice of geoscience. If the practice of geoscience includes the public practice of geoscience, the licensee shall report the employer's Geoscience Firm registration number, unless the employer is a governmental agency or otherwise exempt from the requirement of registration with the Board.

§851.21. Licensing Requirements-Examinations.

(a) The examinations will be administered to applicants in a form and location determined by the Board.

(b) An applicant may request an accommodation in accordance with the Americans with Disabilities Act.

(1) The request must be in writing on a form approved by the Board.

(2) Proof of disability may be required.

(c) An applicant who does not timely arrive at and complete a scheduled examination will forfeit the examination fee.

(d) Cheating on an examination is grounds for denial, suspension, or revocation of a license and/or an administrative penalty.

(e) An applicant who has passed an examination may not retake that type of examination.

(f) An applicant for the Geology discipline must pass both parts of the National Association of State Boards of Geology (ASBOG®) test. Applicants taking the ASBOG® test must also abide by the rules and regulations of ASBOG®.

(g) An applicant for the Soil Science discipline must pass both parts of the Council of Soil Science Examiners (CSSE) test. Applicants taking the CSSE test must also abide by the rules and regulations of CSSE.

(h) An applicant for the Geophysics discipline must pass the Texas Geophysics Examination.

(i) Applicants requesting a waiver from any examination(s) shall file any additional information needed to substantiate the eligibility for the waiver with the application.

§851.23. Experience.

Applicants shall submit an experience record to the Board as a part of the application.

(1) The experience record shall be written by the applicant, shall clearly describe the geoscience work that the applicant personally performed, and shall delineate the role of the applicant in any group geoscience activity.

(2) The experience record should provide an overall description of the nature and scope of the work with emphasis on detailed descriptions of the geoscience work personally performed by the applicant.

(3) Professional geoscience references must be provided to verify enough of the experience record to cover at least the minimum amount of time needed by the applicant for issuance of a license.

(4) Parts of the experience record that are to be verified by references shall be written in sufficient detail to allow the Board reviewer to document the minimum amount of experience required and to allow the reference to recognize and verify the quality and quantity of the experience claimed.

(5) The experience record must demonstrate evidence of the applicant's competency to be placed in responsible charge of geoscience work of a similar character.

(6) A total of one year of qualifying work experience credit may be granted for each full-time year of graduate study in a discipline of geoscience, not to exceed two years.

§851.24. References.

(a) Applicants for a license shall provide at least five letters of reference to the Board, of which not fewer than three are from Professional Geoscientists or other professionals acceptable to the Board who have knowledge of the applicant's relevant work experience, unless more letters of reference are required to meet the requirements as stated in §851.21 or §851.23 of this chapter. One or more of the letters of reference shall verify geoscience experience claimed to meet the minimum years of experience required. Professional Geoscientists who have not worked with or directly supervised an applicant may review and judge the applicant's experience and may provide a letter of reference for geoscience; such review shall be noted in the reference letter. Individuals providing reference letters shall not be compensated.

(b) All references shall be individuals with personal knowledge of the applicant's character, reputation, and general suitability for holding a license. References should include one or more individuals who have directly supervised or maintained responsible charge of the applicant.

(c) Professional Geoscientists who provide reference statements and who are licensed in a jurisdiction other than Texas shall include a copy of their pocket card or other verification to indicate that their license is current and valid.

(d) The Board members and staff may, at their discretion, consider any, all or none of the responses from references.

(e) The applicant shall send the Board's reference statement form and a complete copy of the applicable portion(s) of the experience record to each reference.

(f) For a reference statement to be considered complete, the reference shall:

(1) Accurately complete the reference statement in detail;

(2) Review and evaluate all applicable portions of the supplementary experience record;

(3) Signify agreement or disagreement with the information written by the applicant and add any comments or concerns on the reference statement; and

(4) Place the completed reference statement and signed supplementary experience record in an envelope. After sealing the envelope, the reference's signature shall be placed across the sealed flap of the envelope and covered with transparent tape. The reference shall return the sealed envelope to the applicant.

(g) Applicants shall enclose all of the sealed reference envelopes with the application when submitted to the Board.

(h) Additional references may be required of the applicant when the Executive Director finds it necessary to adequately verify the applicant's experience or character. The Board and/or staff may at their discretion communicate with any reference or seek additional information.

§851.25. Education.

(a) An applicant must have graduated from a course of study from an accredited university or program in one of the following disciplines of geoscience satisfactory to the Board that consists of at least four years of study and includes at least 30 semester hours or 45 quarter hours of credit in geoscience, of which at least 20 semester hours or 30 quarter hours of credit must be in upper-level college courses in that discipline; or satisfactorily completed other equivalent educational requirements as determined by the Board.

(1) Geology or sub-discipline of geology including but not limited to engineering geology, petroleum geology, hydrogeology, and environmental geology.

(2) Geophysics.

(3) Soil science.

(b) An official transcript (including either grades or mark sheets and proof that the degree was conferred) shall be provided for the degree(s) utilized to meet the educational requirements for licensure. Official or notarized copies of transcripts shall be submitted to the Board. Official transcripts shall be forwarded directly to the Board office by the respective registrars. The applicant is responsible for ordering and paying for all such transcripts. Additional academic information including but not limited to grades and transfer credit shall be submitted to the Board at the request of the Executive Director.

(c) If transcripts cannot be transmitted directly to the Board from the issuing institution, the Executive Director may recommend alternatives to the Board for its approval. Such alternatives may include validating transcripts in the applicant's possession through a Board-approved commercial evaluation service.

(d) Degrees and coursework earned at foreign universities shall be acceptable if the degree conferred and coursework has been determined by a member of the National Association of Credential Evaluation Services (NACES) to be equivalent to a degree conferred by or coursework completed in an accredited institution or program. It is the applicant's responsibility to have degrees and coursework so evaluated. The commercial evaluation of a degree will not be accepted in lieu of an official transcript.

(e) The relevance to the licensing requirements of academic courses, the titles of which are not self-explanatory, must be substantiated through course descriptions in official school catalogs, bulletins, syllabi, or by other means.

(f) The Board shall accept no coursework which an applicant's transcript indicates was not completed with a passing grade or for credit.

(g) In evaluating two or more sets of transcripts from a single applicant, the Board shall consider a quarter hour of academic credit as two-thirds of a semester hour.

§851.27. Replacement License Certificate or License Expiration Cards.

A new or duplicate license certificate, a new or duplicate license certificate expiration card, or a new wallet license expiration card to post in a secondary work location or to replace one lost, destroyed, or mutilated, may be issued, subject to the rules of the Board, on payment of the established fee. A licensee need not destroy his or her current license certificate, but shall remain responsible for its care and custody, including any misuse of the certificate.

§851.28. Professional Geoscientist License Renewal and Reinstatement.

(a) The Board will mail a renewal notice to the last recorded address of each license holder, at least sixty (60) days prior to the date the license is about to expire. Regardless of whether the renewal notice is received, it is the sole responsibility of the license holder to pay the required renewal fee together with any applicable penalty at the time of payment. A licensee may renew a current license up to sixty (60) days in advance of its expiration online by accessing the process from the Board's website. A licensee may also renew by paper application

for renewal (form B) by accessing the form on the agency website or calling for a copy of the form up to ninety (90) days in advance of the expiration of the license through up to but not including three years after the expiration of the license.

(b) The first renewal period shall be set no more than 12 months from the first renewal date and the expiration of the first renewal term shall be set to coincide with the last day of the licensee's birth month. The first year renewal fee shall be prorated for the number of months in the first renewal period. Every subsequent expiration date shall be set for one year past the previous renewal date.

(c) A late fee of $50 will be charged for each renewal application received sixty-one (61) days after the licensee's expiration date, unless the renewal is received by mail or courier and is postmarked on or before sixty (60) days after the date of expiration.

(d) The Board may refuse to renew a license if the license holder is the subject of a lawsuit regarding his/her practice of geoscience or is found censurable for a violation of Board laws or rules that would warrant such disciplinary action under §851.157 of this chapter.

(e) A license that has been expired for sixty (60) days or less may be renewed by submitting a renewal application and fee to the Board and the continuing education documentation as required in §851.32 of this chapter. The fee for a license that is renewed within the first sixty (60) days of expiration is the fee that was or is in place at the time the license expired.

(f) A license that has been expired for more than sixty (60) days and less than three years from the original expiration date may be renewed by submitting to the Board a renewal application and fee, the late penalty fee, any increase in fees as required by §851.80 of this chapter, and the continuing education documentation as required in §851.32 of this chapter. The licensee must also submit a signed affirmation indicating whether the licensee practiced as a P.G. when their license was expired. The fee for a license that is renewed within the first year of expiration is the fee that was or is in place at the time the license expired.

(g) A license that has expired for more than one year but less than three years after the original expiration date may be renewed by submitting to the Board an annual renewal application and fee, plus the annual renewal fee that was in place at each expiration/renewal that would have occurred if the license had been renewed on time each year since it expired, the late fee which would have applied after every scheduled license renewal was delinquent for sixty (60) days, and proof of having met the continuing education requirements as required in §851.32(o) of this chapter. The licensee must also submit a signed affirmation indicating whether the licensee practiced as a P.G. when the license was expired. If an applicant for renewal who has met the requirements for renewal has practiced as a P.G. with the license expired, unless certain allegations of misconduct are present, the license shall be renewed. Information regarding unlicensed practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board.

(h) A license that is allowed to expire for a period of three years after the original expiration date is permanently expired and may not be renewed. The former license holder may re-apply for a new license as provided by the Act and applicable Board rules and will have to meet all licensure requirements in said Act and rules at the time of re-application.

(i) As per §1002.403 of the Act, the Board may suspend or revoke a license as disciplinary action against a license holder who is found censurable for a violation of the Act or rules.

(1) A license that has been suspended can be reinstated by the Board only if the suspended licensee complies with all conditions of the suspension, which may include payment of fines, continuing education requirements, participation in a peer review program or any other disciplinary action outlined in §1002.403 of the Act.

(2) A license that has been revoked can be re-instated only if by a majority vote the Board approves reinstatement, given the applicant:

(A) Re-applies and submits all required application materials and fees;

(B) Successfully completes an examination in the required discipline of geoscience being sought for reinstatement if the applicant has not previously passed said examination; and

(C) Provides evidence to demonstrate competency and that future non-compliance with the statute and rules of the Board will not occur.

(j) Pursuant to Texas Occupations Code §55.002, a license holder is exempt from any increased fee or other penalty imposed in this section for failing to renew the license in a timely manner if the license holder provides adequate documentation, including copies of orders, to establish to the satisfaction of the Board that the license holder failed to renew in a timely manner because the license holder was serving on active duty in the United States armed forces outside of Texas.

(k) The application fee is non-refundable.

§851.29. Licensure by Endorsement, Licensure Under a Reciprocal Agreement, and Reciprocal Licensure by Similar Examination.

(a) Licensure by Endorsement.

(1) An applicant for a Professional Geoscientist license who is currently or has been licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, or the District of Columbia may be eligible to demonstrate having met all or some of the qualifications for licensure through endorsement.

(2) Licensure by Endorsement is the process whereby the Board issues a license based on review of evidence of an applicant's completion of all or part of the requirements for licensure in Texas based on documentation of having met the same or a similar requirement in another Professional Geoscientist licensing jurisdiction in the successful application for a license in that jurisdiction.

(3) The Board will only accept documentation provided to the Board directly from a licensing authority that has issued a license to the applicant. It is the responsibility of the applicant to ensure that the licensing authority provide information to the Board. Any cost associated with the transmission of information to the Board is the responsibility of the applicant.

(4) In order for the Board to consider evidence, the applicant must ensure that his or her licensing authority provide:

(A) Verification of the license acceptable to the Board; and

(B) Verification of the specific qualifications that were met in order to become licensed.

(5) Verification of the specific qualifications that were met in order to become licensed may be in the form of:

(A) A letter signed by an authorized agent of the authority indicating the specific qualifications that were met in order to become licensed; and/or

(B) Copies of specific documents that were submitted to the licensing authority to document having met a specific requirement.

(6) The Board may accept, deny or grant partial credit for requirements completed in a different jurisdiction.

(b) Licensure by Reciprocity Agreement.

(1) Licensure by reciprocity agreement is the process whereby an applicant for licensure as a Professional Geoscientist in Texas who is currently licensed as a Professional Geoscientist (or equivalent license) in another United States jurisdiction (state, commonwealth or territory) becomes licensed in Texas and the process whereby an applicant currently licensed as a Professional Geoscientist in Texas applying for licensure as a Professional Geoscientist (or equivalent license) in the other jurisdiction becomes licensed in the other jurisdiction under the terms of a formal reciprocity agreement between the two jurisdiction's Boards.

(2) An applicant who holds a current license in a jurisdiction with which the TBPG has a reciprocity agreement may apply for licensure under the terms of the specific reciprocity agreement between the two Boards.

(3) The Board shall maintain a list of each state or foreign country in which the requirements and qualifications for licensure or registration are comparable to those established in this state and with which a reciprocity agreement exists.

(c) Reciprocal licensure by similar examination. A person who is licensed or registered to practice a discipline of geoscience under the law of another state, a territory or possession of the United States, the District of Columbia, or a foreign country may apply to the Executive Director for licensure without meeting the examination requirements of §851.21 of this chapter. A person applying for licensure under this subsection must submit proof of passage of an examination or examinations that are substantially similar to the applicable §851.21 of this chapter examinations.

§851.30. Firm Registration.

(a) Registration required: Unless an exemption applies, as outlined in Texas Occupations Code §1002.351(b), a firm or corporation may engage in the public practice of geoscience only if the firm is currently registered with the Board; and

(1) The geoscientific work is performed by, or under the supervision of, a Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(2) The business of the firm or corporation includes the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state. As provided in §851.10(11) of this chapter, the term firm includes corporations, sole-proprietorships, partnerships and/or joint stock associations. For the purposes of this section, the term public includes but is not limited to political subdivisions of the state, business entities, and individuals. The Board has the authority under the Act to issue an annual certificate of registration to applicants that, subsequent to review and evaluation, are found to have met all requirements of the Act and Board rules. The Board has the authority under the Act to deny a certificate of registration to any applicant found not to have met all requirements of the Act and Board rules. This section does not apply to an engineering firm that performs service or work that is both engineering and geoscience. For the purpose of fees, Geoscience Firms are categorized as either:

(A) An unincorporated sole-proprietorship (a single owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience; or

(B) Any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience.

(b) Unless registered by the Board or exempt from registration under Texas Occupations Code §1002.351, an individual, firm, or corporation may not represent to the public that the individual, firm, or corporation is a Professional Geoscientist or able to perform geoscientific services or prepare a geoscientific report, document, or other record that requires the signature and seal of a license holder under Texas Occupations Code §1002.263(b).

(c) Registration requirements: In order to be eligible to register as a Geoscience Firm with the Board, the firm must:

(1) Affirm and demonstrate that the firm is an unincorporated sole-proprietorship or another business entity that offers or performs work that includes the public practice of geoscience;

(2) Identify an authorized official of the firm who shall be responsible for: the process of submitting the application for the initial registration of the firm with the Board; ensuring that the firm maintains compliance with the requirements of registration with the Board; ensuring that the firm complies with all laws, codes, rules, and standards applicable to the public practice of geoscience; ensuring that the firm renews its registration status as long as the firm offers or provides public geoscientific services; and communicating with the Board regarding any matter;

(3) Operate under a business model such that:

(A) The geoscientific work is performed by, or under the supervision of, a licensed Professional Geoscientist who is in responsible charge of the work and who signs and seals all geoscientific reports, documents, and other records as required by this chapter; or

(B) The principal business of the firm or corporation is the public practice of geoscience as determined by Board rule and a principal of the firm or an officer or director of the corporation is a licensed Professional Geoscientist and has overall supervision and control of the geoscientific work performed in this state;

(4) Identify the business model and the Professional Geoscientist who fulfills the role of the licensed Professional Geoscientist in paragraph (3) of this subsection;

(5) Unless the firm is an unincorporated sole-proprietorship or an unincorporated partnership, a firm seeking registration with the Board must register the firm with the Office of the Secretary of State (SOS) and obtain a certificate of authority. If the firm operates under a name other than that which is filed with the SOS, an Assumed Name Certificate must be filed with the County Clerk. A firm's SOS certificate of authority number and all Assumed Name Certificate instrument numbers must be provided to the Board upon initial application. If the firm is a sole-proprietorship and the firm operates under a name that does not include the last name of the individual sole proprietor, the firm shall file an Assumed Name Certificate with the County Clerk;

(6) Submit an application for registration of a firm (form C), in accordance to the procedures outlined in subsection (d) of this section;

(7) A firm that offers or performs professional geoscience services only on a part-time basis must ensure that the Professional

Geoscientist who performs the geoscientific work or who directly supervises the geoscientific work while the firm is in operation has physical presence and is a regular full-time employee of the firm. An active licensee who is a sole proprietor shall satisfy the requirement of the regular full-time employee;

(8) Upon initial application, a firm shall affirm that the licensed Professional Geoscientist performing or supervising the geoscientific work for a Geoscience Firm is a regular full-time employee. A Geoscience Firm shall provide evidence of the full-time employment status upon request of the Board. This subsection does not prohibit a licensed Professional Geoscientist from performing consulting geoscience services on a part-time basis as an individual. A Geoscience Firm shall provide that at least one regular full-time Professional Geoscientist employee directly supervise all geoscience work performed in branch, remote, or project offices. If such a branch, remote or project office is normally staffed full-time while performing geoscience work or is represented by the firm as a permanent full-time office, then at least one regular full-time Professional Geoscientist must be physically present in each such office.

(d) Firm Registration Application Process.

(1) The authorized official of the firm shall complete and submit, along with the required application fee, the form furnished by the Board which includes but is not limited to the following information listed in subparagraphs (A) - (E) of this paragraph:

(A) The name, address, and communication number of the firm offering to engage or engaging in the practice of professional geoscience for the public in Texas;

(B) The name, position, address, and communication numbers of each officer or director;

(C) The name, address and current active Texas Professional Geoscientist license number of each regular, full-time geoscience employee performing geoscientific work for the public in Texas on behalf of the firm;

(D) The name, location, and communication numbers of each subsidiary or branch office offering to engage or engaging in the practice of professional geoscience for the public in Texas, if any; and

(E) A signed statement attesting to the correctness and completeness of the application.

(2) Upon receipt of all required materials and fees and having satisfied requirements in this section, the firm shall be registered and a unique Geoscience Firm registration number shall be assigned to the firm registration. The new firm registration shall be set to expire at the end of the calendar month occurring one year after the firm registration is issued.

(3) An application is active for one year including the date that it is filed with the Board. After one year an application expires.

(4) Obtaining or attempting to obtain a firm registration by fraud or false misrepresentation is grounds for an administrative sanction and/or penalty.

(5) Applications are not reviewed until the application and fee have been received in the TBPG office. Applicants are initially notified of any deficiencies in the application.

(6) Applicants should respond to a deficiency notice within forty-five (45) days from the date of notification for applicants to correct deficiencies. If an applicant does not respond to a deficiency notice or does not ensure that necessary documents are provided to the TBPG office, the application will expire as scheduled one year after the date it became active.

(e) The application fee will not be refunded.

(f) The initial certificate of registration shall be valid for a period of one year from the date it is issued, plus any days remaining through the end of that month. A renewed firm registration is valid for a period of one year from the expiration date of the firm registration being renewed.

(g) A Geoscience Firm's completed and approved registration is the legal authority granted the holder to actively offer or practice geoscience upon meeting the requirements as set out in the Act and these rules. When a firm registration is issued, a firm registration certificate, the first firm registration certificate expiration card, and the first portable firm registration card is provided to the new Geoscience Firm. The firm registration certificate shall bear the name of the firm, the firm's unique Geoscience Firm registration number, and the date the firm registration was originally issued. The firm registration certificate is not valid proof of current registration as a firm, unless the firm registration certificate expiration card is accompanying the firm registration certificate and the date on the firm registration certificate card is not expired. The firm registration certificate expiration card shall bear the name of the firm, the firm's unique firm registration license number, and the date the firm registration will expire, unless it is renewed. The portable firm registration card shall bear the name of the firm, the firm's unique Geoscience Firm registration number, the date the registration was originally issued, and the date the registration will expire, unless it is renewed.

(h) At least sixty (60) days in advance of the date of the expiration, the Board shall notify each firm holding a certificate of registration of the date of the expiration and the amount of the fee that shall be required for its renewal for one year. The certificate of registration may be renewed by completing the renewal application and paying the annual registration renewal fee set by the Board. It is the sole responsibility of the firm to pay the required renewal fee prior to the expiration date, regardless of whether the renewal notice is received.

(i) A certificate of registration which has been expired for less than one (1) year may be renewed by completing a firm registration renewal application; an affirmation signed by the authorized official of the firm and the licensed Professional Geoscientist who performs or supervises the geoscience work for the firm indicating whether geoscientific services were offered, pending, or performed for the public in Texas when the firm's registration was expired and payment of a $50 late renewal penalty. If a firm under application for late firm registration renewal has met the requirements for renewal and has indicated that the geoscience services were offered, pending, or performed for the public in Texas while the firm's registration was expired, unless certain allegations of misconduct are present, the firm's registration shall be renewed. Information regarding unregistered geoscience practice received under this section shall be referred to the enforcement division for appropriate action that could include the initiation of a complaint by the Board.

(j) The application fee is non-refundable.

§851.31. Temporary License.

(a) The Board may issue a temporary license to an applicant as described in §1002.258(a) of the Act.

(b) A temporary license holder is subject to all rules and legal requirements to which a standard license is subject. The Board may issue a temporary license to an applicant currently licensed in another jurisdiction who:

(1) Has held such a license in good standing as a geoscientist for at least two years in another jurisdiction, including a foreign country, that has licensing requirements substantially equivalent to the requirements of this Board and has passed a national or other examination recognized by the Board relating to the discipline of geoscience for which licensure is being sought;

(2) Submits all required forms and fees; and

(3) Complies with and meets the requirements set forth in §1002.258 of the Act.

(c) Pursuant to §1002.258(c) of the Act, a temporary license expires either on the 90th day after the date of issuance or on the date a reciprocal license is issued or denied, whichever event occurs first.

(d) The application fee is non-refundable.

§851.32. Continuing Education Program.

(a) Each license holder shall meet the Continuing Education Program (CEP) requirements for professional development as a condition for license renewal.

(b) Terms used in this section are defined as follows:

(1) Professional Development Hour (PDH)--A contact hour (clock hour) of CEP activity. PDH is the basic unit for CEP reporting.

(2) Continuing Education Unit (CEU)--Unit of credit customarily used for continuing education courses. One continuing education unit equals 10 hours of class in an approved continuing education course.

(3) College/Unit Semester/Quarter Hour--Credit for course in a discipline of geoscience or other related technical elective of the discipline.

(4) Course/Activity--Any qualifying course or activity with a clear purpose and objective which will maintain, improve, or expand the skills and knowledge relevant to the license holder's field of practice.

(c) Every license holder is required to obtain 15 PDH units during the renewal period year.

(d) A minimum of 1 PDH per renewal period must be in the area of professional ethics, roles and responsibilities of Professional Geoscientists, or review on-line of the Texas Geoscientist Practice Act and Board rules.

(e) If a license holder exceeds the annual requirement in any renewal period, a maximum of 30 PDH units may be carried forward into the subsequent renewal periods.

(f) PDH units may be earned as follows:

(1) Successful completion or auditing of college credit courses.

(2) Successful completion of continuing education courses, either offered by a professional or trade organization, university or college, or offered in-house by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(3) Successful completion of correspondence, on-line, televised, videotaped, and other short courses/tutorials.

(4) Presenting or attending qualifying seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions, or conferences sponsored by a corporation, other business entity, professional or technical societies, associations, agencies, or organizations, or other group.

(5) Teaching or instructing as listed in paragraphs (1) - (4) of this subsection.

(6) Authoring published papers, articles, books, or accepted licensing examination items.

(7) Active participation in professional or technical societies, associations, agencies, or organizations, including:

(A) Serving as an elected or appointed official;

(B) Serving on a committee of the organization; or

(C) Serving in other official positions.

(8) Patents Issued.

(9) Engaging in self-directed course work.

(10) Software Programs Published.

(g) All activities described in subsection (f) of this section shall be relevant to the practice of a discipline of geoscience and may include technical, ethical, or managerial content.

(h) The conversion of other units of credit to PDH units is as follows and subject to subsection (g) of this section:

(1) 1 College or unit semester hour--15 PDH.

(2) 1 College or unit quarter hour--10 PDH.

(3) 1 Continuing Education Unit--10 PDH.

(4) 1 Hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions, or conferences--1 PDH.

(5) 1 Hour of professional development through self-directed course study (Not to exceed 5 PDH)--1 PDH.

(6) Each published paper or article--10 PDH and book--45 PDH.

(7) Active participation, as defined in subsection (f)(7) of this section, in professional or technical society, association, agency, or organization (Not to exceed 5 PDH per year)--1 PDH.

(8) Each patent issued--15 PDH.

(9) Each software program published--15 PDH.

(10) Teaching or instructing as described in subsection (f)(5) of this section--3 times the PDH credit earned.

(i) Determination of Credit:

(1) The Board shall be the final authority with respect to whether a course or activity meets the requirements of this chapter.

(2) The Board shall not pre-approve or endorse any CEP activities. It is the responsibility of each license holder to use his/her best professional judgment by reading and utilizing the rules and regulations to determine whether all PDH credits claimed and activities being considered meet the continuing education requirement. However, a course provider may contact the Board for an opinion for whether or not a course or technical presentation would meet the CEP requirements.

(3) Credit for college or community college approved courses will be based upon course credit established by the college.

(4) Credit for qualifying seminars and workshops will be based on one PDH unit for each hour of attendance. Attendance at

qualifying programs presented at professional and/or technical society meetings will earn PDH units for the actual time of each program.

(5) Credit for self-directed course work will be based on one PDH unit for each hour of study and is not to exceed 5 PDH per renewal period. Credit determination for self-directed course work is the responsibility of the license holder and subject to review as required by the Board.

(6) Credit determination for activities described in subsection (h)(6) of this section is the responsibility of the license holder and subject to review as required by the Board.

(7) Credit for activity described in subsection (h)(7) of this section requires that a license holder serve as an officer of the organization, actively participate in a committee of the organization, or perform other activities such as making or attending a presentation at a meeting or writing a paper presented at a meeting. PDH credits are not earned until the end of each year of service is completed.

(8) Teaching credit, as defined in subsection (f)(5) of this section, is valid for teaching a course or seminar for the first time only.

(j) The license holder is responsible for maintaining records to be used to support credits claimed. Records required include, but are not limited to:

(1) A log, on a form provided by TBPG, showing the type of activity claimed, sponsoring organization, location, duration, instructor's or speaker's name, and PDH credits earned; and

(2) Attendance verification records in the form of completion certificates, receipts, attendance roster, or other documents supporting evidence of attendance.

(k) The license holder must submit CEP certification on the log form provided by TBPG and a list of each activity, date, and hours claimed that satisfy the CEP requirement for that renewal year when audited. A percentage of the licenses will be randomly audited each year.
Figure: 22 TAC §851.32(k)

(l) CEP records for each license holder must be maintained for a period of three years by the license holder.

(m) CEP records for each license holder are subject to audit by the Board or its authorized representative.

(1) Copies must be furnished, if requested, to the Board or its authorized representative for audit verification purposes.

(2) If upon auditing a license holder, the Board finds that the activities cited do not fall within the bounds of educational, technical, ethical, or professional management activities related to the practice of geoscience; the Board may require the license holder to acquire additional PDH as needed to fulfill the minimum CEP requirements.

(n) A license holder may be exempt from the professional development educational requirements for one of the following reasons listed in paragraphs (1) - (4) of this subsection:

(1) New license holders by way of examination shall be exempt for their first renewal period.

(2) A license holder serving on active duty and deployed outside the United States, its possessions and territories, in or for the military service of the United States for a period of time exceeding one hundred twenty (120) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year.

(3) A license holder employed outside the United States, its possessions and territories, actively engaged in the practice of geoscience for a period of time exceeding three hundred (300) consecutive days in a year shall be exempt from obtaining the professional development hours required during that year except for five (5) hours of self-directed course work.

(4) License holders experiencing long term physical disability or illness may be exempt. Supporting documentation must be furnished to the Board.

(o) A license holder may bring an expired license to active status by obtaining all delinquent PDH units. However, if the total number required to become current exceeds 30 units, then 30 units shall be the maximum number required.

(p) Noncompliance:

(1) If a license holder does not certify that CEP requirements have been met for a renewal period, the license shall be considered expired and subject to late fees and penalties.

(2) A determination by audit that CEP requirements have been falsely reported shall be considered to be misconduct and will subject the license holder to disciplinary action.

§851.40. Geoscientist-in-Training Designation.

Individuals who meet the educational requirements of §1002.255(a)(2)(A) of the Act and have successfully passed an examination as specified in §851.41(a)(2) of this chapter are eligible to apply for Geoscientist-in-Training (GIT) certification. This certification does not entitle an individual to practice as a licensed Professional Geoscientist.

§851.41. Geoscientist-in-Training Qualifications.

(a) To be eligible for obtaining a Geoscientist-in-Training (GIT) certificate, an applicant must meet the following qualifications:

(1) Has met the educational requirements as established in §851.25(a) of this chapter.

(2) Has successfully passed the examination established by the Board designed to demonstrate that the applicant has mastered the basic knowledge needed within the geosciences profession. Applicable examinations are:

(A) The fundamentals examination of ASBOG for geologists;

(B) The fundamentals examination of CSSE for soil scientists; or

(C) The Texas Geophysics Examination for geophysicists.

(3) Has a supporting letter addressing the applicant's ethical character.

(4) Has paid the application fee as set by the Board and published in §851.80 of this chapter.

(b) If for any reason the Board is not satisfied that an applicant is eligible in all respects for certification, it may deny the individual's application or it may require additional information concerning the applicant's qualifications for certification.

§851.42. Geoscientist-in-Training Application and Certification.

(a) To be certified as a Geoscientist-in-Training (GIT), an individual must:

(1) Submit a GIT application in a format prescribed by the Board;

(2) Submit an official academic transcript in accordance with §851.25(b) of this chapter;

(3) Submit one letter of support as directed by the Board addressing the individual's ethical character; and

(4) Pay the fee as established by the Board.

(b) A Geoscientist-in-Training certificate expires at the end of the month one year from the date of issuance, and can be renewed annually if the individual:

(1) Accumulates eight or more Personal Development Hours (PDH) as described in §851.32 of this chapter throughout the prior certification year to include one hour of ethics training;

(2) Remains in good standing with the Board; and

(3) Files for renewal of GIT certification and pays the fee established by the Board.

(c) If an applicant for GIT certification does not submit all required documents within one year of the original application date, the application shall expire and the applicant must reapply and pay a new application fee.

§851.43. Renewal of a Geoscientist-in-Training Certification.

A Geoscientist-in-Training (GIT) certification may be renewed annually for a period of up to eight years. Renewals after the eighth year of certification will be granted at the discretion of the Board.

§851.44. Use of the Title "Geoscientist-in-Training."

Individuals who are certified as a Geoscientist-in-Training may use "GIT" or "Geoscientist-in-Training" as a title after their name, providing these designations are not used in conjunction with or preceded by the work "licensed" or any other words that might lead one to believe they are licensed as a Professional Geoscientist.

§851.45. Relationship of Geoscientist-in-Training Certification to Licensure of Professional Geoscientists.

The Geoscientist-in-Training (GIT) Certification is intended as a stepping stone toward licensure as individuals are gaining acceptable geoscience experience. Individuals who are GIT certified and in good standing with the Board will only need to supply letters of reference as detailed in §851.24 of this chapter, provide evidence of experience as described in §851.23 of this chapter, and successfully pass the appropriate practice exam of ASBOG and CSSE. The degree program, coursework and transcripts are evaluated during the application phase for GIT Certification, and shall not be re-evaluated upon application for licensure as a Professional Geoscientist.

§851.46. Revocation of Certification.

The Board reserves the right to take appropriate disciplinary action including the revocation of certification granted pursuant to this chapter for failure to comply with the ethical standards found elsewhere in this chapter.

§851.80. Fees.

(a) All fees are non-refundable.

(b) Initial application and license fee--$255.

(c) Examination processing fee of $25 for all disciplines and examination fee:

(1) Geology--Fundamentals and Practice as determined by ASBOG.

(2) Geophysics--$175.

(3) Soil Science--Fundamentals and Practice as determined by CSSE.

(d) Issuance of a revised or duplicate license--$25.

(e) Renewal fee--$223 or as prorated under §851.28(b) of this chapter. The fee for annual renewal of licensure for any person sixty-five (65) years of age or older as of the renewal date shall be half the current renewal fee.

(f) Late renewal fee--$50.

(g) Fee for affidavit of licensure--$15.

(h) Verification of licensure--$15.

(i) Temporary license--$200.

(j) Firm registration--$300.

(k) Firm registration renewal--$300.

(l) Sole-proprietorship registration--$50.

(m) Sole-proprietorship renewal--$50.

(n) Insufficient funds fee--$25.

(o) Initial application for Geoscientist-in-Training Certificate--$25.

(p) Annual renewal of Geoscientist-in-Training Certificate--$25.

This agency hereby certifies that the proposal has been reviewed by 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 1, 2010.

TRD-201003705
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 936-4405

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SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §§851.101 - 851.114

The proposed new rules are authorized by the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act; and §1002.154 which provides that Board shall enforce the Act.

The proposed new rules affect Texas Occupations Code Chapter 1002.

§851.101. General.

(a) These rules of professional conduct are promulgated pursuant to the Texas Geoscience Practice Act (the Act), Texas Occupations Code, §1002.153, which directs the Board to adopt a code of professional conduct that is binding on all license holders under the Act. Except as otherwise noted, these rules of professional conduct apply

only to situations which are directly or indirectly related to the practice of geoscience.

(b) Any person who holds a Professional Geoscientist license and/or is the authorized official of a Geoscience Firm, is a Geoscience Firm, or who holds a certificate as a Geoscientist-in-Training is responsible for understanding and complying with the Act, rules adopted by the Board and any other law or rule pertaining to the professional practice of geoscience. Any person under application for, currently holding, or eligible to renew a license, registration, or certification issued by the Board is bound by the provisions of the Act and this chapter.

(c) A Professional Geoscientist, an authorized official of a Geoscience Firm, or a person who holds a certificate as a Geoscientist-in-Training having knowledge of any alleged violation of the Act and/or Board rules shall cooperate with the Board in furnishing such information as may be required.

(d) A Professional Geoscientist, an authorized official of a Geoscience Firm, or a person who holds a certificate as a Geoscientist-in-Training shall promptly answer all inquiries concerning matters under the jurisdiction of the Board, and shall fully comply with final decisions and orders of the Board. Failure to comply with these matters shall constitute a separate offense of misconduct subject to the penalties provided under the Act.

(e) The Board may revoke or suspend a Professional Geoscientist's license, place on probation a Professional Geoscientist whose license has been suspended, reprimand a Professional Geoscientist, or assess an administrative penalty against a Professional Geoscientist for a violation of any provision of these rules of professional conduct or the Act. The Board also may take action against an Applicant pursuant to §851.110 of this chapter.

(f) Upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions:

(1) The seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public;

(2) The economic or potential damage to property caused by the misconduct;

(3) The respondent's history concerning previous grounds for sanction;

(4) The sanction necessary to deter future misconduct;

(5) Efforts to correct the misconduct; and

(6) Any other matter justice may require.

(g) These rules of professional conduct are not intended to suggest or define standards of care in civil actions against Professional Geoscientists, Geoscientists-in-Training, or Geoscience Firms involving their professional conduct.

(h) A Professional Geoscientist, a Geoscientist-in-Training, or a Geoscience Firm may donate professional geoscience services to charitable causes but must adhere to all provisions of the Act and the rules of the Board in the provision of all geoscientific services rendered, regardless of whether the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm is paid for the services.

(i) A Professional Geoscientist who is presenting geoscientific testimony, including geoscientific interpretation, analysis, or conclusions, or recommending geoscientific work before any public body or court of law, whether under sworn oath or not, must adhere to all provisions of the Act and the rules of the Board in the provision of all geoscientific services rendered regardless of whether the Professional Geoscientist is paid for the service or is providing such service on behalf of themselves or some other organization for which their services are provided at no cost.

§851.102. Competence/Negligence.

(a) A Professional Geoscientist or a Geoscience Firm shall undertake to perform a professional service only when the Professional Geoscientist or Geoscience Firm, together with those whom the Professional Geoscientist or Geoscience Firm shall engage as consultants, are qualified by education and/or experience in the specific technical areas involved. During the delivery of a professional service, a Professional Geoscientist or Geoscience Firm shall act with reasonable care and competence and shall apply the technical knowledge and skill, which is ordinarily applied by reasonably prudent Professional Geoscientists practicing under similar circumstances and conditions.

(b) A Professional Geoscientist shall not affix his/her signature or seal to any document dealing with subject matter in which he/she is not qualified by education and/or experience to form a reasonable judgment.

(c) "Gross Incompetency" shall be grounds for disciplinary action by the Board. A Professional Geoscientist may be found guilty of "Gross Incompetency" under any of the following circumstances:

(1) The Professional Geoscientist or Geoscience Firm has engaged in conduct that provided evidence of an inability or lack of skill or knowledge necessary to discharge the duty and responsibility required of a Professional Geoscientist or Geoscience Firm;

(2) The Professional Geoscientist has engaged in conduct which provided evidence of an extreme lack of knowledge of, or an inability or unwillingness to apply, the principles or skills generally expected of a reasonably prudent Professional Geoscientist or Geoscience Firm;

(3) The Professional Geoscientist has been adjudicated mentally incompetent by a court; or

(4) Pursuant to §851.109(b) of this chapter.

§851.103. Recklessness.

(a) A Professional Geoscientist or Geoscience Firm shall not practice geoscience in any manner which, when measured by generally accepted geoscience standards or procedures, is reasonably likely to result or does result in the endangerment of the safety, health, or welfare of the public. Such practice is deemed to be "reckless."

(b) "Recklessness" shall be grounds for disciplinary action by the Board. "Recklessness" shall include the following practices:

(1) Conduct that indicates that the Professional Geoscientist or Geoscience Firm is aware of yet consciously disregards a substantial risk of such a nature that its disregard constitutes a significant deviation from the standard of care that a reasonably prudent Professional Geoscientist or Geoscience Firm would exercise under the circumstances;

(2) Knowing failure to exercise ordinary care and attention toward the intended result when a procedure, technique, material, or system is employed as a result of a decision made by the Professional Geoscientist or Geoscience Firm and such failure jeopardizes public health, safety, or welfare; or

(3) Action which demonstrates a conscious disregard for compliance with a statute, regulation, code, ordinance, or recognized standard applicable to the design or construction of a particular project when such disregard jeopardizes public health, safety, or welfare.

§851.104. Dishonest Practice.

(a) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly perform an act, omit an act or allow an omission, make an assertion, or otherwise engage in a practice in such a manner as to:

(1) Defraud;

(2) Deceive; or

(3) Create a misleading impression.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not advertise publicly or individually to a client or prospective client in a manner that is false, misleading, or deceptive.

(c) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific publicly funded geoscience work.

(d) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not make any false, misleading, deceptive, fraudulent or exaggerated claims or statements about the services of an organization or agency, including, but not limited to, the effectiveness of geoscientific services, qualifications, or products.

(e) If a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm learns that any false, misleading, deceptive, fraudulent or exaggerated claims or statement about the geoscientific services, qualifications or products have been made, the licensee shall take reasonable steps to correct the inappropriate claims. As appropriate, the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm may notify the Board in writing about these claims.

(f) Professional Geoscientists and Geoscience Firms shall issue statements in an objective and truthful manner. Professional Geoscientists, Geoscientist-in-Training, and Geoscience Firms should strive to make affected parties aware of the concerns regarding particular actions or projects, and of the consequences of geoscientific decisions or judgments that are overruled or disregarded.

(g) All advertisements or announcements of professional services which a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm offers, including telephone directory listings, business cards, etc. shall clearly state the person's or firm's licensure, registration or certification designation.

(h) Information used by a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in any advertisement or announcement shall not contain information which is false, inaccurate, misleading, incomplete, out of context, deceptive or not readily verifiable. Advertising includes, but is not limited to, any announcement of services, letterhead, signage, business cards, commercial products, and billing statements.

(i) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm who retains or hires others to advertise or promote the licensee's practice remains responsible for the statements and representations made.

(j) A Professional Geoscientist shall use the identification "Professional Geoscientist" or the initials, "P.G.":

(1) In the professional use of the license holder's name, whether P.G. is in an exempt or non-exempt professional geoscience setting; and

(2) In connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification.

(k) A Geoscientist-in-Training shall use the identification "Geoscientist-in-Training" or the initials, "GIT":

(1) In the professional use of the license holder's name; and

(2) In connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification.

§851.105. Conflicts of Interest.

(a) If a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm has any business association or financial interest which might reasonably appear to influence the judgment of the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in connection with the performance of a professional service and thereby jeopardize an interest of a client or employer of the Professional Geoscientist, the Geoscientist-in-Training, or Geoscience Firm, the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall promptly inform the client or employer in writing of the circumstances of the business association or financial interest. Unless the client or employer provides written consent after full disclosure regarding the circumstances of the business association or financial interest, the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall either terminate the business association or financial interest or forego the project or employment.

(b) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not solicit or accept, directly or indirectly, any financial or other valuable consideration, material favor, or other benefit of any substantial nature, financial or otherwise, from more than one party in connection with a single project or assignment unless the circumstances are fully disclosed in writing to all parties.

(c) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not solicit or accept, directly or indirectly, any financial or other valuable consideration, material favor, or other benefit of any substantial nature from any supplier of materials or equipment or from any contractor or any consultant in connection with any project on which the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm is performing or has contracted to perform geoscience services.

(d) The phrase "benefit of any substantial nature" is defined to mean any act, article, money, or other material consideration which is of such value or proportion that its acceptance creates an obligation or the appearance of an obligation on the part of the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm or otherwise could adversely affect the ability of the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm to exercise judgment without regard to such benefit.

§851.106. Responsibility to the Regulation of the Geoscience Profession and Public Protection.

(a) Professional Geoscientists, Geoscientists-in-Training, and Geoscience Firms shall be entrusted to protect the health, safety, and welfare of the public in the practice of their profession.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not:

(1) Knowingly participate, directly or indirectly, in any plan, scheme, or arrangement having as its purpose the violation of any provision of the Act or the rules of the Board;

(2) Aid or abet, directly or indirectly:

(A) Any unlicensed person in connection with the unauthorized practice of geoscience;

(B) Any business entity in the practice of geoscience unless carried on in accordance with the Act and this chapter; or

(C) Any person or any business entity in the use of a professional seal or other professional identification so as to create the opportunity for the unauthorized practice of geoscience by any person or any business entity;

(3) Fail to exercise reasonable care or diligence to prevent his/her partners, associates, shareholders, and employees from engaging in conduct which, if done by a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm, would violate any provision of the Act or the rules of the Board.

(c) A Professional Geoscientist or a Geoscientist-in-Training possessing knowledge of an Applicant's qualifications for licensure shall cooperate with the Board by responding in writing to the Board regarding those qualifications when requested to do so by the Board.

(d) A Professional Geoscientist shall be responsible and accountable for the care, custody, control, and use of his/her Professional Geoscientist seal, professional signature, and other professional identification. A Professional Geoscientist whose seal has been lost, stolen, or otherwise misused shall report the loss, theft, or misuse to the Board immediately upon discovery of the loss, theft, or misuse. The Board may invalidate the license number of the lost, stolen, or misused seal upon the request of the Professional Geoscientist if the Board deems it necessary.

(e) A Professional Geoscientist, a Geoscientist-in-Training, or an authorized official of a firm shall remain mindful of his/her obligation to the profession and to protect public health, safety, and welfare and shall report to the Board known or suspected violations of the Act or the rules of the Board.

(f) A Professional Geoscientist or Geoscience Firm shall keep adequate records of geoscientific services provided to the public for no less than five (5) years following the completion and final delivery of the service. Adequate records shall include, but not be limited to:

(1) Documents that have been signed and sealed or would require a signature and a seal;

(2) Relevant documentation that supports geoscientific interpretations, conclusions, and recommendations;

(3) Descriptions of offered services;

(4) Billing, payment, and financial communications; and

(5) Other relevant records.

(g) Professional Geoscientists, a Geoscientists-in-Training, and Geoscience Firms should strive to adequately examine the environmental impact of their actions and projects, including the prudent use and conservation of resources and energy, in order to make informed recommendations and decisions.

§851.107. Prevention of Unauthorized Practice.

(a) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not practice or offer to practice geoscience in any governmental jurisdiction in which to do so would be in violation of a law regulating the practice of geoscience in that jurisdiction.

(b) The revocation, suspension, or denial of a license or firm registration to practice geoscience in another jurisdiction shall be sufficient cause for the revocation, suspension, or denial of a license or firm registration to practice geoscience in the State of Texas.

(c) A Professional Geoscientist who fails to renew his/her license prior to its annual expiration date shall not use the title "geoscientist" and shall not engage in the public practice of geoscience as defined by the Texas Occupations Code §1002.002 until after the Professional Geoscientist's license has been properly renewed.

(d) A Geoscience Firm that fails to renew its Geoscience Firm registration prior to its annual expiration date shall not use the title "Geoscience Firm" and shall not engage in the public practice of geoscience as defined by the Texas Occupations Code §1002.002 until after the Geoscience Firm's registration has been properly renewed.

(e) A Geoscientist-in-Training who fails to renew his/her certification prior to its annual expiration date shall not use the title "Geoscientist-in-Training" until after the Geoscientist-in-Training's certification has been properly renewed.

§851.108. Criminal Convictions.

(a) Pursuant to Texas Occupations Code Chapter 53, the Board may suspend or revoke an existing license or disqualify a person from receiving a license because of the person's conviction of a crime if the crime directly relates to the duties and responsibilities of a Professional Geoscientist. The following procedures will apply in the consideration of an application for licensure as a Geoscientist or in the consideration of a Licensee's criminal history:

(1) Each Applicant will be required to provide information regarding the Applicant's criminal history as part of the application process. Each Licensee will be required to report any criminal conviction to the Board within thirty (30) days of the date the conviction is entered by the court and to verify the status of the Licensee's criminal history on each license renewal form. An Applicant or Licensee shall not be required to report a conviction for a minor traffic offense.

(2) An Applicant or Licensee who has been convicted of any crime will be required to provide a summary of each conviction in sufficient detail to allow the Executive Director to determine whether it appears to directly relate to the duties and responsibilities of a Professional Geoscientist.

(3) If the Executive Director determines the conviction might be directly related to the duties and responsibilities of a Professional Geoscientist, the Board's staff will obtain sufficient details regarding the conviction to allow the Board to determine the effect of the conviction on the Applicant's eligibility for licensure or on the Licensee's fitness for continued licensure.

(b) In determining whether a criminal conviction is directly related to the duties and responsibilities of a Professional Geoscientist, the Executive Director and the Board will consider the following:

(1) The nature and seriousness of the crime;

(2) The relationship of the crime to the purposes for requiring a license to practice geoscience;

(3) The extent to which a Professional Geoscientist license might offer an opportunity to engage in further criminal activity of the same type as that in which the Applicant or Licensee had been involved; and

(4) The relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a Professional Geoscientist.

(c) In addition to the factors that may be considered under subsection (b) of this section, the Executive Director and the Board shall consider the following:

(1) The extent and nature of the Applicant's or Licensee's past criminal activity;

(2) The age of the Applicant or Licensee at the time the crime was committed and the amount of time that has elapsed since the Applicant's or Licensee's last criminal activity;

(3) The conduct and work activity of the Applicant or Licensee prior to and following the criminal activity;

(4) Evidence of the Applicant's or Licensee's rehabilitation or rehabilitative effort;

(5) Other evidence of the Applicant's or Licensee's present fitness to practice as a Professional Geoscientist, including letters of recommendation from law enforcement officials involved in the prosecution or incarceration of the Applicant or Licensee or other persons in contact with the Applicant or Licensee; and

(6) Proof that the Applicant or Licensee has maintained steady employment and has supported his/her dependents and otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered.

(d) Crimes directly related to the duties and responsibilities of a Professional Geoscientist include any crime that reflects a lack of fitness for professional licensure or a disregard of the standards commonly upheld for the professional practice of geoscience, such as the following:

(1) Criminal negligence;

(2) Soliciting, offering, giving, or receiving any form of bribe;

(3) The unauthorized use of property, funds, or proprietary information belonging to a client or employer;

(4) Acts relating to the malicious acquisition, use, or dissemination of confidential information related to geoscience; and

(5) Any intentional violation as an individual or as a consenting party of any provision of the Act.

(e) The Board shall revoke the license of any Professional Geoscientist who is convicted of any felony if the felony conviction results in incarceration. The Board also shall revoke the license of any Professional Geoscientist whose felony probation, parole, or mandatory supervision is revoked.

(f) If an Applicant is incarcerated as the result of a felony conviction, the Board may not approve the Applicant for licensure during the period of incarceration. If an Applicant's felony probation, parole, or mandatory supervision is revoked, the Board may not approve the Applicant for licensure until the Applicant successfully completes the sentence imposed as a result of the revocation.

(g) If the Board takes action against any Applicant or Professional Geoscientist pursuant to this section, the Board shall provide the Applicant or Licensee with the following information in writing:

(1) The reason for rejecting the application or taking action against the Licensee's license;

(2) Notice that upon exhaustion of the administrative remedies provided by the Administrative Procedure Act, Chapter 2001, Texas Government Code, an action may be filed in a district court of Travis County for review of the evidence presented to the Board and its decision. The person must begin the judicial review by filing a petition with the court within thirty (30) days after the Board's decision is final; and

(3) The earliest date the person may appeal.

(h) All proceedings pursuant to this section shall be governed by the Administrative Procedure Act, Chapter 2001, Texas Government Code.

§851.109. Substance Abuse.

(a) If in the course of a disciplinary proceeding, it is found by the Board that a Professional Geoscientist's abuse of alcohol or a controlled substance, as defined by the Texas Controlled Substances Act, Chapter 481, Texas Health and Safety Code, contributed to a violation of the Act or the rules of the Board, the Board may condition its disposition of the disciplinary matter on the Professional Geoscientist's completion of a rehabilitation program approved by the Department of State Health Services.

(b) A Professional Geoscientist's abuse of alcohol or a controlled substance that results in the impairment of the Professional Geoscientist's professional skill so as to cause a direct threat to the property, safety, health, or welfare of the public may be deemed "Gross Incompetency" and may be grounds for the indefinite suspension of a Professional Geoscientist's license until such time as he or she is able to demonstrate to the Board's satisfaction that the reasons for suspension no longer exist and that the termination of the suspension would not endanger the public.

(c) In order to determine whether abuse of alcohol or a controlled substance contributed to a violation or has resulted in "gross incompetency," the Board may order an examination by one or more health care providers trained in the diagnosis or treatment of substance abuse.

§851.110. Effect of Enforcement Proceedings on Application.

(a) The application of an Applicant against whom the Board has initiated an enforcement proceeding may be held at the Board's discretion, without approval, disapproval, or rejection until:

(1) All enforcement proceedings have been terminated by a final judgment or order and the time for appeal has expired, or if an appeal is taken, such appeal has been terminated;

(2) The Applicant is in full compliance with all orders and judgments of the court, all orders and rules of the Board, and all provisions of the Act; and

(3) The Applicant has complied with all requests of the Board for information related to such compliance, upon which the Board shall complete the consideration of the application in the regular order of business.

(b) An "enforcement proceeding" is initiated by the commencement of an investigation that is based either on a formal complaint filed with the Board or on information presented to the Board that establishes probable cause for a belief in the existence of facts that would constitute a violation of the Act or the rules of the Board.

(c) The following sanctions may be imposed against an Applicant who is found to have falsified information provided to the Board, violated any of the practice or title restrictions of the Act, violated any similar practice or title restriction of another jurisdiction, or otherwise violated any of the statutory provisions or rules enforced by the Board:

(1) Reprimand;

(2) The imposition of an administrative penalty;

(3) Suspension of the license upon its effective date;

(4) Rejection of the application; or

(5) Denial of the right to reapply for licensure for a period not to exceed five (5) years.

(d) The Board may take action against an Applicant for any act or omission if the same conduct would be a ground for disciplinary action against a Professional Geoscientist.

§851.111. Professional Geoscientists Shall Maintain Confidentiality of Clients.

(a) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm may reveal confidences and private information only with a fully informed client's or employer's consent, or when required by law, rule or court order; or when those confidences, if left undisclosed, would constitute a threat to the health, safety or welfare of the public.

(b) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall not use a confidence or private information regarding a client or employer to the disadvantage of such client or employer or for the advantage of a third party.

(c) A Professional Geoscientist or Geoscience Firm shall exercise reasonable care to prevent unauthorized disclosure or use of private information or confidences concerning a client or employer by the Professional Geoscientist's or Geoscience firm's, employees and associates.

§851.112. Required Reports to the Board.

(a) A Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm shall make written reports to the Board office within thirty (30) days of the following, as applicable:

(1) A change of mailing address;

(2) A change or additional place of full or part-time employment;

(3) The initiation of independent practice as an unincorporated sole-proprietorship (a single-owned Professional Geoscientist's geoscience business that has no separate legal existence from its owner) registered by the Board to engage in the public practice of geoscience;

(4) The initiation of practice as any other type of firm, corporation, partnership (whether or not the partnership is an incorporated entity) or other business entity registered by the Board to engage in the public practice of geoscience;

(5) The notification in paragraphs (1) - (4) of this subsection shall include full legal trade or business name of the association or employment, physical location and mailing address of the business, status of business (corporation, assumed name, partnership, or self-employment through use of own name), legal relationship and position of responsibility within the business, telephone number of the business office, effective date of this change; and reason for this notification (changed employment or retired; firm went out of business or changed its name or location, etc.) and information regarding areas of practice within each employment or independent sole practitioner practice setting;

(6) A change of business phone number, an additional business phone number, or a change in the home phone number;

(7) A criminal conviction, other than a Class C misdemeanor traffic offense, of the licensee, Geoscientist-in-Training, or authorized official;

(8) The settlement of or judgment rendered in a civil lawsuit filed against the licensee or firm and relating to the Professional Geoscientist's or Geoscience Firm's professional practice; or

(9) Final actions against the Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm done by a licensing or certification body related to the practice of geoscience when known by the licensee.

(b) The information received under subsection (a) of this section may be used by the Board to determine whether disciplinary action should be taken against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm.

(c) Failure to make a report as required by subsection (a) of this section is grounds for disciplinary action by the Board.

§851.113. Assumed Names.

(a) An independent practice by a Professional Geoscientist may be incorporated in accordance with the Professional Corporation Act, or other applicable law.

(b) When an assumed name is used in any practice of geoscience, the name of the Professional Geoscientist must be listed in conjunction with the assumed name. An assumed name used by a Professional Geoscientist must not be false, deceptive, or misleading.

§851.114. Display of License Certificate.

A Professional Geoscientist:

(1) Shall display the license certificate, issued by the Board, in a prominent place at each location of practice.

(2) Shall display only an original of the license certificate issued by the Board.

(3) Shall not make any alteration on a license certificate issued by the Board.

(4) Or any person shall not display a license certificate issued by the Board, which has been reproduced or is expired, suspended, or revoked.

(5) Who elects to copy or allow to be copied a license certificate issued by the Board takes full responsibility for the use or misuse of the reproduced license.

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

Filed with the Office of the Secretary of State on July 1, 2010.

TRD-201003707
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 936-4405

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §§851.151 - 851.153, 851.156 - 851.158

The proposed new rules are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act, that the complaint may be initiated by the Board or Board staff, and provides for confidentiality of a complaint filed with the Board; §1002.204 which provides for complaint investigation and dispo-

sition; §§1002.251 - 1002.264, 1002.301, and 1002.302 which provide that unless exempted by the Act a license is required to engage in the public practice of geoscience and specifies qualifications for and conditions of licensure; §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation; §1002.352 which provides that the Board shall establish a criteria by which a person who expresses an intent to become licensed as a Professional Geoscientist may register with the Board as a Geoscientist-in-Training; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The proposed new rules affect Texas Occupations Code Chapter 1002.

§851.151. General.

(a) The Board will conduct inquiries into situations which allegedly violate the requirements of the Texas Geoscience Practice Act and Board rules concerning the practice of geoscience, representations which imply the legal capacity to offer or perform geoscience services for the public, and situations which are considered by the Board to pose or have caused harm to the public. Situations that represent a repeat offense, a danger or nuisance to the public or cannot be reasonably resolved through voluntary compliance will be disposed of by administrative proceedings as authorized by law.

(b) The Board may impose appropriate sanctions against a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm for:

(1) The practice of fraud or deceit in obtaining a Professional Geoscientist license, Geoscientist-in-Training certification, or Geoscience Firm registration;

(2) Incompetence, misconduct, fraud, gross negligence, or repeated incidents of negligence in the public practice of geoscience;

(3) Conviction of a license holder or authorized official of a crime involving moral turpitude or a felony;

(4) The imposition of an administrative or civil penalty or a criminal fine, or imprisonment or probation instead of a fine, for a misdemeanor relating to or arising out of the public practice of geoscience;

(5) The issuance of a cease and desist order or a similar sanction relating to or arising out of the public practice of geoscience;

(6) Using the seal of another license holder or using or allowing the use of the license holder's seal on geoscientific work not performed by or under the supervision of the license holder;

(7) Aiding or abetting a person or firm in a violation of this chapter;

(8) The revocation or suspension of a license or firm registration, the denial of renewal of a license or registration, or other disciplinary action taken by a state agency, Board of registration, or similar licensing agency for Professional Geoscientists, Geoscientists-in-Training, Geoscience Firms, or a profession or occupation related to the public practice of geoscience;

(9) Practicing or offering to practice geoscience or representing to the public that the person or the person's firm or corporation is licensed or registered or qualified to practice geoscience if the person or firm is not licensed or registered under this chapter or the person's firm or corporation does not employ a Professional Geoscientist as required under this chapter; or

(10) Violating this chapter, a rule adopted under this chapter, including the code of professional conduct, or a comparable provision of the laws or rules regulating the practice of geoscience in another state or country.

§851.152. Firm Compliance.

(a) A business entity that offers or is engaged in the practice of geoscience in Texas and is found to not be registered with the Board shall register with the Board pursuant to the requirements of §851.30 of this chapter within thirty (30) days of written notice from the Board.

(b) A business entity that offers or is engaged in the practice of geoscience in Texas and that fails to comply with subsection (a) of this section or that has previously been registered with the Board and whose registration has expired shall be considered to be in violation of Board rules and will be subject to administrative penalties as set forth in §§1002.451 - 1002.457 of the Act.

(c) The Board may revoke a certificate of registration that was obtained in violation of the Act and/or Board rules including, but not limited to, fraudulent or misleading information submitted in the application or lack of employee relationship with the designated Professional Geoscientist for the firm.

(d) A business entity that is not registered with the Board may not represent to the public by way of letters, signs, or symbols as a part of any sign, directory, listing, contract, document, pamphlet, stationery, advertisement, signature, or business name that it is engaged in the practice of geoscience by using the terms:

(1) "geoscientist,"

(2) "geoscience,"

(3) "geoscience services,"

(4) "geoscience company,"

(5) "geoscience, inc.,"

(6) "Professional Geoscientists,"

(7) "licensed geoscientists,"

(8) "registered geoscientists,"

(9) "licensed Professional Geoscientists,"

(10) "registered Professional Geoscientist," or

(11) any abbreviation or variation of those terms listed in paragraphs (1) - (10) of this subsection, or directly or indirectly use or cause to be used any of those terms in combination with other words.

(e) In addition to reporting requirements in §851.112 of this chapter, each Geoscience Firm shall notify the Board in writing no later than thirty (30) days after a change in the business entity's:

(1) Physical or mailing address, electronic mail address, telephone or facsimile number or other contact information;

(2) Officers or directors if they are the sole Professional Geoscientists of the firm;

(3) Employment status of the Professional Geoscientists of the firm;

(4) Operation including dissolution of the firm or that the firm no longer offers to provide or is not providing geoscientific services to the public in Texas; or

(5) Operation including addition or dissolution of branch and/or subsidiary offices.

(f) Notice as provided in subsection (g) of this section shall include, as applicable, the:

(1) Full legal trade or business name entity;

(2) The firm registration number;

(3) Telephone number of the business office;

(4) Name and license number of the license holder employed by or leaving the entity;

(5) Description of the change; and

(6) Effective date of this change.

(g) A Geoscience Firm shall ensure that all geoscience work is done by or under the supervision of a Professional Geoscientist.

(h) A Geoscience Firm that obtains a new certificate of authority Office of the Secretary of State or files a new Assumed Name Certificate with the County Clerk must provide the new instrument number to the Board within thirty (30) days of the action.

(i) All geoscience documents released, issued, or submitted by or for a Geoscience Firm, including preliminary documents, must clearly indicate the firm name and registration number.

(j) The Board may revoke or suspend a Geoscience Firm's registration, place on probation a firm whose registration has been suspended, reprimand a Geoscience Firm, or assess an administrative penalty against a Geoscience Firm for a violation of any provision of these rules or the Act by the firm or any employee of the firm. The Board also may take action against an Applicant pursuant to §851.110 of this chapter.

(k) Upon a finding of professional misconduct, the Board may consider but is not limited to the following factors in determining an appropriate sanction or sanctions against a Geoscience Firm:

(1) The seriousness of the conduct, including the hazard or potential hazard to the health or safety of the public;

(2) The economic damage or potential damage to property caused by the misconduct;

(3) The respondent's history concerning previous grounds for sanction;

(4) The sanction necessary to deter future misconduct;

(5) Efforts to correct the misconduct; and

(6) Any other matter justice may require.

§851.153. Professional Geoscientist Compliance.

Any Professional Geoscientist who directly or indirectly enters into any contract, arrangement, plan, or scheme with any person, firm, partnership, association, or corporation or other business entity which in any manner results in a violation of §851.152 of this chapter shall be subject to legal and disciplinary actions available to the Board. Professional Geoscientists shall perform or directly supervise the geoscience work of any subordinates. Under no circumstances shall Professional Geoscientists work in a part-time arrangement with a firm not otherwise in full compliance with §851.152 of this chapter in a manner that could enable such firm to offer or perform professional geoscience services.

§851.156. Professional Geoscientist's Seals.

(a) The purpose of the Professional Geoscientist's seal is to assure the user of the geoscience product that the work has been performed by the Professional Geoscientist named and to identify the Professional Geoscientist's work.

(b) The Professional Geoscientist shall utilize the designation "P.G." or the titles set forth in the Texas Geoscience Practice Act (Act), §1002.251. Physical seals of two different sizes will be acceptable: a pocket seal (the size commercially designated as 1-5/8-inch seal) or desk seal (commercially designated as a two-inch seal) to be of the design shown in this subsection. Computer-applied seals may be of a reduced size provided that the Professional Geoscientist's name and number are clearly legible. All seals obtained and used by license holders must contain any given name or initial combination except for nicknames, provided the surname currently listed with the Board appears on the seal and in the usual written signature.
Figure: 22 TAC §851.156(b)

(c) Professional Geoscientists shall only seal work done by them or performed under their direct supervision. Upon sealing, Professional Geoscientists take full professional responsibility for that work.

(d) It shall be misconduct to knowingly sign or seal any geoscience document or product if its use or implementation may endanger the health, safety, property or welfare of the public.

(e) It shall be misconduct or an unlawful act for a license holder whose license has been revoked, suspended, or has expired, to sign or affix a seal on any document or product.

(f) All seals obtained and used by license holders shall be capable of leaving a permanent ink or impression representation on the geoscience work, or shall be capable of placing a computer-generated representation in a computer file containing the geoscience work.

(1) Electronically conveyed geoscience work that would require a seal as per subsection (j) of this section must contain an electronic seal and electronic signature if hard copies with the licensee's ink or embossed seal and original signature will not be submitted. Such seals should conform to the design requirements set forth in subsection (b) of this section.

(2) Geoscience work transmitted in an electronic format that contains a computer generated seal shall be accompanied by the following text or similar wording: "The seal appearing on this document was authorized by (Example: Leslie H. Doe, P.G. 0112) on (date).", unless accompanied by an electronic signature as described in this section. A license holder may use a computer-generated representation of his or her seal on electronically conveyed work; however, the final hard copy documents of such geoscience work must contain an original signature of the license holder(s) and date or the documents must be accompanied by an electronic signature as described in this section.

(3) A scanned image of an original signature shall not be used in lieu of an original signature or electronic signature. An electronic signature is a digital authentication process attached to or logically associated with an electronic document and shall carry the same weight, authority, and effects as an original signature. The electronic signature, which can be generated by using either public key infrastructure or signature dynamics technology, must be as follows:

(A) Unique to the person using it;

(B) Capable of verification;

(C) Under the sole control of the person using it; and

(D) Linked to a document in such a manner that the electronic signature is invalidated if any data in the document are changed.

(g) Preprinting of blank forms with a Professional Geoscientist's seal, or the use of decal or other seal replicas is prohibited. Signature reproductions, including but not limited to rubber stamps or computer-generated signatures, shall not be used in lieu of the Professional Geoscientist's actual signature.

(h) Professional Geoscientists shall take reasonable steps to insure the security of their physical or computer-generated seals at all times. In the event of loss of a seal, the Professional Geoscientist will immediately give written notification of the facts concerning the loss to the Executive Director.

(i) Professional Geoscientists shall affix an unobscured seal, original signature, and date of signature to the originals of all documents containing the final version of any geoscience work as outlined in subsection (j) of this section before such work is released from their control. Preliminary documents released from their control shall identify the purpose of the document, the Professional Geoscientist(s) of record and the Professional Geoscientist license number(s), and the release date by placing the following text or similar wording instead of a seal: "This document is released for the purpose of (Examples: interim review, mark-up, drafting) under the authority of (Example: Leslie H. Doe, P.G. 0112) on (date). It is not to be used for (Examples: construction, bidding, permit) purposes."

(j) The Professional Geoscientist shall sign, seal and date the original title sheet of bound geoscience reports, specifications, details, calculations or estimates, and each original sheet of plans or drawings regardless of size or binding if the plans or drawings are intended to be or are removed from the report. All other geoscience work, including but not limited to research reports, opinions, recommendations, evaluations, addenda, documents produced for litigation, and geoscience software shall bear the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act. A seal must be added on such work if required by the entity receiving the work; otherwise it may be added at the Professional Geoscientist's discretion. Electronic correspondence of this type shall include an electronic signature as described in subsection (f) of this section or be followed by a hard copy containing the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act.

(k) Work performed by more than one Professional Geoscientist shall be sealed in a manner such that all geoscience can be clearly attributed to the responsible Professional Geoscientist or Professional Geoscientists. When sealing plans or documents on which two or more Professional Geoscientists have worked, the seal of each Professional Geoscientist shall be placed on the plan or document with a notation describing the work done under each Professional Geoscientist's responsible charge.

(l) Licensed employees of the state, its political subdivisions, or other public entities are responsible for sealing their original geoscience work; however, such licensed employees engaged in review and evaluation for compliance with applicable law or regulation of geoscience work submitted by others, or in the preparation of general planning documents, a proposal for decision in a contested case or any similar position statement resulting from a compliance review, need not seal the review reports, planning documents, proposals for decision, or position statements.

(m) When a Professional Geoscientist elects to use standards or general guideline specifications, those items shall be clearly labeled as such, shall bear the identity of the publishing entity, and shall be:

(1) Individually sealed by the Professional Geoscientist; or

(2) Specified on an integral design/title/contents sheet that bears the Professional Geoscientist's seal, signature, and date with a statement authorizing its use.

(n) Alteration of a sealed document without proper notification to the responsible Professional Geoscientist is misconduct or an offense under the Act.

(o) A license holder is not required to use a seal for a work product for which the license holder is not required to hold a license under Texas Occupations Code, Chapter 1002.

(p) All geoscience documents released, issued, or submitted by a licensee shall clearly indicate the Geoscience Firm name and registration number by which the Professional Geoscientist is employed. If the Professional Geoscientist is employed by a local, State, or Federal Government agency or a firm that is exempt from the requirement of registration under Texas Occupations Code, Chapter 1002, Subchapter H, then only the name of the agency shall be required.

§851.157. Complaints and Disciplinary Actions.

(a) A complaint may be filed with the Board by a member of the public, a member of the Board or by agency staff. Complaints against a person or entity whose activities are regulated by the Board must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Board at the office of the Board in Austin. A complaint may be filed against any person who: holds a Professional Geoscientist license issued by the Board and/or is the authorized official of a Geoscience Firm registered by the Board, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the Board. A complaint may also be filed against a person or firm that is not licensed or registered with the Board alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas.

(b) A complaint must be filed within two (2) years of the event giving rise to the complaint. The event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent. Complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing.

(c) Complaints and investigations under this chapter are of two types:

(1) Complaints received from a member of the public; and

(2) Complaints and investigations that are initiated by the Board as a result of information that becomes known to the Board or agency staff and that may indicate a violation.

(d) The agency provides a complaint form which should be used to file a complaint.

(1) A complaint from a member of the public must be:

(A) In writing;

(B) Sworn to by the person making the complaint; and

(C) Filed with the Secretary-Treasurer.

(2) A complaint that is initiated by a member of the Board or agency staff must be:

(A) Made in writing; and

(B) Signed by the person who became aware of information that may indicate a violation.

(e) The Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of

the complaint. Complaint information is not confidential after the date formal charges are filed.

(f) If a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential. The information is not subject to discovery, subpoena, or other disclosure. A complaint is considered to be frivolous if the Executive Director and investigator, with Board approval, determine that the complaint:

(1) Was made for the likely purpose of harassment; and

(2) Does not demonstrate apparent harm to any person.

(g) Under the authority and provisions of the Texas Geoscience Practice Act (Act), the Board shall take disciplinary action against an applicant for a license, registration or certification or a license, registration, or certification holder who is found censurable for a violation of law or rules. A disciplinary action may be composed of any one or combination of the following listed in paragraphs (1) - (11) of this subsection:

(1) Refuse to issue or renew a license, registration or certification;

(2) Permanently revoke a license, registration or certification;

(3) Suspend a license, registration or certification for a specified time, not to exceed three years, to take effect immediately notwithstanding an appeal if the Board determines that the holder's continued practice constitutes an imminent danger to the public health, safety, or welfare;

(4) Issue a public or private reprimand to an applicant, a license holder, or an individual, firm, or corporation practicing geoscience or using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(5) Impose limitations, conditions, or restrictions on the practice of an applicant, a license holder, or an individual, firm, or corporation practicing geoscience using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(6) Require that a license, or certificate holder participate in a peer review program under rules adopted by the Board;

(7) Require that a license or certificate holder obtain remedial education and training prescribed by the Board;

(8) Impose probation on a license, registration or certificate holder requiring regular reporting to the Board;

(9) Require restitution, in whole or in part, of compensation or fees earned by a license holder, individual, firm, or corporation practicing geoscience under this chapter;

(10) Impose an appropriate administrative penalty as provided by Subchapter J of the Texas Geoscience Practice Act for a violation of the Act or a rule adopted by the Board on a license, registration or certificate holder or a person or firm who is not licensed and is not exempt from licensure under this chapter; or

(11) Issue a cease and desist order.

(h) All disciplinary actions shall be permanently recorded and made available upon request as public information.

(i) A license holder whose license has expired for nonpayment of renewal fees continues to be subject to all provisions of the Act and Board rules governing license holders until the license is revoked by the Board or becomes non-renewable under the Board's rules or the Act.

(j) Criminal convictions shall be handled as shown in paragraphs (1) - (3) of this subsection:

(1) The Board shall follow the requirements of Administrative Procedure Act, Texas Government Code Chapter 2001, and shall revoke the license of any license holder incarcerated as a result of a felony conviction, or violation of felony probation or parole, or revocation of mandatory supervision subsequent to being licensed as a Professional Geoscientist.

(2) The Board may take any of the actions set out in subsection (g) of this section when a license holder is convicted of a misdemeanor or a felony without incarceration if the crime directly relates to the license holder's duties and responsibilities as a Professional Geoscientist.

(3) Any license holder whose license has been revoked under the provisions of this subsection may apply for a new license upon release from incarceration.

(k) The Board, the Executive Director, an administrative law judge, and the participants in an informal conference may arrive at a greater or lesser sanction than suggested in these rules. Allegations and disciplinary actions will be set forth in the final Board Order and the severity of the disciplinary action will be based on the factors listed in paragraphs (1) - (9) of this subsection:

(1) The seriousness of the acts or omissions;

(2) The number of prior disciplinary actions taken against the respondent;

(3) The severity of penalty necessary to deter future violations;

(4) Efforts or resistance to correct the violations;

(5) Any hazard to the health, safety, property or welfare of the public;

(6) Any actual damage, physical or otherwise, caused by the violations;

(7) Any economic benefit gained through the violations;

(8) The economic harm to property or the environment caused by the violation; or

(9) Any other matters impacting justice and public welfare.

§851.158. Actions Against Non-License Holders.

A non-license holder who is assessed an administrative penalty may exercise due process rights under Texas Occupations Code Chapter 1002, Subchapter J. The Board may also seek an injunction as provided under Texas Occupations Code Chapter 1002, Subchapter K.

This agency hereby certifies that the proposal has been reviewed by 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 1, 2010.

TRD-201003709
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 936-4405

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SUBCHAPTER E. HEARINGS--CONTESTED CASES

22 TAC §§851.201 - 851.243

The proposed new rules are authorized by the Texas Occupations Code §1002.101 which provides that the Board shall appoint an Executive Director who shall be responsible for managing the day to day affairs of the Board; §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that Board shall enforce the Act; §1002.202 which provides that a person may file a complaint alleging a violation of the Act or a rule adopted under the authority of the Act; by Occupations Code §1002.204 which provides for complaint investigation and disposition; §§1002.401 - 1002.405 which provide for license denial and disciplinary procedures; and §§1002.451 - 1002.453 which provide to the imposition of an administrative penalty against a person licensed by the Board or a person who violates the Act or a rule adopted under the authority of the Act.

The proposed new rules affect Texas Occupations Code Chapter 1002.

§851.201. State Office of Administrative Hearings.

(a) Formal contested case hearings will be conducted for the Board by the State Office of Administrative Hearings (SOAH), as authorized by Texas Government Code, Chapter 2003. Hearings will be conducted in accordance with the Administrative Procedure Act (Texas Government Code, Chapter 2001), the rules and regulations of the SOAH, and the Texas Geoscience Practice Act and Board rules.

(b) An administrative law judge (judge) assigned to the SOAH will perform the duties and responsibilities as described in this section and §§851.202 - 851.243 of this chapter.

(c) The judge shall consider any applicable Board rules and policies in conducting the hearing. If there is any conflict between the rules of the SOAH and these Board rules, these rules will control unless otherwise specifically stated in the SOAH rules. This subsection does not apply if the rules of the Board are contrary to or are otherwise precluded by statutory or other controlling law.

§851.202. Board Responsibilities.

The Board will conduct sufficient investigation of complaint matters within its jurisdiction and attempt to resolve cases through authorized informal disposition. However, when agreements are not reached or approved, the Board must refer contested cases to the State Office of Administrative Hearings for formal hearings. The Board shall not attempt to influence the findings of facts or the judge's application of the law in any contested case other than by proper evidence and legal argument. The Board may, however, change a finding of fact or conclusion of law made by the judge, or vacate or modify an order issued by the judge, only for reasons of policy and must state in writing the reason and legal basis for the change.

§851.203. Jurisdiction; Request for Hearing or Law Judge.

(a) The State Office of Administrative Hearings (SOAH) acquires jurisdiction over a case when the Board files a written request for setting of hearing form or request for assignment of an administrative law judge form. A request for setting of hearing or for assignment of an administrative law judge shall be considered filed on the date the request form is received by the SOAH.

(b) The Board shall submit to the SOAH one of the following accompanied by copies of all pertinent documents (including, but not limited to, the complaint, petition, application, or other document describing Board action giving rise to a contested case), along with a written statement of applicable rules and policies: request for setting of hearing; or request for assignment of a judge. If the Board requests a setting for hearing, the SOAH will provide the Board with the date, time, and place of such setting. If the Board requests an assignment of a judge, the SOAH will assign a judge to consider motions and other pre-hearing matters. After a cause has been set for hearing pursuant to a request for setting of hearing or has been assigned a judge pursuant to a proper request, any party may move for appropriate relief, including, but not limited to, discovery and evidentiary rulings, continuances, and settings, which will be ruled on by the SOAH.

§851.204. Filings.

(a) Originals or duplicate originals of all notices, pleadings, motions, answers, affidavits, and all other filings in a contested case, made in accordance with the Administrative Procedure Act, the Texas Rules of Civil Evidence, or other applicable law, shall be filed with the State Office of Administrative Hearings (SOAH) at the time the SOAH acquires jurisdiction or at the time the instrument is issued and delivered if that time is later than the time the SOAH acquires jurisdiction.

(b) Pursuant to the SOAH rules, a copy of all filings shall be sent by mail or otherwise delivered to all parties or their representative of record.

(c) A certificate of service, signed by the person making the filing, showing the manner of service, stating that the filing has been served on all other parties and identifying those parties shall be contained in or attached to all filings. The certificate is prima facie evidence of service. The following form of certificate will be sufficient in this connection: I hereby certify that I have this ____ day of _____, 20____, served copies of the foregoing pleading, upon all other parties to this proceeding, by (here state the manner of service). Signature.

(d) If a filing does not contain a required certificate of service, or otherwise show service on all other parties:

(1) The SOAH may return the filing to the filing party; or

(2) The SOAH may send a notice to all parties stating that the filing does not show service on all parties and will not be considered unless and until SOAH is notified that all parties have been served with the filing; or

(3) The SOAH may, in the interest of economy of effort, send a copy of the filing to all parties.

(e) In computing any period of time prescribed or allowed by Board rules, by order of the Board, or by any applicable statute, the period shall begin on the day after the act or event considered, and conclude on the last day of such computed period, unless it be a Saturday, Sunday, or legal state holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal state holiday.

§851.205. Stipulations, Agreements.

(a) The parties, by stipulation, may agree to any substantive or procedural matter.

(b) A stipulation may be filed in writing or entered on the record at the hearing.

(c) The judge may require additional development of stipulated matters.

(d) No stipulation or agreement between the parties and their attorneys or representatives with regard to any matter involved in any proceeding before the Board or the State Office of Administrative Hearings shall be enforced unless it shall have been reduced to writing and

signed by the parties or their authorized representatives, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated in an order bearing their written approval. This subsection does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by these sections, unless precluded by law.

§851.206. Service.

Unless otherwise required by law, service of the following documents shall be made by personal delivery to the party or to the party's representative by certified mail, return receipt requested, hand delivery or via facsimile to the party's address of record:

(1) Notices of hearing;

(2) Default orders;

(3) Pre-hearing orders;

(4) Proposal for decisions; and

(5) Decisions and orders of the Board.

§851.207. Conduct and Decorum.

(a) Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the Board, the administrative law judge, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas State Bar.

(b) Unless otherwise prohibited by federal or state law, all proceedings before the Board or conducted by the State Office of Administrative Hearings are open to the public. The judge may remove persons whose conduct impedes the orderly progress of the hearing, and restrict attendance because of the physical limitations of the hearing facility.

§851.208. Classification of Parties.

Parties to proceedings before the Board and the State Office of Administrative Hearings are applicants, protestants, petitioners, complainants, respondents, and interveners. Regardless of errors as to designations in their pleadings, the parties shall be accorded their true status in the proceeding.

§851.209. Appearances in Person or by Representative; Waivers; Default.

(a) An individual may represent himself or herself.

(b) A party may be represented by an attorney authorized to practice law in the State of Texas, or other representative when authorized by law.

(c) A party's representative shall enter his or her appearance with the State Office of Administrative Hearings (SOAH).

(d) A party's representative of record shall be copied on all notices, pleadings, and other correspondence.

(e) A party's attorney of record remains the attorney of record in the absence of a formal withdrawal and an order approving such withdrawal is issued by a judge.

(f) A hearing before the judge is not necessary if all parties agree to the admission of the evidence and waive their right to appear.

(g) A party may waive the right to appear at the hearing unless prohibited by law.

(h) A waiver shall be in writing and filed with the SOAH.

(i) If, after receiving notice of a hearing, a party fails to attend a hearing, the judge may proceed in that party's absence and, where appropriate, may issue a proposal for decision against the defaulting party.

(j) A waiver may be withdrawn by a party on written notice received by the SOAH no later than seven (7) days before the scheduled hearing. The judge may permit withdrawal of a waiver subsequent to that time on a showing of good cause or in the interest of justice. When a waiver is permitted by law, failure of a party to appear personally or by representation after filing written notice of waiver may not result in a finding of default.

§851.210. Classification of Pleadings.

Pleadings filed in contested cases shall be protests, petitions, complaints, answers, replies, motions for rehearing, and other motions. Regardless of any error in the designation of a pleading, it shall be accorded its true status in the proceeding in which it is filed.

§851.211. Form and Content of Pleadings.

(a) Pleadings shall be typewritten or printed upon paper 8 1/2 inches wide and 11 inches long with an inside margin at least one inch wide, and exhibits annexed thereto shall be folded to the same size. Reproductions are acceptable, provided all copies are clear and permanently legible.

(b) All pleadings for which no official form is prescribed shall contain:

(1) The name of the party seeking to bring about or prevent action by the Board;

(2) A concise statement of the facts relied upon by the pleader;

(3) A prayer stating the type of relief, action, or order desired by the pleader;

(4) Any other matter required by statute; and

(5) A certificate of service, as required by §851.204(c) of this chapter.

(c) Each application, petition, or complaint which is intended to institute a proceeding before the Board shall be accompanied by any filing fee prescribed by law and this chapter.

§851.212. Discovery.

(a) Parties to an administrative hearing before the State Office of Administrative Hearings (SOAH) shall have the discovery rights provided in the Administrative Procedure Act, the Texas Geoscience Practice Act, and Board rules.

(b) Requests for issuances of subpoenas or commissions should be directed to the Board.

(c) All discovery requests should be initially directed to the party from which discovery is being sought.

(d) All disputes with respect to any discovery matter shall be filed with and resolved by the SOAH.

(e) All parties will be afforded a reasonable opportunity to file objections or move for a protective order with respect to the issuance of a subpoena or commission.

(f) Copies of discovery requests and documents filed in response thereto shall be filed with all parties, but should not be filed with the SOAH unless directed by the judge or when in support of a motion to compel, motion for protective order, or motion to quash.

§851.213. Motions; Amendments.

(a) Unless otherwise provided by this chapter:

(1) A party may move for appropriate relief before or during a hearing;

(2) A party shall submit all motions in writing or orally at a hearing;

(3) Written motions shall:

(A) Be filed no later than fifteen (15) days before the date of the hearing, provided, for good cause stated in the motion the judge may permit a written motion subsequent to that time;

(B) State concisely the question to be determined;

(C) Be accompanied by any necessary supporting documentation, and if based on matters which do not appear of record, they shall be supported by affidavit; and

(D) Be served on each party;

(4) An answer to a written motion shall be filed on the earlier of:

(A) Seven (7) days after receipt of the motion; or

(B) On the date of the hearing;

(5) On written notice to all parties or with telephone consent of all parties, the judge may schedule a conference to consider a written motion; or

(6) The judge may reserve ruling on a motion until after the hearing; or

(7) The judge may issue a written decision or state the decision on the record; or

(8) If a ruling on a motion is reserved, the ruling shall be in writing and may be included in the judge's proposed decision; and

(9) The filing or pendency of a motion does not alter or extend any time limit otherwise established by this chapter.

(b) Continuances may be granted by the State Office of Administrative Hearings in accordance with the Administrative Procedure Act, the Texas Geoscience Practice Act and Board rules, and applicable case law. Motions for continuance shall be in writing or stated in record, and shall set forth the specific grounds upon which the party seeks the continuance.

(c) Unless made during a prehearing or hearing, for all motions for continuance, cancellation of a scheduled proceeding, or extension of an established deadline filed fewer than ten (10) days before the date or deadline in question, the movant must contact the other party(ies) and must indicate in the motion whether it is opposed by any party(ies). Further, if a continuance to a date certain is sought, the motion must include a proposed date or dates (preferably a range of dates) and must indicate whether the party(ies) contacted agree on the proposed new date(s).

(d) Any pleading may be amended at any time up to seven (7) days prior to hearing and thereafter with approval of the judge; provided, that the complaint or petition upon which notice has been issued shall not be amended so as to broaden the scope.

§851.214. Prehearing Conferences and Orders.

(a) When appropriate, the judge may hold a prehearing conference to resolve matters preliminary to the hearing.

(b) A prehearing conference may be convened to address the following matters:

(1) Issuance of subpoenas;

(2) Factual and legal issues;

(3) Stipulations;

(4) Requests for official notice;

(5) Identification and exchange of documentary evidence;

(6) Admissibility of evidence;

(7) Identification and qualification of witnesses;

(8) Motions;

(9) Discovery disputes;

(10) Order of presentation;

(11) Scheduling;

(12) Settlement conferences; and

(13) Such other matters as will promote the orderly and prompt conduct of the hearing.

(c) Among other matters, as stated in subsection (b) of this section, an administrative law judge may order:

(1) That the parties discuss the prospects of settlement or stipulations and be prepared to report thereon at the prehearing conference;

(2) That the parties file and be prepared to argue preliminary motions at the prehearing conference;

(3) That the parties be prepared to specify the controlling factual and legal issues in the case at the prehearing conference; and

(4) That the parties make a plain and concise statement of undisputed facts and issues at the prehearing conference.

(d) At the discretion of the judge, all or part of the prehearing conference may be recorded or transcribed.

(e) The judge may, after the office acquires jurisdiction, issue an order requiring a prehearing statement of the case. The parties shall, within fourteen (14) days of service, file a statement specifying the parties present position on any or all of the following as required by the judge:

(1) The disputed issues or matters to be resolved;

(2) A brief statement of the facts or arguments supporting the party's position in each disputed issue or matter;

(3) A list of facts or exhibits to which a party will stipulate; and

(4) A description of the discovery, if any, the party intends to engage in and an estimate of the time needed to complete discovery. Parties shall supplement this statement on a timely basis.

(f) The judge may issue a prehearing order reciting the actions taken or to be taken with regard to any matter addressed at the prehearing conference. The prehearing order shall be a part of the case record. If a prehearing conference is not held, the judge may issue a prehearing order to regulate the conduct of the proceedings.

§851.215. Notice of Hearing.

(a) The Board shall be responsible for providing notice to all parties as required under the Administrative Procedure Act, and other applicable law.

(b) A judge may issue notice of date, time, and place for hearings.

§851.216. Certificates of Registration.

When the grant, denial, renewal, revocation, probation, reprimand, or suspension of a certificate of registration is required by statute to be

preceded by notice and opportunity for hearing, the provisions of these sections concerning contested cases apply.

§851.217. Conduct of Hearings.

(a) On a genuine issue in a contested case, each party is entitled to:

(1) Call witnesses;

(2) Offer evidence;

(3) Cross-examine any witness called by a party; and

(4) Make opening and closing statements.

(b) Once the hearing is begun the parties may be off the record only when the judge permits. If the discussion off the record is pertinent, then the judge will summarize the discussion for the record.

(c) Objections shall be timely noted in the record. See Texas Rules of Civil Evidence, §103.

(d) The judge may continue a hearing from time to time and from place to place. If the time and place for the proceeding to reconvene are not announced at the hearing, a notice shall be mailed stating the time and place of hearing.

(e) The judge may question witnesses and/or direct the submission of supplemental data.

(f) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

§851.218. Formal Exceptions.

Formal exceptions to rulings of the judge during a hearing shall be unnecessary. It shall be sufficient that the party at the time any ruling is made or sought shall have made known to the judge the action he desires.

§851.219. Motions for Postponement, Continuance, Withdrawal, or Dismissal of Matters before the Board.

Motions for postponement, continuance, withdrawal, or dismissal of matters which have been duly set for hearing shall be in writing, shall be filed with the judge and distributed to all interested parties, under a certificate of service, not less than five (5) days prior to the designated date that the matter is to be heard. Such motion shall set forth, under oath, the specific grounds upon which the moving party seeks such action and shall make reference to all prior motions of the same nature filed in the same proceeding. Failure to comply with the above, except for good cause shown, may be construed as lack of diligence on the part of the moving party, and at the discretion of the judge may result in the dismissal of the matter in issue, with prejudice to re-filing. Depending on the circumstances, motions for withdrawal or dismissal may be ruled on by the judge or, at his discretion, by the Board.

§851.220. Place and Nature of Hearings.

All hearings conducted in any proceeding shall be open to the public. All hearings shall be held in Austin, unless for good and sufficient cause the Board or the State Office of Administrative Hearings shall designate another place of hearing in accordance with applicable law.

§851.221. Administrative Law Judge.

(a) The judge shall have the authority and duty to:

(1) Conduct a full, fair, and impartial hearing;

(2) Take action to avoid unnecessary delay in the disposition of the proceeding; and

(3) Maintain order.

(b) The judge shall have the power to regulate the course of the hearing and the conduct of the parties and authorized representative, including the power to:

(1) Administer oaths;

(2) Take testimony;

(3) Rule on questions of evidence;

(4) Rule on discovery issues;

(5) Issue orders relating to hearing and pre-hearing matters, including orders imposing sanctions that the Board may impose;

(6) Admit or deny party status;

(7) Limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations;

(8) Grant a continuance;

(9) Request parties to submit legal memoranda, proposed findings of fact, and conclusions of law; and

(10) Issue proposals for decision pursuant to the Administrative Procedure Act, §15.

(c) A judge shall disqualify himself or herself or shall recuse himself or herself on the same grounds and under the same circumstances as specified in Texas Rules of Civil Procedure, §18b.

(d) A substitute judge may use the existing record and need not repeat previous proceedings, but may conduct further proceedings as are necessary and proper to conclude the hearing and render a proposal for decision.

§851.222. Order of Proceedings.

(a) A case shall be called to order by the judge.

(b) The judge shall explain briefly the purpose and nature of the hearing.

(c) The judge may allow the parties to present preliminary matters.

(d) The judge shall state the order of presentation of evidence.

(e) Witnesses shall be sworn or put under affirmation to tell the truth.

§851.223. Reporters and Transcript.

(a) The proceedings, or any part of them, must be transcribed on written request of any party. Such written request must be received by the State Office of Administrative Hearings (SOAH) not less than ten (10) calendar days before the scheduled date of the hearing. The cost of the original transcript shall be assessed one-half to the party requesting the transcription, the remaining one-half to the other parties equally. The original transcript shall be delivered to the SOAH. The cost of copies of the transcript will be paid by the requesting party.

(b) Suggested corrections to the transcript of the record may be offered within ten (10) days after the transcript is filed in the proceeding, unless the SOAH shall permit suggested corrections to be offered thereafter. Suggested corrections shall be served in writing upon each party of record, the official reporter, and the SOAH. If suggested corrections are not objected to, the judge will direct the corrections to be made and the manner of making them. In case the parties disagree on suggested corrections, they may be heard by the judge, who shall then determine the manner in which the record shall be changed, if at all.

§851.224. Telephone Hearings.

(a) The judge may, with consent of the parties, conduct all or part of the hearing by telephone, video, or other electronic means, if

each participant in the hearing has an opportunity to participate in, hear, and, except when a telephone is used, see the entire proceeding.

(b) All substantive and procedural rights apply to telephone hearings, subject only to the limitations of the physical arrangement.

(c) Documentary evidence. For a telephone hearing documentary evidence to be offered shall be mailed by the proponent to all parties and the office at least five (5) days before the hearing.

(d) Default. For a telephone hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than 10 minutes after the scheduled time for hearing:

(1) Failure to answer the telephone; or

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

(3) Failure to be ready to proceed with the hearing as scheduled.

§851.225. Dismissal, Settlement without Hearing.

(a) The State Office of Administrative Hearings may entertain motions for dismissal without a hearing for the following reasons: failure to prosecute; unnecessary duplication of proceedings or res adjudicata; withdrawal; moot questions or stale petitions; or lack of jurisdiction.

(b) Upon request of any party and approval by the judge, or in the judge's discretion, a conference may be held to address settlement possibilities. Settlement discussions shall not be made a part of the case record.

§851.226. Rules of Evidence.

(a) The judge may limit testimony or any evidence which is irrelevant, immaterial, or unduly repetitious. In accordance with the Administrative Procedure Act, the rules of evidence as applied in nonjury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law. Objections in evidentiary offers may be made and shall be noted in the record. Subject to these requirements, if a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(b) Exclusion of witnesses.

(1) Upon request by any party, the judge shall exclude witnesses other than parties from the hearing room, except when testifying.

(2) The judge may order the witness, parties, attorneys, and all other persons present in the hearing room not to disclose to any witness excluded under this subsection the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during the witness' absence.

(3) A party that is not a natural person may designate an individual to remain in the hearing room, even though the individual may be a witness.

§851.227. Documentary Evidence.

Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. On request, parties shall be given an opportunity to compare the copy with the original. When numerous documents are offered, the judge may limit those admitted to a number which are typical and representative, and may, at his discretion, require the abstracting of the relevant data from the documents and the presentation of the abstracts in the form of an exhibit; provided, however, that before making such requirement, the judge shall require that all parties of record or their representative be given the right to examine the documents from which such abstracts were made.

§851.228. Official Notice.

(a) The judge may take official notice of a fact that is judicially noticeable in accordance with the Administrative Procedure Act.

(b) In addition, notice may be taken of generally recognized facts within the area of the Board's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material officially noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The special skills of knowledge of the Board and its staff may be utilized in evaluating the evidence.

§851.229. Prepared or Prefiled Testimony.

In all contested proceedings and after service of copies upon all parties of record at such time as may be designated by the judge, the prepared, written testimony of a witness upon direct examination, either in narrative or question and answer form, may be incorporated in the record as if read or received as an exhibit, upon the witness's being sworn and identifying the same. Such witness shall be subject to cross-examination and the prepared testimony shall be subject to a motion to strike in whole or in part.

§851.230. Limitations on Number of Witnesses.

The judge shall have the right in any proceeding to limit the number of witnesses whose testimony is merely cumulative.

§851.231. Exhibits.

Exhibits of documentary character shall be of such size as described in §851.211 of this chapter, as not unduly to encumber the files and records of the Board. There shall be a brief statement on the first sheet of the exhibit of what the exhibit purports to show. Exhibits shall be limited to facts material and relevant to the issues involved in a particular proceeding.

(1) Tender and service. The original of each exhibit offered shall be tendered to the reporter for identification; one copy shall be furnished to the judge, and one copy to each other party of record or his attorney or representative.

(2) Excluded exhibits. In the event an exhibit has been identified, objected to, and excluded, the judge shall determine whether or not the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification, shall be endorsed by the judge with his ruling, and shall be included in the record for the purpose only of preserving the exception.

(3) After hearing. Unless specifically directed by the judge, no exhibit will be permitted to be filed in any proceeding after the conclusion of the hearing. In the event the judge allows an exhibit to be filed after the conclusion of the hearing, copies of the late-filed exhibit shall be served on all parties of record.

§851.232. Offer of Proof.

When testimony is excluded by ruling of the judge, the party offering such evidence shall be permitted to make an offer of proof by dictating or submitting in writing the substance of the proposed testimony, prior to the conclusion of the hearing, and such offer of proof shall be sufficient to preserve the point for the record. The judge may ask such questions of the witness as he deems necessary to satisfy himself

that the witness would testify as represented in the offer of proof. An alleged error in sustaining an objection to questions asked on cross-examination may be preserved without making an offer of proof.

§851.233. Depositions.

The taking and use of depositions in any proceeding shall be governed by the Administrative Procedure Act.

§851.234. Subpoenas.

Under the Administrative Procedure Act, following written request by a party or on its own motion:

(1) Subpoenas for the attendance of a witness from any place in the State of Texas at a hearing in a proceeding may be issued by the Board, any member thereof, the Executive Director, or, during the course of a hearing, by the judge;

(2) Motions for subpoenas to compel the production of books, papers, accounts, or documents shall be addressed to the Board, shall be verified and shall specify as nearly as may be the books, papers, accounts, or documents desired and the material and relevant facts to be proved by them. If the matter sought is relevant, material, and necessary and will not result in harassment, imposition, or undue inconvenience or expense to the party to be required to produce the same, the Board, any member thereof, or the judge may issue a subpoena, compelling production of books, papers, accounts, or documents as deemed necessary; and

(3) Such subpoenas shall be issued only after a showing of good cause and deposit of sums sufficient to insure payment of expenses incident to the subpoenas. Service of subpoenas and payment of witness fees shall be made in the manner prescribed in the Administrative Procedure Act, except that the mileage and per diem fees for nonparty deponents and witnesses shall be in the amount by law for employees of the State of Texas for intrastate mileage and per diem.

§851.235. Proposals for Decision.

(a) The judge shall prepare a proposal for decision which shall contain:

(1) Findings of fact and conclusions of law, separately stated; and

(2) If appropriate, a proposed order.

(b) The judge may amend the proposal for decision pursuant to exceptions, briefs, and replies to exceptions and briefs without the proposal for decision again being served on the parties.

(c) The judge shall submit the proposal for decision to the Board with a copy to each party and his attorney of record.

(d) Upon the expiration of the 20th day following the time provided for the filing of exceptions and briefs as described in §851.236 of this chapter, the proposal for decision may be adopted by written order of the Board, unless exceptions and briefs shall have been filed in the manner required.

(e) If deemed warranted, the judge may direct a party to draft and submit a proposal for decision which shall include proposed findings of fact and a concise and explicit statement of the underlying facts supporting such proposed findings developed from the record.

§851.236. Filing of Exceptions, Briefs, and Replies.

Any party of record may, within twenty (20) days after the date of service of a proposal for decision, file exceptions and briefs to the proposal for decision, and replies to such exceptions and briefs may be filed within fifteen (15) days after the date for filing of such exceptions and briefs. A request for extension of time within which to file exceptions, briefs, or replies shall be filed with the Board's Executive Director and the judge, and a copy thereof shall be served on all other parties of record by the party making such request. The judge shall promptly notify the parties of his action upon the same and allow additional time only in extraordinary circumstances where the interests of justice so require.

§851.237. Form and Content of Briefs, Exceptions, and Replies.

Briefs, exceptions, and replies shall conform as nearly as may be possible to the size and form of pleadings as described in §851.211 of this chapter. The points involved shall be concisely stated. The evidence in support of each point shall be abstracted or summarized and/or briefly stated in the form of proposed findings of fact. Complete citations to the page number of the record or exhibit referring to evidence shall be made. The specific purpose for which the evidence is relied upon shall be stated. The argument and authorities shall be organized and directed to each point properly proposed as a finding of fact in a concise and logical manner. Briefs shall contain a table of contents and authorities. Briefs, prior to the issuance of a proposal for decision, may be filed only when requested or permitted by the judge.

§851.238. Oral Argument.

Any party may request oral argument prior to the final determination of any proceeding, but oral argument shall be allowed only at the sound discretion of the Board. A request for oral argument shall be stated in a separate pleading filed with the Board.

§851.239. Final Decisions and Orders.

All final decisions and orders of the Board shall be in writing and shall be signed by a majority of the Board members. A final decision shall include findings of fact and conclusions of law, separately stated. Parties shall be notified either personally or by mail of any decision or order. On written request, a copy of the decision or order shall be delivered or mailed to any party and to his attorney of record.

§851.240. Administrative Finality.

(a) A decision is final, in the absence of a timely motion for rehearing, and is final and appealable on the date of rendition of the order overruling the motion for rehearing, or on the date the motion is overruled by operation of law. If the Board includes a member who:

(1) Receives no salary for his work as a Board member; and

(2) Resides outside Travis County, the Board may rule on a motion for rehearing at a meeting or by mail, telephone, telegraph, or other suitable means of communication.

(b) If the Board finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a final decision or order in a contested case, it shall recite the finding in the decision or order as well as the fact that the decision or order is final and effective on the date rendered, in which event the decision or order is final and appealable on the date rendered and no motion for rehearing is required as a prerequisite for appeal.

§851.241. Motions for Rehearing.

Except as provided in §851.240 of this chapter, a motion for rehearing is a prerequisite to an appeal. A motion for rehearing must be filed within twenty (20) days after the date of rendition of a final decision or order. Replies to a motion for rehearing must be filed with the Board within thirty (30) days after the date of rendition of the final decision or order, and Board action on the motion must be taken within forty-five (45) days after the date of rendition of the final decision or order. If Board action is not taken within the forty-five (45)-day period, the motion for rehearing is overruled by operation of law forty-five (45) days after the date of rendition of the final decision or order. The Board may by written order extend the period of time for filing the motions and replies and taking Board action, except that an extension may not extend the period for Board action beyond ninety (90) days after the date

of rendition of the final decision or order. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, ninety (90) days after the date of the final decision or order. The parties may by agreement, with the approval of the Board, provide for a modification of the times provided in this section.

§851.242. Rendering of Final Decision or Order.

The final decision or order must be rendered within sixty (60) days after the date the hearing is finally closed. Because a contested case is heard by a judge with the State Office of Administrative Hearings, the Board may prescribe a longer period of time within which the final order or decision of the Board shall be issued, normally in keeping with the scheduled quarterly meetings of the Board. The extension, if so prescribed, shall be announced at the conclusion of the hearing by the judge after consultation with the Board's Executive Director.

§851.243. The Record.

(a) The record in a contested case shall include:

(1) All pleadings, motions, and intermediate rulings;

(2) Evidence received or considered;

(3) A statement of matters officially noticed;

(4) Questions and offers of proof, objections, and rulings on them;

(5) Proposed findings and exceptions;

(6) Any decision, opinion, or report by the judge presiding at the hearing; and

(7) All staff memoranda or data submitted to or considered by the judge or members of the Board who are involved in making the decision.

(b) Findings of fact shall be based exclusively on the evidence presented and matters officially noticed.

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

Filed with the Office of the Secretary of State on July 1, 2010.

TRD-201003710
Charles Horton
Interim Executive Director
Texas Board of Professional Geoscientists
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 936-4405

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 33. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SUBCHAPTER G. ENVIRONMENTAL LEAD INVESTIGATIONS

25 TAC §33.80

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (department), proposes new §33.80 concerning the Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Program, known in Texas as the Texas Health Steps (THSteps) Program.

BACKGROUND AND PURPOSE

Texas Health Steps is the Texas name for the federally-mandated Medicaid program known as EPSDT. EPSDT provides medical and dental checkups, diagnosis, and medically necessary treatment to Medicaid clients from birth through 20 years of age. By authorization of HHSC, the department operates and administers the outreach and informing, medical and dental screening, and dental treatment services components of EPSDT.

The United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) has informed HHSC that environmental lead investigations are a required EPSDT benefit for children with elevated blood lead levels. These investigations are currently provided through local health department lead programs or through the department's Regulatory Division when there is no local health department accessible that can provide the investigation. The proposed rule will make environmental lead investigations conducted in accordance with §37.338 and §37.339 of this title (relating to Reporting, Treatment and Investigation of Child Blood Lead Levels), a Medicaid benefit for THSteps clients with elevated blood lead levels.

HHSC is requesting approval of a Medicaid state plan amendment under the federal Social Security Act, 42 U.S.C. §1396 *et seq.*, from CMS to obtain federal matching funds for the service. The Medicaid benefit includes an investigation to determine the source of lead at the child's home or primary residence. The state plan amendment will describe qualified providers as certified lead risk assessors who are employed by or contractors of the state health department or local health departments.

SECTION-BY-SECTION SUMMARY

Proposed §33.80 provides for Medicaid coverage of environmental lead investigations for THSteps clients from birth through 20 years of age with elevated blood lead levels.

FISCAL NOTE

Ms. Jann Melton-Kissel, Director of the Specialized Health Services Section, has determined that for each year of the first five-year period that the section is in effect, there will be no cost to the department as a result of enforcing and administering the section as proposed.

The Medicaid environmental lead investigation benefit will be funded through HHSC. HHSC will be proposing a related rate rule that will reflect the fiscal impact of the new Medicaid benefit, which is not significant.

No major impact on local governments is anticipated as a result of the proposed rule. Local governments that operate local health departments that provide lead investigations for the department currently use existing non-Medicaid funds for those investigations. Medicaid reimbursement for some of those investigations provides an alternative source of funding for this service. The potential exists for some positive fiscal impact if current local government dollars expended on environmental lead investigations become available for other local government purposes.

SMALL AND MICRO-BUSINESS ECONOMIC IMPACT STATEMENT

Ms. Melton-Kissel also has determined that there will be no adverse economic impact on small businesses or micro-businesses.

Staff and contractors of local and state health departments are currently the only certified lead risk assessors providing environmental lead investigations for THSteps clients.

The addition of Medicaid payment for environmental lead investigations does not impose a regulatory burden on businesses of any size. Because the services are reimbursed through Medicaid, the rule may result in an economic increase to small or micro-businesses that contract with a local or state health department to provide the investigations.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Melton-Kissel, has determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The anticipated public benefit is a clearly defined benefit for all THSteps clients with elevated blood lead levels because the prompt identification of the cause of a persistent elevated blood lead level, or confirmed case of lead poisoning in a child, is a high priority in the management of children with lead poisoning (elevated blood lead levels).

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce the risk 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 a state or a sector of the state. This proposal is not specially intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Becky Brownlee, THSteps Branch, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, by telephone at (512) 458-7111, extension 2964, or by email to becky.brownlee@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services Acting General Counsel, Linda Wiegman, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The new section is authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new section affects the Health and Safety Code, Chapter 1001, and Government Code, Chapter 531.

§33.80. Environmental Lead Investigations.

(a) Environmental lead investigations are a benefit of Medicaid for all THSteps clients with elevated blood lead levels as specified by federal guidelines.

(b) The investigation to determine the source of lead is:

(1) subject to the requirements in §37.338 and §37.339 of this title (relating to Reporting, Treatment and Investigation of Child Blood Lead Levels);

(2) conducted by certified lead risk assessors who are employed by or contractors of the state health department or local health departments; and

(3) limited to the child's home or primary residence.

This agency hereby certifies that the proposal has been reviewed by 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 1, 2010.

TRD-201003711
Linda Wiegman
Acting General Counsel
Department of State Health Services
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 458-7111 x6972

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PART 4. ANATOMICAL BOARD OF THE STATE OF TEXAS

CHAPTER 477. DISTRIBUTION OF BODIES

25 TAC §§477.1, 477.2, 477.4, 477.7, 477.8

The Anatomical Board of the State of Texas (Board) proposes amendments to §§477.1, 477.2, 477.4, 477.7, and 477.8 concerning the rules and procedures for the distribution of whole body donations for education and research.

The Board's proposed amendments are to implement Health and Safety Code §692A.011(a)(4) as amended by House Bill 2027 in the 81st Legislative Session. Section 692A.011(a)(4) provides that the use of a gift of a whole body to an eye or tissue bank must be coordinated through the Anatomical Board of the State of Texas.

Amendments to §477.1 are proposed to improve the definitions of the Act and rule, to expand the scope of the definition of "bodies" or "parts of human bodies," as well as more clearly define the scope of the Board's jurisdiction.

An amendment to §477.2 is proposed to expand the requirement of accreditation to tissue banks that receive whole body donations under the Health and Safety Code, Chapter 692A.

Amendments to §477.4 are proposed to expand the requirement that no whole body be shipped out of the State of Texas by a tissue bank unless written permission for such shipment has been granted by the Board acting through its secretary-treasurer. Along those same lines, the amendment adds an exception to the exportation standard allowing a whole body donation to be shipped out of the state if the willed body programs in the geographic area have declined the donation.

An amendment to §477.7 is proposed to expand to tissue banks the requirement of filing a cadaver procurement and transfer form.

An amendment to §477.8 expands the requirement for filing forms for recording of willed and donated bodies to those institutions that receive donations as authorized by Health and Safety Code, Chapter 692A.

John Aschenbrenner, Chairman of the State Anatomical Board, has determined that for each fiscal year of the first five years the sections are in effect, there will be no fiscal implications to the state as a result of enforcing or administering the sections as proposed.

Mr. Aschenbrenner has also determined that there are no anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed.

Mr. Aschenbrenner has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit as a result of the enforcing or administering the sections is to effectively regulate the disposition/dispersion of whole bodies in Texas, all of which will protect and promote public health, safety and welfare.

Comments on the proposal may be submitted in writing either in person or by courier to Len Cleary, PhD., Secretary/Treasurer, Anatomical Board of the State of Texas, P.O. Box 20745, Houston, Texas 77225-0745. Comments will be accepted for 30 days following publication of the proposed amendments in the *Texas Register.*

The proposed amendments are authorized by the Texas Health and Safety Code §692A.011(a)(4) that provides that the use of a gift of a whole body to an eye or tissue bank must be coordinated through the Anatomical Board of the State of Texas.

The proposed amendments affect the Texas Administrative Code, Title 25, Chapter 477.

§477.1. Definition and Jurisdiction of the Board.

(a) Definition. Whenever the terms human "body" or "bodies" or "parts of human body" or "parts of human bodies" are used in Chapter 477 - 485 [~~483~~], the terms include anatomical specimens, defined as parts of a human corpse in §691.001 of the Health and Safety Code.

(b) Jurisdiction:

(1) Anatomical Donations. The board exercises jurisdiction over bodies willed or donated to the board, medical, dental or chiropractic schools, or other donees authorized by the board under Health and Safety Code, Chapters 691 and 692A [~~692~~]. The board also exercises jurisdiction over individuals, corporations, associations, institutions, research organizations, or other legal entities authorized to receive whole bodies under Chapters 691 and 692A [~~or 692~~].

(2) (No change.)

§477.2. Institutional Requirements.

(a) Institution accreditation. Institutions applying to be authorized to receive and hold bodies, or parts thereof, must show evidence of accreditation by the accrediting board for that profession. This applies to tissue banks authorized to receive donations under the Health and Safety Code Chapter 692A.

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

§477.4. Transport, Importation and Exportation of Bodies.

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

(c) Exportation. No body under the jurisdiction of the board including donations to tissue banks authorized by Health and Safety Code, Chapter 692A, shall be shipped out of the State of Texas, unless permission in writing for such shipment has been granted by the board acting through its secretary-treasurer. If the secretary-treasurer is an employee of the institution that is to make the shipment, secondary approval must be given by the chair.

(1) The board may grant approval of exportation of a body if it or its secretary-treasurer or chair determines that:

(A) a written request has been received from an institution that is in the approved categories described in subsection (a) of Section 479.1 relating to "Institutions Authorized to Receive and Hold Bodies" that describes the need for the body and the facilities available for holding the body.

(B) the supply of bodies exceeds the needs of the institutions in this state; [~~and~~]

(C) the donor authorized out-of-state shipment; and[~~.~~]

(D) in the case of donations to tissue banks authorized by Health and Safety Code, Chapter 692A, all Willed Body Programs in the geographic region have declined the donation.

(2) (No change.)

(d) - (e) (No change.)

§477.7. Board Forms.

(a) (No change.)

(b) Yearly cadaver procurement and use report. Each institution which has received, directly or by transfer, and/or used a body during the prior year shall complete, sign and file with the secretary-treasurer the yearly cadaver procurement and use report prescribed by the board. This report shall be filed not later than August 31 of each year for the prior annual period August 1 through July 31. Tissue banks receiving donations as authorized by Health and Safety Code Chapter 692A will file a cadaver procurement and transfer form as prescribed by the board.

(c) (No change.)

§477.8. Forms for Recording of Willed and Donated Bodies.

(a) Member institutions operating a willed body program, and institutions or individuals receiving donated bodies, including those authorized under Health and Safety Code, Chapter 692A, shall prepare separate forms for pre-death wills under Health and Safety Code, Chapter 691 and post-death donations under the Anatomical Gift Act, Health and Safety Code, Chapter 692A [~~692~~]. A copy of such forms shall be deposited, as a sample, with the secretary-treasurer.

(b) All Chapter 691 will forms and Chapter 692A [~~692~~] donation forms shall incorporate the following: "Complaints or inquiries regarding a willed or donated body should be directed to the secretary-treasurer of the Anatomical Board of the State of Texas. The name

and address of this individual may be obtained from the institution to which the body was delivered."

This agency hereby certifies that the proposal has been reviewed by 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 6, 2010.

TRD-201003767
Leonard Cleary, Ph.D.
Secretary-Treasurer
Anatomical Board of the State of Texas
Earliest possible date of adoption: August 15, 2010
For further information, please call: (713) 500-5631

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CHAPTER 479. FACILITIES: STANDARDS AND INSPECTIONS

25 TAC §479.1, §479.4

The Anatomical Board of the State of Texas (Board) proposes amendments to §479.1 and §479.4 concerning the rules and procedures of the distribution of bodies.

The Board's proposed amendment to §479.1 is to implement Health and Safety Code §692A.011(a)(4) as amended by House Bill 2027 in the 81st Legislative Session. Section 692A.011(a)(4) provides that the use of a gift of a whole body to an eye or tissue bank must be coordinated through the Anatomical Board of the State of Texas. The Board's proposed amendment to §479.4 is to clarify that the Board will not review applications for approval of crematories at member institutions.

An amendment to §479.1 is proposed to add the requirement that tissue banks receiving whole body donations under Health and Safety Code Chapter 692A may only transfer those donations to institutions in categories approved by the Board.

An amendment to §479.4 is proposed to remove the requirement that a crematory be approved by the Board.

John Aschenbrenner, Chairman of the State Anatomical Board, has determined that for each fiscal year of the first five years the sections are in effect, there will be no fiscal implications to the state as a result of enforcing or administering the sections as proposed.

Mr. Aschenbrenner has also determined that there are no anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed.

Mr. Aschenbrenner has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit as a result of enforcing or administering the sections is to effectively regulate the disposition/dispersion of bodies in Texas, all of which will protect and promote public health, safety, and welfare.

Comments on the proposal may be submitted in writing either in person or by courier to Len Cleary, Ph.D., Secretary/Treasurer, Anatomical Board of the State of Texas, P.O. Box 20745, Houston, Texas 77225-0745. Comments will be accepted for 30 days following publication of the proposed amendments in the *Texas Register.*

The proposed amendment to §479.1 is authorized by Health and Safety Code §692A.011(a)(4) as amended by House Bill 2027 in the 81st Legislative Session. Section 692A.011(a)(4) provides that the donation of a whole body to an eye or tissue bank must be coordinated through the Anatomical Board of the State of Texas. The proposed amendment to §479.4 is authorized by the Board's general rulemaking power under Health and Safety Code §691.022(b).

The proposed amendments affect the Texas Administrative Code, Title 25, Chapter 479.

§479.1. Institutions Authorized to Receive and Hold Bodies.

(a) Approved categories. Institutions or organizations authorized by the board to receive and hold bodies include accredited medical schools or colleges, dental schools or colleges, health science centers, hospitals, schools of mortuary science, chiropractic schools or colleges, osteopathic medical schools or colleges. Tissue banks receiving donations under Health and Safety Code, Chapter 692A may only transfer those donations to institutions in approved categories.

(b) (No change.)

§479.4. Final Disposition of the Body and Disposition of the Remains.

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

(c) Cremation. Cremation shall occur at a professional crematorium or at the board-member institution in its own crematory[~~, if the crematory has been approved by the board~~].

(1) Cremation at a professional crematorium. If a professional crematorium is utilized, the crematory must be registered with, or if required by law, licensed by the Texas Funeral Service Commission.

(2) Cremation at a board-member institution. An institution may operate its own crematory [~~if approved by the board~~]. The crematory shall be under the direct control of the Department of Anatomy or the institution's department to which the anatomical program is attached and may be used for no purpose other than the cremation of human remains.

(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 July 6, 2010.

TRD-201003768
Leonard Cleary, Ph.D.
Secretary-Treasurer
Anatomical Board of the State of Texas
Earliest possible date of adoption: August 15, 2010
For further information, please call: (713) 500-5631

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CHAPTER 485. AUDIT PROCEDURES

25 TAC §485.1

The Anatomical Board of the State of Texas (Board) proposes amendments to §485.1 concerning the rules and procedures for audits.

The amendment to §485.1 requires that member institutions use an audit template prescribed by the Board and requires that an audit using that template must be conducted at an interval of five years, coincidental with regularly scheduled Board inspections.

John Aschenbrenner, Chairman of the Anatomical Board of the State of Texas, has determined that for each fiscal year of the first five years the section is in effect, there will be no fiscal implications to the state as a result of enforcing or administering the section as proposed.

Mr. Aschenbrenner has also determined that there are no anticipated economic costs to small businesses or micro-businesses required to comply with the section as proposed.

Mr. Aschenbrenner has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the sections. The public benefit as a result of the enforcing or administering the sections is to effectively enforce and regulate audit procedures of Board member institutions, all of which will protect and promote public health, safety and welfare.

Comments on the proposal may be submitted in writing either in person or by courier to Len Cleary, Ph.D., Secretary/Treasurer, Anatomical Board of the State of Texas, P.O. Box 20745, Houston, Texas 77225-0745. Comments will be accepted for 30 days following publication of the proposed amendments in the *Texas Register.*

The proposed amendment to §485.1 is authorized by the Board's general rulemaking power under Health and Safety Code §691.022(b).

The proposed amendments affect the Texas Administrative Code, Title 25, Chapter 485.

§485.1. Audit Procedures.

Each member institution shall conduct an audit of its procedures and methods for receiving, storing, using, and transporting bodies or anatomical specimens and disposing of remains. This audit must be conducted at an [~~a minimum~~] interval of 5 years, coincidental with regularly scheduled Board inspections. The audit shall be performed by the institution's audit department or a professional audit firm according to an audit template prescribed by the Board. The template shall be reviewed by the Board at each Annual Meeting. The results of the audit shall be filed with the secretary-treasurer within 30 days of its completion. A follow-up report shall be filed with the secretary-treasurer no more than 1 year later. [~~The audit, at a minimum, shall include:~~]

[~~(1) A records review to determine that the receipt and shipment of bodies and anatomical specimens are acknowledged by appropriate filing of records with the board;~~]

[~~(2) An inventory of bodies and anatomical specimens on hand verified by SAB number and a determination that records of the board reflect that the bodies or specimens are in the possession of the institution;~~]

[~~(3) A review of crematory contracts, if any, and a determination that the contracting crematory is properly licensed in the State;~~]

[~~(4) A determination of proper payment of assessment and transfer fees to the board when due;~~]

[~~(5) A review of shipping documents for verification that shipments have been approved by the board and a determination that the records of both the institution and the board reflect the location where the bodies or anatomical specimens were shipped;~~]

[~~(6) A review of the supervisory chain of command to determine the existence of actual oversight to assure that bodies and anatomical specimens are treated with respect; and~~]

[~~(7) A determination that remains are disposed of in accordance with state law, including these rules.~~]

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

Filed with the Office of the Secretary of State on July 6, 2010.

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Leonard Cleary, Ph.D.
Secretary-Treasurer
Anatomical Board of the State of Texas
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For further information, please call: (713) 500-5631

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 8. RATES

28 TAC §5.4701

The Texas Department of Insurance (Department) proposes new §5.4701 to implement amendments to §2210.352 and §2210.354 of the Insurance Code, under HB 4409, 81st Legislature, 2009, Regular Session concerning making written requests for additional supporting information related to the Texas Windstorm Insurance Association's (Association) annual rate filing under §2210.352, except a filing under §2210.352(a-1), and the means and time periods for interested persons to review and provide written comments and information related to such annual rate filings. With respect to the Association's 2009 annual filing, the Department adopted §5.4901 of this subchapter on an emergency basis. The emergency rule §5.4901 has since expired.

The proposal is necessary to establish procedures and time periods to implement the Insurance Code §2210.352(b) requirement that, except as provided by the Insurance Code §2210.352(a-1), interested persons must be provided with a reasonable opportunity to review the Association's annual rate filing, obtain copies of the filing, and to submit to the Commissioner written comments or information related to the filing. The proposal is also necessary to specify the time period for interested persons to request additional supporting information related to the annual rate filing under the Insurance Code §2210.354.

The basic requirement for requesting and providing additional supporting information has existed in the Insurance Code §2210.354 for a number of years prior to the HB 4409 amendments. The Department is not aware that this requirement has generated significant questions as to what constitutes a valid additional supporting information. For this reason the proposal does not define what constitutes a valid request for additional supporting information beyond the requirement in proposed §5.4701(c) that "[A] written request for additional supporting

information must meet the requirements of the Insurance Code §2210.354 and be submitted as required in the Insurance Code §2210.354 and this section."

The Insurance Code §2210.352 was significantly modified by the adoption of HB 4409, 81st Legislature, 2009, Regular Session. The section no longer sets forth requirements for a public hearing after notice of the rate filing. Further, the time period for Commissioner's review and decision to approve or disapprove the rate filing has been reduced from November 15 to October 15 of the year in which the filing is made. The section still, however, provides that, except for a filing under the Insurance Code §2210.352(a-1), the Commissioner shall provide all interested persons with a reasonable opportunity to review the filing, obtain a copy of the filing, and submit written comments and information related to the filing. To fulfill that legislative intent, this proposal establishes a procedure for providing interested persons with reasonable notice of the rate filing, information on how to obtain a copy of the proposal, and a time frame for submitting comments on the proposal.

The Insurance Code §2210.354 was also changed by HB 4409. The Legislature directed the Commissioner to adopt by rule the time period for an interested person to request additional supporting information related to the Association's annual rate filing, other than a rate filing made under the Insurance Code §2210.352(a-1). This time period is constrained by a new requirement in the Insurance Code §2210.354(c) that the Commissioner must submit these requests for additional supporting information to the Association not later than the 21st day after the date the Department receives the Association's annual rate filing. This proposal establishes a time period for interested persons to submit a written request for additional supporting information within the time period required for the Department to compile and timely submit the requests to the Association. The procedures and time lines proposed in new §5.4701 are set forth in the following paragraphs.

Proposed new §5.4701(a) establishes that the Department shall provide notice of the Association's annual rate filing. The notice shall be posted on the Department's website and with the Secretary of State. The proposed notice shall provide interested persons information on how to obtain a copy of the filing. Additionally, the notice will provide specific dates by which written requests for additional supporting information and written comments or information related to the filing must be submitted. The parameters for determining these submission dates are addressed in proposed new subsections (c) and (d). Further, the notice shall provide the mail, delivery, and electronic addresses to which these requests, comments, and information may be delivered.

Proposed new subsection (b) establishes that the written requests for additional supporting information and written comments or information related to the filing must be delivered to the Office of the Chief Clerk no later than 5:00 p.m. on the dates specified in the notice issued pursuant to subsection (a) of the proposed section.

Proposed new subsection (c) provides that a written request for additional supporting information must meet the requirements of the Insurance Code §2210.354 and be submitted as required in the Insurance Code §2210.354 and the proposed section. Proposed subsection (c) further establishes the time period for submitting a written request for additional information as required by the Insurance Code §2210.354(a)(2). The subsection establishes that the date shall not be later than September 1, of the year in which the filing is made or 16 days after the date that the filing is received. The specific submission date, which may need to be extended if it falls on a weekend or holiday, will be specified in the notice issued pursuant to proposed subsection (a). This date is necessary to allow the Department sufficient time to compile the requests and submit them to the Association within the 21 day period required by the Insurance Code §2210.354(c). The 16-day period is selected because September 1 is 16 days after August 15. Because the Association may make its annual rate filing before August 15, reliance only on the September 1st date might create a problem concerning compliance with the Insurance Code §2210.354(c) if the Association made the annual rate filing prior to August 15. Thus, the subsection allows for calculation of an alternative date for submission of requests for additional supporting information, but maintains the 16-day period reflected in the September 1 date.

Proposed new subsection (d) establishes the requirement that all comments related to the annual rate filing must be submitted no later than October 1 of the year in which the filing is made. The specific submission date, which may need to be extended if it falls on a weekend or holiday, will be specified in the notice issued pursuant to proposed subsection (a). The Insurance Code §2210.352(c) requires the Commissioner to approve or disapprove the Association's annual rate filing not later than October 15 of the year in which the filing is made. Thus, the Commissioner will have approximately 14 days to complete the review of the annual rate filing and all submitted written comments and information and prepare an order approving or disapproving the Association's annual rate filing.

FISCAL NOTE. J'ne Byckovski, Chief Actuary of the Property and Casualty Program, has determined that for each year of the first five years the proposed section will be in effect, the proposed section will require Department staff to prepare a notice and file the notice with the Secretary of State as well as post the notice to the Department's web site. Costs related to these functions will be absorbed within the Department's existing resources and will not require an additional appropriation for personnel or other operating resources. Thus, 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 proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Byckovski also has determined that for each year of the first five years the proposed sections are in effect, there will be public benefits resulting from the proposal and that the proposal shall not result in any additional costs of compliance in addition to those arising from the applicable statutes.

Anticipated Public Benefits. The Department anticipates that the primary public benefit resulting from the proposal will be the efficient and detailed procedure and time lines for interested persons to participate in the Association's annual rate filing process as provided in the Insurance Code §2210.352 and §2210.354. The proposal establishes a procedure of public notice to interested persons that the rate filing is available for review, the means to obtain a copy of the rate filing, the time period for requesting additional supporting information related to the rate filing, and the time period for making comments on the rate filing. The proposal further establishes a specific procedure for the Association to request a different period for providing the

requested additional supporting information and the Commissioner's options in reviewing the Association's request.

Estimated Costs for Persons Required to Comply with the Proposal. The proposal will apply to persons submitting written requests for additional supporting information, and submitting written comments and information related to the annual rate filing. The proposal does not require any person participating in these activities to incur costs in addition to those arising from the applicable statutes. The Insurance Code §2210.354 provides that interested persons may submit to the Commissioner requests for additional supporting information. Other than providing addresses to facilitate submitting such requests, the proposal does not alter or increase the means for complying with the requirement to submit a written request. The proposal does set a period in which the request must be submitted, but this period does not increase the labor it takes to prepare the request or otherwise create an additional cost of compliance. For the same reasons, the proposal does not result in additional costs concerning the Insurance Code §2210.352 authorization that interested persons may submit to the Commissioner comments and requests for additional supporting information.

Other costs associated with obtaining copies of the filing, making written requests for additional supporting information, providing additional supporting information, requesting a different period for providing additional supporting information, or submitting comments and information related to the proposal also result from the statutory authorizations and requirements of the Insurance Code §2210.352 and §2210.354, and not from this proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Section 2006.002(c) of the Government Code requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro business."

The Department has determined that this proposal does not have an economic impact on small businesses, for reasons specified in the Public Benefit/Cost Note section of this proposal. Therefore, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule is not required.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on August 16, 2010, to Gene C. Jarmon, 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 J'ne Byckovski, Chief Actuary of the Property and Casualty Program, Mail Code 105-5F, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new section is proposed pursuant to the Insurance Code §§2210.008, 2210.352, 2210.354, and 36.001. Section 2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code. Section 2210.352(b) requires the Commissioner to provide persons interested in the Association's annual rate filing, other than a rate filing under the Insurance Code §2210.352(a-1) to have an opportunity to review the rate filing, obtain a copy of the rate filing, and to provide the Commissioner with written comments and information related to the rate filing. Section 2210.354(a) requires the Commissioner to establish a time period for persons interested in the Association's annual rate filing, other than a rate filing under the Insurance Code §2210.352(a-1) to submit written requests for additional information related to the Association's rate filing. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statute is affected by this proposal: Insurance Code Chapter 2210.

§5.4701. Requests for Additional Supporting Information.

(a) The department shall post on the department's website and with the Texas Secretary of State notice of the Texas Windstorm Insurance Association's (Association) annual rate filing under the Insurance Code §2210.352, other than a filing under the Insurance Code §2210.352(a-1). The notice shall provide:

(1) notice of the filing;

(2) information on how to obtain a copy of the filing;

(3) the time period for submitting written requests for additional supporting information as provided in the Insurance Code §2210.354;

(4) the time period for submitting written comments or information related to the filing as provided in the Insurance Code §2210.352; and

(5) the applicable mail, delivery, and electronic addresses for submitting written requests for additional supporting information and written comments or information related to the filing.

(b) All written requests for additional supporting information and written comments or information related to the filing must be submitted to the Office of the Chief Clerk no later than 5:00 p.m. on the date specified in the notice issued pursuant to subsection (a) of this section.

(c) A written request for additional supporting information must meet the requirements of the Insurance Code §2210.354 and be submitted as required in the Insurance Code §2210.354 and this

section. The period for submitting a written request for additional supporting information as provided in the Insurance Code §2210.354 and specified in the notice issued in subsection (a) of this section shall be no later than the earlier of:

(1) September 1 of the year in which the filing is made; or

(2) the 16th day after the day the filing is received by the department.

(d) All written comments or information related to the annual rate filing must be submitted as required under this section not later than October 1 of the year in which the filing is made.

This agency hereby certifies that the proposal has been reviewed by 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 6, 2010.

TRD-201003750
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS

28 TAC §126.7

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

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes the repeal of §126.7 concerning Designated Doctor Examinations: Requests and General Procedures. This repeal is necessary to ensure clarity and efficiency in designated doctor regulation and is proposed simultaneously with the proposal of new Chapter 127, §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 (relating to Designated Doctor Scheduling and Examinations), published elsewhere in this edition of the *Texas Register.* The proposal of new §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 recodifies the majority of the provisions of this proposed repeal of §126.7.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the repeal of the section will be in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the repeal and there will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Gilbert has also determined that, for each year of the first five years the repeal of the section is in effect, the public benefit anticipated as a result of the repeal will be to bring increased clarity and efficiency in designated doctor regulation. There will be no economic cost to any individuals, or insurers or other entities regulated by the Division, regardless of size, as a result of the proposed repeal.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because the proposal of new §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 recodifies the majority of the provisions of this proposed repeal. Therefore, in accordance with the Government Code §2006.002(c), the Division is not required to prepare a regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on August 16, 2010. Comments may be submitted via the internet through the Division's internet website at *www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us* or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on August 17, 2010 at 9:00 a.m. CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. Those persons interested in attending the public hearing should contact the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, (512) 804-4730 to confirm the date, time, and location of the public hearing for this proposal. The Division offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Salazar at (512) 804-4403 at least two business days prior to the hearing date. The public hearing schedule will also be available on the Division's website at *www.tdi.state.tx.us/wc/rules/proposedrules/index.html.*

The repeal is proposed under the broad general authority granted to the Commissioner by Labor Codes §402.00111 and §402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Labor Code.

The following statutes are affected by this proposal: §126.7, Labor Code §408.0041.

§126.7. Designated Doctor Examinations: Requests and General Procedures.

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

Filed with the Office of the Secretary of State on July 2, 2010.

TRD-201003728

Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 804-4703

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CHAPTER 127. DESIGNATED DOCTOR PROCEDURES AND REQUIREMENTS SUBCHAPTER A. DESIGNATED DOCTOR SCHEDULING AND EXAMINATIONS

28 TAC §§127.1, 127.5, 127.10, 127.15, 127.20, 127.25

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes new Chapter 127 concerning Designated Doctor Procedures and Requirements. The Division proposes new §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 concerning designated doctor scheduling and examinations under new Subchapter A. These new sections primarily recodify the provisions of proposed repealed §126.7 concerning Designated Doctor Examinations: Requests and General Procedures). The proposed repeal of §126.7 of this title is published elsewhere in this edition of the *Texas Register.* The new sections also expand on the recodified language to comply with the amendments to §408.0041 of the Labor Code by House Bill 7, 79th Legislature, Regular Session, effective September 1, 2005 (HB 7). Additionally, the proposal expands on recodified language to improve the quality and availability of designated doctor examinations by providing that the Division may require designated doctors to remain appointed to a claim so long as that doctor is still qualified to examine the injured employee and to clarify or improve a number of the Division's existing designated doctor procedures in order to facilitate a more efficient designated doctor scheduling and examination process.

HB 7 amended §408.0041 of the Labor Code to provide that the Commissioner has the discretion to approve or deny requests for designated doctor examinations. Specifically, HB 7 changed subsection (a) of Labor Code §408.0041 to provide that the Commissioner "may" order a designated doctor examination at the request of an insurance carrier or an injured employee. Previously, Labor Code §408.0041 stated that the Commissioner "shall" order a designated doctor examination upon receiving such a request. Additionally, HB 7 also amended subsection (b) of Labor Code §408.0041 to provide that Division shall assign a designated doctor 10 days after a request for an examination is "approved." Previously, Labor Code §408.0041 required the Division to assign a designated doctor within 10 days after a request was "received." Lastly, HB 7 added subsection (l) to Labor Code §408.0041, which states that if a person submits a frivolous request for a designated doctor examination, as determined by the Commissioner, that person commits an administrative violation. Taken together, these amendments to Labor Code §408.0041 demonstrate a clear mandate for the Division to take a greater role in monitoring and evaluating requests for designated doctor examinations, and these new sections are necessary to implement that mandate.

These proposed sections also provide that the Division may require designated doctors to remain appointed to a claim so long as that doctor is still qualified to examine the injured employee. This change will improve the quality and availability of designated doctor examinations and is anticipated to increase the efficiency of the Division's dispute resolution process. The change is also supported by the Sunset Advisory Commission. In its April 2010 Staff Report, the Sunset Advisory Commission found that appointing multiple designated doctors to a single claim can muddle the dispute resolution process for that claim, and that multiple appointments to a single claim were common (at least 906 disputes that were set for a benefit review conference at the Division in fiscal year 2009 involved claims to which multiple designated doctors had been appointed). These proposed sections address these concerns.

Additionally, these proposed sections also describe how parties may dispute the approval or denial of a designated doctor appointment before the disputed examination takes place and clarify several of the Division's existing designated doctor procedures in order to facilitate a more efficient designated doctor scheduling and examination process.

An informal draft of this proposal was published on the Division's website from March 9, 2010 to April 5, 2010, and the Division received 31 informal comments. Subsequent changes were made to the draft based on the informal comments and are reflected in this proposal. There have also been nonsubstantive changes made to these sections to conform to current nomenclature, reformatting, consistency, clarity, editorial reasons, and to correct typographical and/or grammatical errors in respect to the recodified language from proposed repeal of §126.7 of this title.

Proposed New §127.1. Proposed new subsection (a) primarily recodifies language from proposed repealed §126.7(a) - (c) of this title, though it also deletes the provision that prohibited designated doctors that work for networks under Chapter 1305 of the Insurance Code from examining injured employees who are receiving health care through the same network. This prohibition is redundant with the requirements for a designated doctor to be qualified to be appointed to a claim and is addressed by new proposed §127.5(c) - (d) of this title. Proposed new subsection (b) describes the information requesters must include when requesting a designated doctor examination. While it primarily incorporates the provisions of current Division Form No. 032, subsection (b) also requires requesters to provide a specific reason for the examination and, if the requester indicates that the injured employee's medical condition has changed since a previous designated doctor examination, to explain that change of condition. Proposed new subsection (c) requires that a requester demonstrate good cause if that requester submits a request for a designated doctor examination that would require the Division to schedule an examination within 60 days of a previous examination of an injured employee. Subsection (c) also describes the minimum demonstration of good cause. Proposed new subsection (d) provides the reasons for which the Division shall deny a request for a designated doctor examination. Proposed new subsection (e) describes the dispute resolution process system participants may use to dispute the Division's approval or denial of a designated doctor request and states that, if approved, such a dispute shall stay an approved examination request.

Proposed New §127.5. Proposed new subsection (a) primarily recodifies language from proposed repealed §126.7(e) of this title. Proposed new subsection (a) also clarifies that designated doctors must perform examinations at the ordered address and removes the requirement that designated doctor examinations may not occur earlier than 14 days after the order for the examination is issued. Proposed new subsection (b) clarifies the Divi-

sion's current policy that designated doctors and injured employees may not reschedule the location of an examination without good cause and Division approval. Proposed new subsection (c) primarily recodifies language from proposed repealed subsection §126.7(h) of this title and describes how the Division shall appoint a designated doctor to a claim when no other qualified doctor has been appointed to the claim, including the requirement that designated doctors be on the designated doctor list on the day the appointment is offered. Proposed new subsection (d) provides that if the Division has previously appointed a designated doctor to a claim, the Division may appoint that doctor again provided the doctor still meets the four listed qualifications of proposed subsection (c) of this section. Proposed new subsection (d) also provides that designated doctors must perform subsequent examinations on a claim at the same examination address as the designated doctor's previous examination of the claimant or at another examination address approved by the Division. Proposed new subsection (e) recodifies language from repealed proposed repealed §126.7(f) of this title.

Proposed New §127.10. Proposed new subsection (a) primarily recodifies language from proposed repealed §126.7(i) of this title. It also clarifies that analysis sent to a designated doctor by a treating doctor or insurance carrier may only be provided in accordance with Labor Code §408.0041(c) and that the cost of copying medical records provided to designated doctors shall be reimbursed in accordance with §134.120 of this title (relating to Reimbursement of Medical Documentation). Additionally, proposed new subsection (a) also requires that designated doctors receive an injured employee's medical records three working days, rather than one working day, before a designated doctor's examination of an injured employee. Proposed new subsection (b) recodifies the language of repealed proposed repealed §126.7(j) of this title. Proposed new subsection (c) primarily recodifies the language of proposed repealed §126.7(k) of this title. Proposed new subsection (c) also clarifies when a designated doctor may make a referral to another health care provider and that any additional testing or referrals, while not subject to preauthorization under Labor Code §413.014, Insurance Code, Chapter 1305, or Chapters 10, 19 or 134 of this title (relating to Workers' Compensation Healthcare Networks; Agent's Licensing; and Benefits--Guidelines for Medical Services, Charges, and Payments respectively), are subject to retrospective review under Labor Code Chapters 408 and 413, Insurance Code Chapter 1305, and Chapters 10, 19 or 133 of this title (relating to Medical Benefits). Proposed new subsection (c) also clarifies that additional testing or referral to another health care provider extends designated doctors' time to file their reports by 10 additional working days from the date of their physical examination of the injured employee. Proposed new subsection (d) recodifies the language of proposed repealed §126.7(n) of this title. Proposed new subsection (e) primarily recodifies the language of proposed repealed subsection §126.7(o) of this title. It also clarifies the specific provisions of §129.5 of this title (relating to Work Status Reports) applicable to Work Status Reports filed by designated doctors. Additionally, proposed new subsection (e) extends the time file a Work Status Report under this subsection to seven working days, as opposed to calendar days, and requires Work Status Reports to be filed with the Division as well. Proposed new subsection (f) primarily recodifies language from proposed repealed §126.7(p) of this title. It also extends the time designated doctors have to file their narrative reports under that subsection to seven working days, as opposed to calendar days, requires the narrative reports to be filed with the Division, and lists the required elements of the narrative reports. Proposed new subsection (g) primarily recodifies the language of proposed repealed §126.7(d) of this title but also clarifies that presumptive weight only applies to issues the designated doctor was properly appointed to address. Proposed new subsection (h) primarily recodifies the language of proposed repealed §126.7(r) of this title but also clarifies that, as required by Labor Code §408.0041, insurance carriers must pay all accrued benefits, including medical benefits, pursuant to a designated doctor's report. Proposed new subsection (i) primarily recodifies the language of proposed repealed §126.7(q) of this title. It also clarifies that designated doctors shall maintain injured employee records, analyses, and narratives provided by insurance carriers and treating doctors for five years from the anniversary date of the date of the designated doctor's last examination of the injured employee. This requirement is intended to harmonize the Division's record retention requirements with the minimum requirements for record retention among licensing boards applicable to designate doctors. Importantly, this subsection also clarifies that this record retention requirement does not reduce or replace any other record retention requirement imposed on designated doctors by their respective licensing boards. Additionally, proposed new subsection (i) requires designated doctors to maintain reports they generate as well as documentation that they fulfilled certain administrative requirements when applicable. Proposed new subsection (j) clarifies that parties may dispute any entitlement to benefits affected by a designated doctor report through the dispute resolution processes outlined in Chapters 140 - 147 of this title.

Proposed New §127.15. Proposed new subsection (a) primarily recodifies language from proposed repealed §126.7(l) of this title. It also clarifies that a designated doctor may initiate communication to any health care provider who has previously treated or examined the injured employee for the work-related injury or with a peer review doctor identified by the insurance carrier who reviewed the injured employee's claim or any information regarding the injured employee's claim. Proposed new subsection (b) recodifies language from proposed repealed §126.7(m) of this title.

Proposed New §127.20. Proposed new subsection (a) primarily recodifies language from proposed repealed §126.7(u) of this title. It also clarifies that parties may only request clarification on issues already addressed by the designated doctor's report or on issues that the designated doctor was ordered to address but did not address. Proposed new subsection (b) lists required elements for all requests for clarification. Proposed new subsection (c) recodifies language from proposed repealed §126.7(u) of this title. Proposed new subsection (d) primarily recodifies language from proposed repealed §126.7(u) of this title and also clarifies various administrative requirements for designated doctors responding to requests for clarification. Proposed new subsection (e) clarifies that any failure to respond to a request for clarification is an administrative violation.

Proposed New §127.25. Proposed new subsections (a) - (d) recodify language from proposed repealed §126.7(g) of this title.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the proposed rules will be in effect there will be minimal fiscal implications to state or local government as a result of enforcing or administering the sections. There also will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Ms. Gilbert has determined that the proposed rules will have no or minimal impact on the cost of the Division's designated doctor scheduling process, because the proposed rules primarily codify existing scheduling procedures or form requirements or implement requirements found in the Labor Code.

There will be no fiscal implication to local governments as a result of enforcing or administering the proposed amendments.

Local Government and State Government as a Covered Entity. Local government and state government as a covered entity will be impacted in the same manner as persons required to comply with the proposed amendments as described later in the preamble.

Ms. Gilbert has determined that for each year of the first five years the sections are in effect, the public benefit as a result of the proposed new rules will be a more efficient dispute resolution process and increased quality of designated doctor examinations due to designated doctors remaining on a claim so long as they are still qualified to perform the examination and stakeholders preventing unnecessary examinations through the dispute resolution process described in proposed new §127.1(e) of this title (relating to Requesting Designated Doctor Examinations). Ms. Gilbert has also determined that the proposed new rules will also result in increased stakeholder awareness of the Division's scheduling procedures and increased efficiency in the designated doctor scheduling and examination process because the proposed new rules clarify or codify a number of the Division's current designated doctor scheduling procedures.

Furthermore, while Ms. Gilbert has determined that the costs of compliance associated with the proposal primarily result from existing requirements in Labor Code §408.0041 and, regarding record retention, from existing requirements in the rules of applicable licensing boards, she has also determined that certain provisions of the new rules may impose minimal costs upon stakeholders. Specifically, Ms. Gilbert has determined that the new requirement to file reports under proposed §127.10(f) of this title (relating to General Procedures for Designated Doctor Examinations) with the Division by facsimile or electronic transmission may impose minimal costs on designated doctors as previously they were not required to do so by rule. Additionally, though the record retention requirements of proposed §127.10(i) primarily overlap with the preexisting record retention requirement imposed upon designated doctors by their respective licensing boards, the requirements of proposed §127.10(i) of this title also require designated doctors retain certain minor administrative documents, such as documentation that reports were filed by verifiable means, that are not covered by licensing board requirements. These minor additions may impose marginal costs upon some providers who did not previously retain this information. Ms. Gilbert has further determined that while parties who opt to request a hearing under proposed §127.1(e) of this title to contest the approval of a designated doctor examination request before the examination occurs may incur certain legal costs as a result of attending these hearings, these costs are ultimately the result of current Division policy as parties are entitled to request such hearings currently. Moreover, the costs are also offset, if not exceeded, by the savings such parties gain as a result of not having to request hearings after the disputed examinations and as a result of possibly preventing unnecessary designated doctor examinations. Mrs. Gilbert has also determined that while staying designated doctor appointments as a result of a request for hearing under proposed §127.1(e) of this title could, under exceptional circumstances, result in some costs to designated doctors who are required to reschedule postponed examinations on short notice, the Division has included sufficient safeguards into proposed §127.1(e) of this title, specifically the requirement that parties request an expedited hearing within three days of receipt of the examination order, that these circumstances and costs should be prevented.

Ms. Gilbert determined that any additional costs stem from compliance with existing designated doctor procedures that the Division is clarifying or codifying in this proposal.

As required by the Government Code §2006.002(c), the Division has determined that the proposal will not have an adverse economic effect on the small and micro-businesses that may be required to comply with the proposed new sections.

The cost of compliance with the proposal will not vary between large businesses and small or micro-businesses, and the Division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro-businesses.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on August 16, 2010. Comments may be submitted via the internet through the Division's internet website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on August 17, 2010 at 9:00 a.m. CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. Those persons interested in attending the public hearing should contact the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, (512) 804-4730 to confirm the date, time, and location of the public hearing for this proposal. The Division offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Salazar at (512) 804-4403 at least two days prior to the hearing date. The public hearing schedule will also be available on the Division's website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html.

The amendments and new sections are proposed under the Labor Code §§408.0041, 408.0043, 408.0044, 408.0045, 408.027 and under the general authority of §402.00128 and §402.061. Section 408.0041 provides the general requirements and procedures for designated doctor examinations. In relevant part, §408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. In relevant part, §408.0044 provides that a designated doctor who is a dentist and reviews a dental service in conjunction with a specific workers' compensation case must be licensed to practice dentistry. Section 408.0045 provides, in relevant part,

that a designated doctor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Section 408.027 states the procedures by which an insurance carrier may choose to pay, reduce, deny, or determine to audit a health care provider's claim.

Section 402.00128 lists the general powers of the Commissioner, including the power to hold hearings. Section 402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The following sections are affected by this proposal: §§127.1, 127.5, 127.10, 127.15, 127.20, 127.25, Labor Code §408.027, 408.0041, 408.0043, 408.0044, 408.0045 and 413.014.

§127.1. Requesting Designated Doctor Examinations.

(a) At the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the division may order a medical examination by a designated doctor to resolve questions about the following:

(1) the impairment caused by the injured employee's compensable injury;

(2) the attainment of maximum medical improvement (MMI);

(3) the extent of the injured employee's compensable injury;

(4) whether the injured employee's disability is a direct result of the work-related injury;

(5) the ability of the injured employee to return to work; or

(6) issues similar to those described by paragraphs (1) - (5) of this subsection.

(b) To request a designated doctor examination a requestor must:

(1) provide a specific reason for the examination;

(2) explain any change of condition if the requestor indicates that the injured employee's medical condition has changed since a previous designated doctor examination on the same claim;

(3) report the injured employee's current medical condition and the type of health care the injured employee is currently receiving;

(4) provide general information regarding the identity of the requestor, injured employee, employer, treating doctor, insurance carrier, as well as the statutory date of maximum medical improvement, if any;

(5) submit the request on the form prescribed by the division under this section. A copy of the prescribed form can be obtained from:

(A) the division's website at www.tdi.state.tx.us/wc/indexwc.html; or

(B) the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744 or any local division field office location;

(6) provide all information listed below applicable to the type of examination the requestor seeks:

(A) if the requestor seeks an examination on the attainment of MMI, include the date of MMI if any; the date of certification of MMI if any; and the name of the certifying doctor, if any, and whether the certifying doctor was a treating doctor, required medical examination doctor, or referral doctor;

(B) if the requestor seeks an examination on the impairment rating of the injured employee, include the date of MMI, if any, the date of certification of MMI and prior assigned impairment rating, if any, and the name of the certifying doctor, if any, and whether the certifying doctor was a treating doctor, required medical examination doctor, or referral doctor;

(C) if the requestor seeks an examination on the extent of the compensable injury or an examination regarding the causation of the claimed injury, include a description of the accident or incident that caused the claimed injury; a list of all injuries determined to be compensable by the division or accepted as compensable by the insurance carrier; and a list of all injuries in question;

(D) if the requestor seeks an examination on whether the injured employee's disability is a direct result of the work-related injury, include the beginning and ending dates for the claimed periods of disability; state if the injured employee is either not working or is earning less than pre-injury wages as defined by Labor Code §401.011(16); and list all injuries determined to be compensable by the division or accepted as compensable by the insurance carrier;

(E) if the requestor seeks an examination regarding the injured employee's ability to return to work in any capacity and what activities the injured employee can perform, include the beginning and ending dates for the periods to be addressed and a job description for job offers the employer intends to offer the injured employee;

(F) if the requestor seeks an examination to determine whether or not an injured employee entitled to supplemental income benefits may return to work in any capacity for the identified period, include the beginning and ending dates for the periods to be addressed and whether or not this period involves the ninth quarter or a subsequent quarter of supplemental income benefits;

(G) if the requestor seeks an examination on topics under subsection (a)(6) of this section, specify the issue in sufficient detail for the doctor to answer the question(s); and

(7) provide a signature to attest that every reasonable effort has been made to ensure the accuracy and completeness of the information provided in the request.

(c) If a party submits a request for a designated doctor examination under subsection (b) of this section that would require the division to schedule an examination within 60 days of a previous examination of the injured employee that party must provide good cause for scheduling that designated doctor examination in order for the division to approve the party's request. For the purposes of this subsection, the commissioner or the commissioner's designee shall determine good cause on a case by case basis and will require at a minimum:

(1) a showing by the requestor if that requestor also requested the previous examination that the submitted questions could not have reasonably been included in the prior examination and are reasonably necessary to resolve the requested issue(s) and will affect entitlement to benefits; or

(2) a showing by the requestor if that requestor did not request the previous examination that the submitted questions are reasonably necessary to resolve the requested issues and will affect entitlement to benefits.

(d) The division shall deny a request for a designated doctor examination:

(1) if the request does not comply with any of the requirements of subsections (b) or (c) of this section;

(2) if the request would require the division to schedule an examination in violation of Labor Code §§408.0041, 408.123, or 408.151; or

(3) if the commissioner or the commissioner's designee determines the request to be frivolous because it lacks either any legal or any factual basis that would merit approval.

(e) A party may dispute the division's approval or denial of a designated doctor request through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures). Additionally, a party is entitled to seek an expedited contested case hearing under §140.3 of this title (relating to Expedited Proceedings) to dispute an approved request for a designated doctor examination. The division, upon receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited contested case hearing. Parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the division within three days of receiving the order of designated doctor examination under §127.5(a) of this title (relating to Scheduling Designated Doctor Appointments).

§127.5. Scheduling Designated Doctor Appointments.

(a) The division, within 10 days after approval of a valid request, shall issue an order that assigns a designated doctor and shall notify the designated doctor, the treating doctor, the injured employee, the injured employee's representative, if any, and the insurance carrier that the designated doctor will be directed to examine the injured employee. The order shall:

(1) indicate the designated doctor's name, license number, examination address and telephone number, and the date and time of the examination or the date range for the examination to be conducted;

(2) explain the purpose of the designated doctor examination;

(3) require the injured employee to submit to an examination by the designated doctor;

(4) require the designated doctor to perform the examination at the indicated examination address; and

(5) require the treating doctor, if any, and insurance carrier to forward all medical records in compliance with §127.10(a)(3) of this title (relating to General Procedures for Designated Doctor Examinations).

(b) The examination address indicated on the order in subsection (a)(4) of this section may not be changed by any party or by an agreement of any parties without good cause and the approval of the division.

(c) Except as provided in subsection (d) of this section, the division shall select the next available doctor on the designated doctor list for a medical examination requested under §127.1 of this title (relating to Requesting Designated Doctor Examinations). A designated doctor is available to perform an examination at any address the doctor has filed with the division if the doctor:

(1) does not have any disqualifying associations as described in §180.21 of this title (relating to Commission Designated Doctor List);

(2) has credentials appropriate to the issue in question, the injured employee's medical condition, and as required by Labor Code §§408.0043, 408.0044, 408.0045, and applicable rules;

(3) is on the designated doctor list on the day the examination is offered; and

(4) has not treated or examined the injured employee in a non-designated doctor capacity within the past 12 months and has not examined or treated the injured employee in a non-designated doctor capacity with regard to a medical condition being evaluated in the designated doctor examination.

(d) If the division has previously assigned a designated doctor to the claim at the time a request is made, the division may use that doctor again if the doctor meets the requirements of subsections (c)(1) - (4) of this section. Examinations under this subsection must be conducted at the same examination address as the designated doctor's previous examination of the claimant or at another examination address approved by the division.

(e) The designated doctor's office and the injured employee shall contact each other if there exists a scheduling conflict for the designated doctor appointment. The designated doctor or the injured employee who has the scheduling conflict must make the contact at least 24 hours prior to the appointment. The 24-hour requirement will be waived in an emergency situation. The rescheduled examination shall be set to occur within 21 days of the originally scheduled examination. Within 24 hours of rescheduling, the designated doctor shall contact the division's field office, the injured employee or the injured employee's representative, if any, and the insurance carrier with the time and date of the rescheduled examination. If the examination cannot be rescheduled within 21 days of the originally scheduled examination, the designated doctor shall notify the division immediately, and the division may select a new designated doctor.

§127.10. General Procedures for Designated Doctor Examinations.

(a) The designated doctor is authorized to receive the injured employee's confidential medical records and analyses of the injured employee's medical condition, functional abilities, and return-to-work opportunities to assist in the resolution of a dispute under this subchapter without a signed release from the injured employee. The following requirements apply to the receipt of medical records and analyses by the designated doctor:

(1) The treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. For subsequent examinations with the same designated doctor, only those medical records not previously sent must be provided. The cost of copying shall be reimbursed in accordance with §134.120 of this title (relating to Reimbursement for Medical Documentation).

(2) The treating doctor and insurance carrier may also send the designated doctor an analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities. The analysis may include supporting information such as videotaped activities of the injured employee, as well as marked copies of medical records. If the insurance carrier sends an analysis to the designated doctor, the insurance carrier shall send a copy to the treating doctor, the injured employee, and the injured employee's representative, if any. If the treating doctor sends an analysis to the designated doctor, the treating doctor shall send a copy to the insurance carrier, the injured employee, and the injured employee's representative, if any. The analysis sent by any party may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in §408.0041.

(3) The treating doctor and insurance carrier shall ensure that the required records and analyses (if any) are received by the designated doctor no later than three working days prior to the date of the

designated doctor examination. If the designated doctor has not received the medical records or any part thereof at least three working days prior to the examination, the designated doctor shall report this violation to the division and reschedule the examination. The doctor shall conduct the rescheduled examination regardless of whether or not the injured employee's complete medical records have been timely received.

(b) The designated doctor shall review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities and return to work opportunities provided by the insurance carrier and treating doctor in accordance with subsection (a) of this section, as well as the injured employee's medical condition and history as provided by the injured employee, and shall perform a complete physical examination. The designated doctor shall give the medical records reviewed the weight the doctor determines to be appropriate.

(c) The designated doctor shall perform additional testing when necessary to resolve the issue in question. The designated doctor may also refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question. Any additional testing or referral required for the evaluation is not subject to preauthorization requirements in accordance with the Labor Code §413.014, Insurance Code, Chapter 1305, or Chapters 10, 19 or 134 of this title (relating to Workers' Compensation Healthcare Networks; Agent's Licensing; and Benefits--Guidelines for Medical Services, Charges, and Payments respectively) but is subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier in accordance with Labor Code Chapters 408 and 413, Insurance Code Chapter 1305, and Chapters 10, 19 or 133 of this title (relating Medical Benefits). Any additional testing or referral examination must be completed within 10 working days of the designated doctor's physical examination of the injured employee. The need for additional testing or referral to another health care provider under this subsection extends the amount of time the designated doctor has to file the report by 10 additional working days from the date of the designated doctor's physical examination of the injured employee.

(d) A designated doctor who determines the injured employee has reached maximum medical improvement (MMI) or who assigns an impairment rating, or who determines the injured employee has not reached MMI, shall complete and file the report as required by §130.1 and §130.3 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment and Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by a Doctor other than the Treating Doctor).

(e) A designated doctor who examines an injured employee pursuant to any question relating to return to work is required to file a Work Status Report that meets the required elements of these reports described in §129.5 of this title (relating to Work Status Reports) and a narrative report within seven working days of the date of the examination of the injured employee. This report shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall file the reports with the injured employee and the injured employee's representative (if any) by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the report by other verifiable means.

(f) A designated doctor who resolves questions on issues other than those listed in subsections (d) and (e) of this section, shall file a report within seven working days of the date of the examination of the injured employee. This report shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall provide the report to the injured employee and the injured employee's representative (if any) by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the report by other verifiable means. Reports under this subsection must be filed in the form and manner prescribed by the division and must contain at a minimum:

(1) identification of the question(s) addressed by the designated doctor evaluation;

(2) general information regarding the identity of the designated doctor, injured employee, employer, treating doctor, insurance carrier, as well as the identity of the certified workers' compensation health care network, if applicable;

(3) general information regarding the designated doctor's evaluation, including the date and address where the examination took place;

(4) a summary of any additional testing conducted as part of the evaluation, including the identity of any referral health care providers utilized to perform additional testing, the types of tests conducted and the dates the testing occurred;

(5) a narrative description of the physical examination itself as well as a description of what medical records or other information the designated doctor reviewed as part of the evaluation;

(6) a summary of the designated doctor's response(s) to each of the questions addressed during the designated doctor's evaluation, including an explanation of the findings and conclusions used to support the designated doctor's response;

(7) a statement that there is no known disqualifying association as described in §180.21 of this title (relating to Commission Designated Doctor List) between the designated doctor and the injured employee, the injured employee's treating doctor, the insurance carrier or the insurance carrier's certified workers' compensation health care network, if applicable; and

(8) a certification by the designated doctor of the date that the report was sent to all of the recipients as required by this subsection and that the report was sent in the manner required by this subsection.

(g) The report of the designated doctor is given presumptive weight regarding the issue(s) in question the designated doctor was properly appointed to address, unless the preponderance of the evidence is to the contrary.

(h) The insurance carrier shall pay all benefits, including medical benefits otherwise due under the Texas Workers' Compensation Act and division rules, in accordance with the designated doctor's report for the issue(s) in dispute. For medical benefits, the insurance carrier shall have 21 days from receipt of the designated doctor's report to reprocess the applicable medical bill(s). For all other benefits, the insurance carrier shall tender payment no later than five days after receipt of the report.

(i) The designated doctor shall maintain accurate records for, at a minimum, five years from the anniversary date of the date of the designated doctor's last examination of the injured employee. This requirement does not reduce or replace any other record retention requirements imposed upon a designated doctor by an appropriate licensing board. These records shall include the injured employee's medical records, any analysis submitted by the insurance carrier or treating doctor (including supporting information), reports generated by the desig-

nated doctor as a result of the examination, and narratives provided by the insurance carrier and treating doctor, to reflect:

(1) the date and time of any designated doctor appointments scheduled with an injured employee;

(2) the circumstances regarding a cancellation, no-show or other situation where the examination did not occur as initially scheduled or rescheduled and, if applicable, documentation of the notice that the doctor provided to the division and the insurance carrier within 24 hours of rescheduling an appointment;

(3) the date of the examination;

(4) the date medical records were received from the treating doctor or any other person;

(5) the date reports described in subsections (d), (e) and (f) of this section were submitted to all required parties and documentation that these reports were submitted to the division, treating doctor, and insurance carrier by facsimile or electronic transmission and to other required parties by verifiable means;

(6) the name(s) of any referral health care providers used by the designated doctor, if any; the date of appointments by referral health care providers; and the reason for referral by the designated doctor; and

(7) the date, if any, the doctor contacted the division for assistance in obtaining medical records from the insurance carrier or treating doctor.

(j) Parties may dispute any entitlement to benefits affected by a designated doctor's report through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures).

§127.15. Undue Influence on a Designated Doctor.

(a) To avoid undue influence on the designated doctor:

(1) except as provided by §127.10(a) of this title (relating to General Procedures for Designated Doctor Examinations), only the injured employee or appropriate division staff may communicate with the designated doctor prior to the examination of the injured employee by the designated doctor regarding the injured employee's medical condition or history;

(2) after the examination is completed, communication with the designated doctor regarding the injured employee's medical condition or history may be made only through appropriate division staff; and

(3) the designated doctor may initiate communication with any health care provider who has previously treated or examined the injured employee for the work-related injury or with a peer review doctor identified by the insurance carrier who reviewed the injured employee's claim or any information regarding the injured employee's claim.

(b) The insurance carrier, treating doctor, injured employee, or injured employee's representative, if any, may contact the designated doctor's office to ask about administrative matters, including but not limited to whether the designated doctor received the records, whether the exam took place, or whether the report has been filed, or other similar matters.

§127.20. Requesting a Letter of Clarification Regarding Designated Doctor Reports.

(a) Parties may file a request with the division for clarification of the designated doctor's report. A copy of the request must be provided to the opposing party. The division may contact the designated doctor if it determines that clarification is necessary to resolve an issue regarding the designated doctor's report. Parties may only request clarification on issues already addressed by the designated doctor's report or on issues that the designated doctor was ordered to address but did not address.

(b) Requests for clarification must:

(1) include the name of the designated doctor, the reason for the designated doctor's examination, the date of the examination, and the name and signature of the requestor;

(2) explain why clarification of the designated doctor's report is necessary and appropriate to resolve a future or pending dispute;

(3) include questions for the designated doctor to answer that are neither inflammatory nor leading; and

(4) provide any medical records that were not previously provided to the designated doctor and explain why these records are necessary for the designated doctor to respond to the request for clarification.

(c) The division, at its discretion, may also request clarification from the designated doctor on issues the division deems appropriate.

(d) To respond to the request for clarification, the designated doctor must be on the division's designated doctor list at the time the request is received by the division. The designated doctor shall respond, in writing, to the request for clarification within five days of receipt and send copies of the response to the parties listed in §127.10(f) of this title (relating to General Procedures for Designated Doctor Examinations). If, in order to respond to the request for clarification, the designated doctor has to reexamine the injured employee, the doctor shall:

(1) respond, in writing, to the request for clarification advising of the need for an additional examination within five days of receipt of the request and provide copies of the response to the parties specified in §127.10(f) of this title;

(2) conduct the reexamination within 21 days from the request by the division at the same examination address as the original examination; and

(3) respond, in writing, to the request for clarification based on the additional examination within seven working days of the examination and provide copies of the response to the parties specified in §127.10(f) of this title.

(e) Any refusal or failure by a designated doctor to conduct a reexamination that is necessary to respond to a request for clarification is an administrative violation.

§127.25. Failure to Attend a Designated Doctor Examination.

(a) An insurance carrier may suspend temporary income benefits (TIBs) if an injured employee, without good cause, fails to attend a designated doctor examination.

(b) In the absence of a finding by the division to the contrary, an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if by the day the examination was originally scheduled to occur the injured employee has both:

(1) failed to submit to the examination; and

(2) failed to contact the designated doctor's office to reschedule the examination.

(c) If, after the insurance carrier suspends TIBs pursuant to this subsection, the injured employee contacts the designated doctor to reschedule the examination, the designated doctor shall schedule the

examination to occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor. The insurance carrier shall reinstate TIBs effective as of the date the injured employee submitted to the examination unless the report of the designated doctor indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. The re-initiation of TIBs shall occur no later than the seventh day following:

(1) the date the insurance carrier was notified that the injured employee submitted to the examination; or

(2) the date that the insurance carrier was notified that the division found that the injured employee had good cause for not attending the examination.

(d) An injured employee is not entitled to TIBs for a period during which the insurance carrier suspended benefits pursuant to this subsection unless the injured employee later submits to the examination and the division finds or the insurance carrier determines that the injured employee had good cause for failure to attend the 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 July 2, 2010.

TRD-201003729
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 804-4703

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CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER D. DISPUTE OF MEDICAL BILLS

28 TAC §133.306

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §133.306 concerning Interlocutory Orders for Medical Benefits. These amendments are necessary to coordinate with, and supplement, rules pertaining to the implementation of statutory provisions of House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005, which require the adoption of a pharmacy closed formulary.

HB 7 added requirements to the Labor Code concerning pharmaceutical services which provided under amended Labor Code §408.028(b) that:

The commissioner by rule shall adopt a closed formulary under §413.011. Rules adopted by the commissioner shall allow an appeals process for claims in which a treating doctor determines and documents that a drug not included in the formulary is necessary to treat an injured employee's compensable injury.

To fulfill the legislative requirements of Labor Code §408.028 to adopt a pharmacy closed formulary, the Division also proposes amendments to §134.500 and §134.506 and proposes new §§134.510, 134.520, 134.530, 134.540, and 134.550 concerning Pharmaceutical Benefits which are proposed elsewhere in this edition of the *Texas Register.*

Additionally, HB 2515, enacted by the 76th Legislature, Regular Session, effective September 1, 1999, adopted Labor Code §413.055 which allows the Commissioner of Workers' Compensation (Commissioner) to enter an interlocutory order for the payment of all or part of medical benefits. The order may address accrued benefits, future benefits, or both accrued benefits and future benefits. An insurance carrier is entitled to reimbursement for any overpayments of benefits made under an order entered if the order is reversed or modified by final arbitration, order, or decision of the Commissioner, or a court.

Labor Code §402.042 requires the Commissioner to develop and implement policies that clearly define the respective responsibilities of the Commissioner and the staff of the Division. Texas Administrative Code, Title 28, §133.306 was originally adopted to achieve this goal. Subsection (a) provided for the delegation of the Commissioner's authority to enter interlocutory orders to Division staff and subsections (b) and (c) set forth standards for Division staff to enter such orders.

Proposed amendments to §133.306 in subsections (a), (b), (c) and (d) conform terminology in the proposed rule with terminology currently used in the Labor Code, which changed as a result of the enactment of HB 7 abolishing the Texas Workers' Compensation Commission and creating the Division of Workers' Compensation under the umbrella of the Texas Department of Insurance. These subsections additionally correct a spelling inconsistency concerning the word "division."

In order to supplement the legislative requirement to adopt a pharmacy closed formulary, the Division, in consultation with the Division's Medical Advisor, proposes amendments to this section for consistency of issuing interlocutory orders for medical benefits. In addition to the described amendments below, there have been nonsubstantive changes made to conform to current nomenclature, reformatting, consistency, clarity, editorial reasons, and to correct typographical and/or grammatical errors.

Proposed new subsection (b)(3) and amendments to subsection (c) further clarify the process in which the Division may enter interlocutory orders in certain situations relating to the delivery of pharmaceutical benefits; and applies to pharmacy closed formulary requirements for both network claims and those not subject to certified networks. The amendments further clarify and update the existing interlocutory order process after an adverse determination by a utilization review agent for drugs excluded from the Division's pharmacy closed formulary as set forth in proposed §§134.510, 134.530, 134.540, and 134.550 concerning Requirements for the Transition to the Use of the Closed Formulary for Claims with Dates of Injury Prior to January 1, 2011; Requirements for Use of the Closed Drug Formulary for Claims Not Subject to Certified Networks; Requirements for Use of the Closed Drug Formulary for Claims Subject to Certified Networks; and Medical Interlocutory Order, respectively. These proposed amendments provide a safety net for injured employees subject to a potential medical emergency when denied preauthorization of a previously prescribed drug which is not included in the Division's pharmacy closed formulary. Without this amendment, this section only allows an interlocutory order to be entered into in situations where there is a compensability, liability or extent of injury dispute and the Division determines that the prescribed drug was medically necessary or after the conclusion of the medical dispute process. Such a restriction potentially exposes injured employees to a potential medical emergency when a disagreement between the prescribing doctor and insurance carrier's utilization review agent prevents the continued use of a previously

preauthorized and dispensed drug that has been excluded from the Division's pharmacy closed formulary.

Proposed amendments to subsection (f) only changes and updates the title of §116.11 concerning Request for Reimbursement or Refund from the Subsequent Injury Fund. Subsection (f) states that an insurance carrier that makes an overpayment pursuant to an interlocutory order may be eligible for reimbursement from the Subsequent Injury Fund. An insurance carrier must make a request for reimbursement in accordance with §116.11.

Subsection (g) is proposed to be deleted because the effective date for requests is no longer necessary.

Matthew Zurek, Executive Deputy Commissioner of Health Care Management and System Monitoring, has determined that for each year of the first five years the proposed section will be in effect, there will be minimal 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.

There will be no fiscal implications for local government as a result of enforcing or administering the proposed amended section because they do not enforce or administer the rule. However, there may be some additional requests for reimbursement made on the Subsequent Injury Fund (SIF) if, at the conclusion of the Medical Interlocutory Order (MIO) appeals process, under this proposal or proposed new §134.550 concerning Medical Interlocutory Order which is proposed by the Division elsewhere in this edition of the *Texas Register,* an insurance carrier is found to have overpaid for pharmaceutical services. Since the pharmacy closed formulary initially only applies to new injuries, it is unlikely that the MIO appeals process and the proposed amendments to this section would result in a significant number of requests for reimbursement from the SIF until January 1, 2013. However, the potential exposure of the SIF may expand significantly in the third and subsequent years until all remaining legacy claims have been fully integrated into the use of the pharmacy closed formulary.

Mr. Zurek has determined that for each year of the first five years the proposed amendments will be in effect the anticipated public benefit will be Division rules that reflect legislative amendments to Labor Code §408.028(b) by HB 7 concerning the adoption of a pharmacy closed formulary, and the intent of Labor Code §413.055. Injured employees may receive essential medical treatments and services that an injured employee must receive within a short time frame in order to prevent a medical emergency. Mr. Zurek has determined that these proposed amendments do not impose costs upon insurance carriers, health care providers, employers or injured employees because these proposed amendments do not impose any new requirements upon these entities or system participants. Therefore, these proposed amendments will not have an adverse economic effect on small and micro businesses, and it is neither legal nor feasible to waive the requirements of the proposed amendments for small or micro-businesses.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposal will not have an adverse economic effect on small or micro businesses. Because the proposal does not impose any new requirements or costs with which businesses, regardless of size, must comply, any costs to persons required to comply with these proposed amendments are the result of the enactment of HB 7, the intent of Labor Code §413.055, and not the result of the adoption, enforcement, or administration of the proposed amendments. In accordance with the Government Code §2006.002(c), the Division has therefore determined that a regulatory flexibility analysis is not required because the proposal will not have an adverse impact on small or micro businesses.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on August 16, 2010. Comments may be submitted via the internet through the Division's internet website at http://www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on August 16, 2010 at 9:00 a.m. CST in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. Those persons interested in attending the public hearing should contact the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, (512) 804-4730 to confirm the date, time, and location of the public hearing for this proposal. The Division offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Salazar at (512) 804-4403 at least two days prior to the hearing date. The public hearing schedule will also be available on the Division's website at http://www.tdi.state.tx.state.tx.us/wc/rules/proposedrules/index.html.

The proposed amendments are proposed under Labor Code §§413.055, 410.032, 410.168, 408.027, 408.0271, 409.009, 410.209, 408.028, 401.011(22-a), 408.021, 413.002, 413.011, 413.013, 413.031, 413.051, 402.042, 402.00128, 402.00111, 402.061, and 402.00116, and Insurance Code Chapters 1305, 4201, and 4202.

Labor Code §413.055 allows the Commissioner to enter interlocutory orders regarding medical benefits and these orders may be disputed at a hearing but the order is binding during the appeal. Labor Code §413.055 also allows for reimbursement under the Subsequent Injury Fund for reversed or modified orders. Labor Code §410.032 requires a benefit review officer who presides at the benefit review conference to consider a request for an interlocutory order and to give the opposing party the opportunity to respond before issuing an interlocutory order. Labor Code §410.168 allows a hearing officer to enter an interlocutory order for the payment of all or part of medical benefits or income benefits. The order may address accrued benefits, future benefits, or both accrued benefits and future benefits. The order is binding during the pendency of an appeal to the appeals panel. Labor Code §408.027 requires a health care provider to submit a claim for payment to the insurance carrier not later than the 95th day after the date on which the health care services are provided to the injured employee and the insurance carrier must pay, reduce, deny, or determine to audit the health

care provider's claim not later than the 45th day after the date of receipt by the carrier of the provider's claim. Labor Code §408.0271 allows an insurance carrier to demand a refund from the health care provider for the portion of payment on the claim that was received by the health care provider for health care services that the insurance carrier determines to be inappropriate and the health care provider may appeal the insurance carrier's determination. Labor Code §409.009 allows a person to file a written claim with the Division as a subclaimant if the person has provided compensation, directly or indirectly, to or for an employee, has sought, and has been refused compensation by the insurance carrier. Labor Code §410.209 provides that the Subsequent Injury Fund shall reimburse an insurance carrier for any overpayment of benefits made under an interlocutory order or decision that is reversed or modified. Labor Code §408.028 requires the adoption of a pharmacy closed formulary in the workers' compensation system. Labor Code §408.028 also requires an appeals process for the pharmacy closed formulary. Labor Code §401.011(22-a) defines the term "health care reasonably required" when used in the Texas workers' compensation system. Labor Code §408.021 states that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Labor Code §413.002 sets forth specified Division duties and responsibilities regarding medical review. Labor Code §413.011 requires the Commissioner to adopt health care reimbursement policies and guidelines to ensure the quality of medical care and to achieve effective medical cost control, in addition the Commissioner is required to adopt treatment guidelines, return-to-work guidelines, disability management rules, and establish medical policies and guidelines. Labor Code §413.013 requires the Division by rule to establish programs related to health care treatments and services for dispute resolution, monitoring and review. Labor Code §413.031 provides procedures for medical dispute resolution. Labor Code §413.0511 states that the Medical Advisor shall make recommendations regarding the adoption of rules and policies. Labor Code §402.042 requires the Commissioner to develop and implement policies that clearly define the respective responsibilities of the Commissioner and the staff of the Division. Labor Code §402.00128 vests general operational powers to the Commissioner to conduct daily operations of the Division and implement Division policy including the duty to delegate, assess and enforce penalties and enter appropriate orders as authorized by Labor Code Title 5. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule making authority, under Labor Code Title 5. Labor Code §402.061 provides the Commissioner of Workers' Compensation the authority to adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or Commissioner. Insurance Code Chapter 1305 contains all the provisions of the Workers' Compensation Health Care Network Act and applies to certified networks. Insurance Code §1305.101 provides that prescription medications and services shall be reimbursed as provided by the Texas Workers' Compensation Act and applicable rules of the Commissioner of Workers' Compensation. Insurance Code Chapter 4201 concerns utilization review agents and applies to utilization review of health care service provided to a person eligible for workers' compensation medical benefits under Labor Code Title 5 or Insurance Code Chapter 1305. Insurance Code §4201.054 provides that Labor Code Title 5 prevails in the event of a conflict between Insurance Code Chapter 4201 and Labor Code Title 5. Insurance Code Chapter 4202 concerns independent review organizations, entities utilized in a dispute over the issue of medical necessity and reasonableness.

The following sections are affected by this proposal: §133.306, Labor Code §§401.011(22-a), 402.042, 408.021, 408.027, 408.0271, 408.028, 409.009, 410.032, 410.168, 410.209, 413.002, 413.011, 413.013, 413.031, 413.0511 and 413.055; Insurance Code Chapters 1305, 4201 and 4202.

§133.306. Interlocutory Orders for Medical Benefits.

(a) The Commissioner of Workers' Compensation [~~executive director~~] may delegate the authority to issue interlocutory orders for accrued and/or future medical benefits to division [~~Division~~] staff[~~, in accordance with §402.042 of the Texas Labor Code~~].

(b) The division [~~Division~~] may enter an interlocutory order for accrued or future medical benefits when:

(1) the division [~~Division~~] determines that an insurance carrier has disputed medical benefits as the result of a liability, compensability, or extent of injury dispute that an insurance carrier has raised in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements), and the division [~~Division~~] determines that those medical benefits are or were medically necessary and constitute health care reasonably required [~~essential medical treatment(s) and/or service(s)~~] and are not subject to the medical dispute resolution process set forth in Chapter 133, Subchapter D of this title (relating to Dispute of Medical Bills); [~~or~~]

(2) at [~~At~~] the conclusion of the medical dispute resolution process: [~~or an informal resolution conference, as set forth in §133.305 of this title (relating to Medical Dispute Resolution)~~]

(A) the division [~~Division~~] determines that an insurance carrier has disputed medical benefits as the result of a liability, compensability, or extent of injury dispute that an insurance carrier has raised in accordance with §124.2 of this title, and the division [~~Division~~] deems that the disputed medical benefits are or were medically necessary and constitute health care reasonably required [~~essential medical treatment(s) and/or service(s)~~]; or

(B) the division [~~Division~~] determines that future medical benefits for which preauthorization is required are medically necessary and constitute health care reasonably required; or [~~essential medical treatment(s) and/or service(s).~~]

(3) a utilization review agent makes an adverse determination for drugs excluded from the division's closed formulary as set forth in §§134.510, 134.530, 134.540, and 134.550 of this title (relating to Requirements for the Transition to the Use of the Closed Formulary for Claims with Dates of Injury Prior to January 1, 2011, Requirements for Use of the Closed Drug Formulary for Claims Not Subject to Certified Networks, Requirements for Use of the Closed Drug Formulary for Claims Subject to Certified Networks, and Medical Interlocutory Order respectively) and the division determines that those medical benefits are or were medically necessary and constitute health care reasonably required.

(c) Absent the interlocutory order as set forth in subsections (a) and (b) of this section, the division [~~The Commission~~] shall enter an interlocutory order only when[~~, absent the interlocutory order,~~] the injured employee would not receive medical benefits that are medically necessary and constitute health care reasonably required [~~essential medical treatment~~].

(d) A party shall comply with an interlocutory order entered in accordance with this section on the earlier of the seventh day after receipt of the order or the date the division [~~Commission~~] establishes in the body of the order.

(e) The insurance carrier may dispute an interlocutory order entered under this title by filing a written request for a hearing in accordance with Labor Code §413.055 [~~of the Texas Labor Code (relating to Interlocutory Orders; Reimbursement)~~] and [~~§133.305 and~~] §148.3 of this title (relating to Requesting a Hearing).

(f) An insurance carrier that makes an overpayment pursuant to an interlocutory order may be eligible for reimbursement from the subsequent injury fund. An insurance carrier must make a request for reimbursement in accordance with §116.11 of this title (relating to Request for Reimbursement [~~or Payment~~] from the Subsequent Injury Fund).

~~[(g) This rule shall apply for all requests submitted on or after July 15, 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 July 2, 2010.

TRD-201003732
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER F. PHARMACEUTICAL BENEFITS

28 TAC §§134.500, 134.506, 134.510, 134.520, 134.530, 134.540, 134.550

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §134.500 concerning Definitions and §134.506 concerning Outpatient Drug Formulary, proposed to be re-titled Outpatient Open Drug Formulary for Claims with Dates of Injury Prior to January 1, 2011. The Division also proposes the addition of five new sections to this subchapter: §§134.510, 134.520, 134.530, 134.540, and 134.550 concerning Transition to the Use of the Closed Formulary for Claims with Dates of Injury Prior to January 1, 2011; Outpatient Closed Drug Formulary for Dates of Injury On or After January 1, 2011; Requirements for Use of the Closed Drug Formulary for Claims Not Subject to Certified Networks; Requirements for Use of the Closed Drug Formulary for Claims Subject to Certified Networks; and Medical Interlocutory Order, respectively. These amendments and new sections are necessary to implement statutory provisions of House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, and effective September 1, 2005.

HB 7 added requirements to the Labor Code concerning pharmaceutical services, which provided under amended §408.028(b) that:

The commissioner by rule shall adopt a closed formulary under §413.011. Rules adopted by the commissioner shall allow an appeals process for claims in which a treating doctor determines and documents that a drug not included in the formulary is necessary to treat an injured employee's compensable injury.

To fulfill the legislative requirements of Labor Code §408.028 to adopt a pharmacy closed formulary and appeals process, the Division also proposes amendments to §133.306 concerning Interlocutory Orders for Medical Benefits which are proposed elsewhere in this edition of the *Texas Register.*

Additional HB 7 legislative objectives stated in Labor Code §413.0111 provides the rules adopted for reimbursement of prescription medication must authorize pharmacies to use agents or assignees to process claims and act on behalf of pharmacists.

HB 7 defined two new terms in the Labor Code that are pertinent to these proposed sections concerning a pharmacy closed formulary. Labor Code §401.011(18-a) defines evidence-based medicine to mean the "use of current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts, and treatment and practice guidelines in making decisions about the care of individual patients." Building on the definition of evidence-based medicine, HB 7 also clarified in Labor Code §401.011(22-a) that health care reasonably required means "health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or if that evidence is not available, generally accepted standards of medical practice recognized in the medical community."

Applicability to Certified Networks The Division's pharmacy closed formulary is also applicable to certified workers' compensation health care networks (certified networks) as there is no explicit statutory provision granted in the Labor Code or the Workers' Compensation Health Care Network Act, Texas Insurance Code Chapter 1305, for certified networks to adopt their own pharmacy closed formulary. As clearly set forth by the Legislature, certified networks are only authorized to adopt treatment guidelines, return to work guidelines, and individual treatment protocols in accordance with Insurance Code §1305.304.

Both Insurance Code Chapter 1305 and the Labor Code §408.028(b) provision, requiring the Commissioner of Workers' Compensation (Commissioner) to adopt a pharmacy closed formulary, were enacted by HB 7 during the 79th legislative session. Under the Labor Code, the Commissioner is required to adopt a single closed formulary which applies to both non-network claims and certified network claims.

Division Research In order to implement the legislatively required pharmacy closed formulary, the Division, in consultation with the Division's Medical Advisor, began researching programs that other state and federal agencies were using. The Division researched the Texas Medicaid Preferred Drug List (PDL), the Veterans Health Administration (VA) National Formulary, the Oregon Workers' Compensation Division's (WCD) alternatives to the development of a PDL, the Ohio Bureau of Workers' Compensation (BWC) PDL, and the Washington State Department

of Labor and Industries (L&I) Workers' Compensation Program PDL. A PDL is a list of preferred medications covered by an insurance plan and is also sometimes referred to as a formulary. A PDL is commonly used outside the workers' compensation system to affect the types of drugs that are dispensed and to control their costs.

Also taken into account was a Workers' Compensation Research Institute publication which indicated in its 2006 report *The Cost and Use of Pharmaceuticals in Workers' Compensation: A Guide for Policymakers* that Washington was the sole state in the United States that utilized a closed formulary for workers' compensation claims and was one of only three states in the country at that time that had formulary requirements in their workers' compensation systems. As of 2010, there are still only three states that require formularies in their workers' compensation systems (Texas, Oklahoma and Washington). Oklahoma has an open formulary while Washington continues to maintain its pharmacy closed formulary.

Division research on the Texas Medicaid PDL, which is administered by the Texas Health and Human Services Commission (HHSC), found that the PDL was the result of legislation in 2003 that directed HHSC to implement PDLs by March 1, 2004. This was in response to Texas Medicaid prescription drug costs increasing on the average of 15 to 20 percent from 2000 through 2003. After the Federal Omnibus Act of 1990 withdrew the use of closed formularies in Medicaid, HHSC developed and maintained a PDL.

Division research on the VA National Formulary found that VA restricts some drug classes by limiting choices as a way of supporting VA negotiations for lower drug prices and meeting VA objectives. Generic prescribing, generic substitution and therapeutic interchange (substitution of a formulary for a non-formulary drug within a drug class) are also used in managing the VA formulary system. There is a list of generic, brand name and over-the-counter drugs, devices, and supplies that provides the basis for a uniform entitlement for all VA regions and facilities, including the separate VA regional integrated service networks and VA medical centers. Non-formulary drugs are approved if there are contraindications to the formulary agents, adverse reactions to the formulary agents, therapeutic failure of all formulary alternatives and no formulary alternatives exist, or the patient has previously responded to a non-formulary agent and risk is associated with a change to a formulary agent.

Division research regarding Oregon WCD found that Oregon employers purchase workers' compensation coverage from private insurers, the publicly chartered corporation State Accident Insurance Fund (SAIF) that covers about 45 percent of the workers' compensation market in Oregon, or they are self-insured. As of 2008, six drug classes were used most often in early claim history: opioids (short acting), non-steroidal anti-inflammatory drugs (NSAIDs) and acetaminophen, anti-infective agents, skeletal muscle relaxants, dermatological products and sedatives. The SAIF's First Fill Formulary, which is evidence-based, allows dispensing of a prescription in these six drug classes prior to claim acceptance, and is intended as a front-end cost-containment effort.

Division research on Ohio's PDL showed it was created through a legislative initiative because of the managed care system impetus in Ohio. The state's PDL was limited to three drug classes, namely non-steroidal inflammatory drugs and COX-2 analgesics, opioid-analgesics, and skeletal muscle relaxants. When the Ohio PDL was instituted in 2005 it was based on historically higher than anticipated pharmaceutical expenditures during the preceding decade. The state's PDL drug classes accounted for two-thirds of Ohio's workers' compensation system pharmaceutical costs. The state uses a preauthorization process for medications on the non-preferred drug list. There was also a pharmaceutical and therapeutics (P&T) committee that the BWC formed in response to the managed care reform consisting of five physicians, and five pharmacists that assisted in the creation of the PDL. However, during the Division's inquiry in 2008, the committee was inactive and remains inactive currently. Ohio's PDL continues to have only three drug classes.

Division research on Washington's workers' compensation PDL determined that it is a subset of the Washington L&I PDL, which is administered by the Washington Healthcare Authority together with five other state-wide programs and is part of the legislatively required Prescription Drug Program (PDP). Washington's "State Fund" administers Washington's workers' compensation system and covers the vast majority of Washington's employers. As a general approach to the entire state's health care system, the Washington Legislature enacted the PDP in 2003 to control state prescription drug costs while maintaining public awareness of safe and cost-effective drug use. The state created a work group to craft the aspects of its new legislative requirements and establish an evidence-based pharmacy closed formulary. Overall the process took approximately 18 months to design and another year to accomplish formulary implementation. A P&T committee was established to evaluate the evidence for certain drug classes, and recommend drugs deemed to be therapeutically equivalent, superior or indicated for a particular condition or special population. The state researched 16 classes to establish evidence-based criteria. As of March 2008, the Washington state health care system had a closed formulary which included 27 drug classifications. The workers' compensation pharmacy closed formulary consisted of 16 drug classes which were applicable to workers' compensation. No payment of narcotics is required after the injured employee reaches maximum medical improvement.

Summary of Division Research of Functioning Pharmacy Programs Of the three researched workers' compensation states (Oregon, Ohio and Washington) with functioning pharmacy programs, Washington's pharmacy formulary has the closest match to the statutory requirements for Texas, which requires the Commissioner by rule to adopt a pharmacy closed formulary. Ohio does not utilize an evidence-based method for selecting their PDL, which eliminates Ohio as a model to consider. Oregon's model is equally disqualified because their state fund has created a voluntary "first fill" type of formulary that only serves approximately 45 percent of the market, and is not a comprehensive pharmaceutical closed formulary.

While Washington offers an interesting model, with a pharmacy manager and representation from the office of the medical director as well as an active P&T Committee, Washington's workers' compensation drug formulary model is not ideal for Texas either. Washington's formulary is part of a complex legislatively created cost control effort that is utilized by Washington's workers' compensation single payer system, Medicaid program, the senior prescription card program, and the state's employee group health system. Unlike Texas, Washington's system processes its own workers' compensation preauthorization requests.

REG Pharmaceutical Descriptive Analysis In 2007, the Department's Workers' Compensation Research and Evaluation Group (REG) completed a descriptive analysis of the use of pharma-

ceuticals in the Texas workers' compensation system. This was the agency's first opportunity to review pharmacy activity since this data was not previously reported to the Division. The descriptive analysis focused on calendar years (CYs) 2005 and 2006 activity. Data sources were the DWC 837 (the Division's medical billing data), Medi-Span master drug database for the classification groups, and Electronic Claims Submission forms from 2000-2004 medical/hospital bills to identify injury types. The data parameters were injury years 1991 through 2006, prescription years 2005 and 2006, and prescriptions for 90 days or less. Using these parameters allowed for the inclusion of 99.8 percent of all data from the data sources. Prescriptions with denials for duplicate, entitlement, and compensability issues were removed from the data.

The data showed that pharmacy payments in the Texas workers' compensation system for prescription years 2005 and 2006 were approximately $130 million each year and accounted for 13-14 percent of the overall Texas workers' compensation medical payments. The REG compared pharmacy services in Texas to those in California because California and Texas were comparable in size, pharmaceutical utilization and industry mix. According to the California Workers' Compensation Institute's estimates in 2005, pharmacy payments accounted for seven percent of California's medical costs that year. Approximately 50 percent of all injured employees in Texas received pharmaceutical prescriptions in CYs 2005 and 2006.

For prescription year 2006, only 13 percent of prescription costs in Texas were attributable to CY 2006 injuries. Further analysis indicated long-term use of pharmaceuticals by some injured employees. Almost 75 percent of the 2006 pharmaceutical costs were for injuries occurring prior to 2005. Injuries sustained between 1991 and 2001 were tied to 33 percent of the prescriptions, and 46 percent of the CY 2006 pharmacy costs.

A total of seven therapeutic classification groups accounted for almost 80 percent of all the prescriptions filled in CY 2006. Analgesics (opioid) and analgesics (anti-inflammatory) accounted for almost 50 percent of the prescriptions written and dollars paid. The other therapeutic classification groups in descending order of total amounts paid were musculoskeletal therapy, antidepressants, anticonvulsants, hypnotics, and anti-anxiety agents. Payments for the top two classification groups were approximately $42 million (33 percent) and $16 million (14 percent). Among the identifiable injury types, low back soft tissue accounted for the highest number of prescriptions.

Closed Formulary Development

In December 2006, under Labor Code §413.011(e), which was enacted by HB 7, the Division adopted its treatment guidelines, §137.100 concerning Treatment Guidelines. The Labor Code requires the treatment guidelines and protocols to be evidence-based, scientifically valid, outcome-focused, and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. After considering the merits of various published treatment guidelines and input from several stakeholder meetings, the Division, with the recommendation of the Division's Medical Advisor, selected the most current edition of the *Official Disability Guidelines - Treatment in Workers' Compensation* (ODG), and published by Work Loss Data Institute (WDLI) as the Division's treatment guidelines. The ODG meets the provisions outlined in Labor Code §413.011(e). Additionally, the guidelines are continuously updated by integrating the findings of new studies as they are conducted and released. Further, the ODG guidelines are designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care by providing clear data on optimum frequency and duration of treatments. The ODG explains that claims should ideally be managed based on the details of the case using the "Procedure Summary." The Procedure Summary includes possible therapies, diagnostic methods, and provides a summary with a reference to the most recent medical evidence with an indication of whether the procedure is recommended, not recommended, or under study. Within a Procedure Summary, ODG provides guidelines for instruction that include specific utilization review criteria often presented in an algorithmic format.

In recognizing that drug costs have become a significant portion of total workers' compensation medical costs, with increasing evidence that many injured employees are receiving prescriptions that may not be the best choices in helping them recover from their injury or illness, in 2008 the WLDI announced the development of a formulary, which would be an integral part of the ODG. As with the other parts of the ODG, the drug formulary is evidence-based. Appendix A is the ODG Workers' Compensation Drug Formulary.

The ODG Appendix A provides a listing of the different medications used in workers' compensation cases, in table format, with populated categories for Drug Class, Generic Name, Brand Name, Generic Equivalent, Cost, and ODG's proprietary Preferred Drug Status. The Preferred Drug Status is the most important column, and it contains an "N" if the drug is not a preferred drug, indicating it is not recommended as a first-line treatment in ODG. The ODG Appendix A provides status information for all the drugs identified throughout ODG, including brand name and generic antidepressants, anti-epilepsy drugs, herbal medicines, muscle relaxants, nonprescription analgesics, NSAIDS, opioids, corticosteroids, topical analgesics, and more.

Derived from the evidence-based recommendations in the chapters from *ODG Treatment in Workers' Comp,* there are hyperlinks from the Appendix A entries to the supporting sections in the Procedure Summary within each chapter of *ODG Treatment in Workers' Comp.* Within the Procedure Summary, the medical evidence supporting each recommendation is summarized in detail, along with patient selection criteria, dosage guidelines, references, and evidence-based cited works supporting the ODG's recommendation for use for the diagnosed injury included. Consequently, all of the recommendations are transparent and evidence-based as established by the ODG evidence ranking methodology.

Stakeholder Input Due to the significance of establishing a pharmacy closed formulary for the Texas Workers' Compensation system, the Division held three stakeholder meetings, met with numerous small stakeholder groups, issued three sets of informal working draft rules, and made revisions to those rules based on input received from system participants.

On August 25, 2008 the Division held the first meeting of system participants regarding the pharmacy closed formulary. The meeting covered an overview of the pharmacy closed formulary project with a presentation of the Department's REG research and analysis, rulemaking considerations and a discussion of specified agenda topics.

The agenda topics at the first meeting related to criteria for pharmacy closed formulary selection, criteria for closed formulary implementation, the appeals process, the alternatives of addressing continuation of previously prescribed medications

not included, or removed from the pharmacy closed formulary, and pharmacy closed formulary maintenance.

In discussing the criteria for a closed formulary system participants generally endorsed the concept of utilizing Appendix A from the ODG as a cornerstone of the closed formulary since Appendix A is a reflection of the evidence-based recommendations detailed in the Division's adopted treatment guidelines. Additionally, system participants also discussed options, including phased implementation based on date of service, date of injury, drug classification and injury type.

Attendees also considered various ways to address appeals for drugs not included in the pharmacy closed formulary. This discussion focused on the utilization, or adaptation of existing preauthorization processes based on the Department's utilization review and independent review requirements. The Division further gave consideration to those unique situations where weaning from current prescriptions or the abrupt discontinuation of a drug could trigger a medical emergency and would require some specific action or protocol. This situation could be integrated as an additional feature of the appeals process required by HB 7.

System participants expressed a significant concern for claims that are both longstanding and have a long term medication component associated with the injury that have not been subject to the level of scrutiny required in a pharmacy closed formulary. The insurance carriers expressed concern because of the long term costs for these claims and the potential for overutilization. For example, in prescription year 2006, the average number of prescriptions per injured employee with an injury date from 1991 - 2000, was 25.8 prescriptions per year. The average number of prescriptions for an injured employee with an injury occurring during CY 2006 was four prescriptions per year. Analysis also showed that the average payment per injured employee for claims with injury years from 1991 - 2000 was $2,895.00 for the 2006 prescription year. The corresponding average payment per injured employee for injury year 2006 was $174.00.

The Division published an informal draft of the rules on the Department's website on December 16, 2008 and received 34 informal comments.

The Division held a second meeting of system participants on March 5, 2009 to respond to concerns expressed by the informal comments and to clarify what encompasses a workers' compensation pharmacy closed formulary in Texas. A second informal draft was published on the Department's website on June 12, 2009. The Division received 24 informal comments. The Division held a third meeting of system participants on August 20, 2009.

The Division reviewed additional concerns identified by the informal comments as well as those identified through continuing communication with interested system participants. The Division posted a third informal draft of the rules on the Department's website on February 4, 2010 and received 18 informal comments.

The Division estimates that there were approximately 250,000 prescriptions for "N" drugs during CY 2008. Approximately 42,000 of these prescriptions were written during the first year post-injury. The remaining prescriptions were associated with claims more than 12 months beyond the injured employee's date of injury. Cognizant of the complex clinical questions related to the ongoing use of drugs excluded from the pharmacy closed formulary and the significant change to require prospective review for drugs excluded from the pharmacy closed formulary, the Division developed and recommended a measured approach to implementation of pharmacy closed formulary.

Initially, the proposed pharmacy closed formulary will apply to claims with dates of injury on or after January 1, 2011. This will limit the expected number of preauthorization requests and will also begin prospective review of use of drugs excluded from the closed formulary upon the initial prescription request. Further, for injuries that occur before January 1, 2011, the proposed rules provide a two-year transition period for prescribing doctors, insurance carriers, and injured employees to discuss and implement individual plans for the use of drugs excluded from the pharmacy closed formulary. The pharmacy closed formulary will be fully implemented for all claims on January 1, 2013.

Based on the Division's research, consultation with the Division's Medical Advisor, the input from interested system participants, and revisions to three informal drafts resulting from this input, the Division proposes these amendments and new sections to this subchapter.

Proposed amendment of §134.500. The proposed amendments provide definitions of new terms to the subchapter: *brand name drug, certified workers' compensation health care network (certified network), closed formulary, generically equivalent, pharmaceutically equivalent, therapeutically equivalent, medical emergency, and substitution.*

Proposed amendments also amend the definitions of *compounding, open formulary, statement of medical necessity, prescribing doctor, and prescription.*

Proposed new paragraph (3), a *closed formulary* is defined as, "all available Food and Drug Administration (FDA) approved prescription and nonprescription drugs prescribed and dispensed for outpatient use, but excludes: (A) drugs identified with a status of "N" in the current edition of the *ODG Treatment in Workers' Comp (ODG) / Appendix A, ODG Workers' Compensation Drug Formulary,* and any updates; (B) any compound that contains a drug identified with a status of "N" in the current edition of the *ODG Treatment in Workers' Comp* (ODG) / Appendix A, *ODG Workers' Compensation Drug Formulary,* and any updates, and (C) any investigational or experimental drug for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, but which is not yet broadly accepted as the prevailing standard of care in accordance with Labor Code §413.014."

In summary, the pharmacy closed formulary includes all FDA approved drugs except drugs with ODG status "N," compounds that include drugs with ODG status "N" and investigational or experimental drugs under Labor Code §413.014.

The ODG "N" drug designation means that a drug is not preferred and not recommended as a first-line treatment for use and will require preauthorization. Investigational or experimental drugs are not yet broadly accepted as the prevailing standard of care and will require preauthorization as well.

The added and amended definitions clarify terms and increase the ability of system participants to understand their responsibilities.

Proposed amendment of §134.506. The Division currently has an open formulary that has been in effect since 2002. The proposed amendments to subsection (a) adopt and continue the open formulary, defined by §134.500(9) concerning Definitions for claims with dates of injury prior to January 1, 2011 and re-

ferred to as "legacy claims" for purposes of this section. The continuation of the open formulary until January 1, 2013 is necessary in order to provide a successful transition to the pharmacy closed formulary. The transition provides an implementation "bridge" between the two systems because of the anticipated volume of legacy claims requiring preauthorization. For this reason, the title of the section is proposed to be changed from Outpatient Drug Formulary to Outpatient Open Drug Formulary for Claims with Dates of Injury Prior to January 1, 2011.

Proposed new subsection (b) indicates that health care, including a prescription for a drug, for claims not subject to a certified network shall be in accordance with the Division's adopted treatment guidelines under §137.100 concerning Treatment Guidelines.

Proposed new subsection (c), states that health care, including a prescription for a drug, for legacy claims subject to a certified network shall be in accordance with the certified network's treatment guidelines pursuant to Insurance Code Chapter 1305 and Chapter 10 of this title (relating to Workers' Compensation Health Care Networks).

Proposed new subsection (d) states that drugs included in the open formulary prescribed and dispensed for legacy claims not subject to a certified network do not require preauthorization, except as required by Labor Code §413.014.

Proposed new subsection (e) states that drugs included in the open formulary prescribed and dispensed for legacy claims subject to a certified network shall be preauthorized in accordance with Insurance Code Chapter 1305 and Chapter 10 of this title.

Proposed new subsection (f) states that drugs included in the open formulary prescribed and dispensed without preauthorization for legacy claims are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier.

Further proposed amendments include the deletion of terms and concepts that are no longer necessary.

Proposed new §134.510. Proposed new §134.510 concerns the transition from an open formulary to the pharmacy closed formulary for claims with dates of injury prior to January 1, 2011, which for purposes of this section, are referred to as "legacy claims."

Proposed new subsection (a) addresses the applicability of the section and states that the section applies to claims with dates of injury prior to January 1, 2011, which are subject to §134.530 concerning Requirements for Use of the Closed Formulary for Claims Not Subject to Certified Networks, §134.540 concerning Requirements for Use of the Closed Formulary for Claims Subject to Certified Networks, and §134.550 concerning Medical Interlocutory Order on and after January 1, 2013.

Proposed new section (b) provides for transition of legacy claims. Paragraph (1) sets forth the transition activities that should occur for any time after January 1, 2011 and prior to January 1, 2013. Subparagraph (A) provides that a prescribing doctor should include a statement of medical necessity as defined in §134.500(13) with the prescription for drugs excluded from the closed formulary. Subparagraph (B) states that the prescribing doctor or the insurance carrier may contact each other for a discussion of ongoing pharmacological management of the injured employee's claim. Subparagraph (C) states that when contacted by the prescribing doctor, the insurance carrier must provide a name and phone number of the insurance carrier representative that the prescribing doctor may contact for discussions of ongoing pharmacological management. Paragraph (2) sets forth what the insurance carrier shall accomplish no later than July 1, 2012. Subparagraph (A) states that the insurance carrier shall identify all legacy claims. Subparagraph (B) provides the details of the required written notification to the injured employee, prescribing doctor, and pharmacy if known.

Proposed new subsection (c) addresses the agreement. To ensure continuity of care, notwithstanding subsection (a), an insurance carrier and prescribing doctor may enter into a voluntary certification agreement in accordance with §134.600 concerning Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) regarding the application of the pharmacy closed formulary for individual legacy claims on a claim-by-claim basis.

Proposed new subsection (d) addresses the agreement documentation requirements. Paragraph (1) states that the insurance carrier shall document any agreement and the terms, and share a copy of the agreement with the prescribing doctor and injured employee. Paragraph (2) states that health care provided as a result of the agreement is not subject to retrospective review of medical necessity. Paragraph (3) states that denial of a request for a voluntary certification agreement is not subject to dispute resolution. Paragraph (4) indicates that if no agreement is reached and documented by January 1, 2013 for a legacy claim, the requirements of §§134.530, 134.540, and 134.550 are to apply.

Proposed new §134.520. The Commissioner proposes to adopt a pharmacy closed formulary under proposed new §134.520, as defined in §134.500(3) concerning Definitions with dates of injury on and after January 1, 2011.

Proposed new §134.530. Proposed new §134.530 concerns the requirements for the use of the pharmacy closed formulary for claims not subject to certified networks.

Proposed new subsection (a) of the section addresses applicability and provides that the closed formulary will be applicable to all drugs that are prescribed and dispensed for outpatient use on or after January 1, 2011 when the date of injury occurred on or after January 1, 2011.

Proposed new subsection (b) addresses preauthorization requirements, which are utilized as the appeals process for drugs excluded from the closed formulary. Additionally, the subsection addresses preauthorization requirements for an intrathecal drug delivery system's initial use and refilling with drugs excluded from the closed formulary.

Proposed new subsection (c) addresses treatment guidelines, and provides that the prescribing of drugs shall be in accordance with the Division's treatment guidelines, §137.100 concerning Treatment Guidelines, with exceptions provided in subsection (c). Paragraph (1) provides that drugs included in the closed formulary and recommended by the Division's treatment guidelines may be prescribed and dispensed without preauthorization. Paragraph (2) provides that drugs included in the closed formulary that exceed or are not addressed by the Division's treatment guidelines may be prescribed and dispensed without preauthorization. Paragraph (3) provides that drugs included in the closed formulary that are prescribed and dispensed without preauthorization are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier in accordance with subsection (f).

Proposed new subsection (d) explains the appeals process for drugs excluded from the closed formulary. Paragraph (1) provides that when the prescribing doctor determines and documents that a drug excluded from the pharmacy closed formulary is necessary to treat an injured employee's compensable injury and has prescribed the drug, the prescribing doctor or other requestor (which may be the pharmacist or injured employee) must request the drug in a specific case by requesting preauthorization, including reconsideration under §134.600 and under the applicable provisions of Chapter 19. Paragraph (2) indicates that if preauthorization is being requested by an injured employee or a requestor other than the prescribing doctor, the prescribing doctor shall provide a statement of medical necessity as set forth in current §134.502 concerning Pharmaceutical Services. Paragraph (3) indicates that if preauthorization is denied for drugs excluded from the pharmacy closed formulary, the requestor may submit a request for medical dispute resolution in accordance with §133.308 of this title (relating to MDR by Independent Review Organizations. Paragraph (4) states that in the event of an unreasonable risk of a medical emergency, an interlocutory order may be obtained in accordance with §133.306 concerning Interlocutory Orders for Medical Benefits or §134.550 concerning Medical Interlocutory Order.

Proposed new subsection (e) addresses initial pharmaceutical coverage. Paragraph (1) states that drugs included in the closed formulary which are prescribed for initial pharmaceutical coverage, in accordance with Labor Code §413.0141, may be dispensed without preauthorization and are not subject to retrospective review of medical necessity. Paragraph (2) states that drugs excluded from the closed formulary which are prescribed for initial pharmaceutical coverage in accordance with Labor Code §413.0141, may be dispensed without preauthorization, except as referenced in subsection (b)(2), and are subject to retrospective review of medical necessity.

Proposed new subsection (f) addresses retrospective review, and states that except as provided in subsection (e)(1), drugs that do not require preauthorization are subject to retrospective review for medical necessity in accordance with §133.230 and §133.240 of this title (relating to Insurance Carrier Audit of a Medical Bill, and Medical Payments and Denials, respectively), and applicable provisions of Chapter 19. Paragraph (1) states that health care, including a prescription for a drug, provided in accordance with §137.100 is presumed reasonable as specified in Labor Code §413.017, and is also presumed to be health care reasonably required as defined by Labor Code §401.011(22-a). Paragraph (2) states that in order for an insurance carrier to deny payment subject to a retrospective review for pharmaceutical services that are recommended by the Division's treatment guidelines, §137.100 of this title, the denial must be supported by documentation of evidence-based medicine that outweighs the presumption of reasonableness established under Labor Code §413.017. Paragraph (3) states that a prescribing doctor who prescribes pharmaceutical services that exceed, are not recommended, or are not addressed by §137.100, is required to provide documentation upon request in accordance with §134.500(13) and §134.502(e) and (f).

Proposed new §134.540. Proposed new §134.540 concerns the requirements for the use of the pharmacy closed formulary for claims subject to certified networks.

Proposed new subsection (a) of the section addresses applicability and provides that the closed formulary will be applicable to all drugs that are prescribed and dispensed for outpatient use for claims subject to a certified network on or after January 1, 2011 when the date of injury occurred on or after January 1, 2011.

Proposed new subsection (b) addresses the preauthorization requirements. Paragraph (1) states that for preauthorization as provided in subsection (d) is required for drugs excluded from the Division's closed formulary. Paragraph (2) states that an intrathecal drug delivery system requires preauthorization in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10 concerning Workers' Compensation Health Care Networks. Paragraph (3) states that refills of an intrathecal drug delivery system with drugs excluded from the closed formulary, which are billed using Healthcare Common Procedure Coding System (HCPCS) Level II J codes, and submitted on a CMS-1500 or UB-04 billing form, require preauthorization in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10.

Proposed new subsection (c) addresses treatment guidelines. The prescribing of drugs shall be in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10. Drugs included in the closed formulary that are prescribed and dispensed without preauthorization are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier in accordance with subsection (e).

Proposed new subsection (d) explains the appeals process for drugs excluded from the closed formulary. Paragraph (1) states that for situations in which the prescribing doctor determines and documents that a drug excluded from the closed formulary is necessary to treat an injured employee's compensable injury and has prescribed the drug, the prescribing doctor, other requestor, or injured employee must request approval of the drug in a specific instance by requesting preauthorization in accordance with the certified network's preauthorization process established pursuant to Chapter 10, Subchapter F and applicable provisions of Chapter 19. Paragraph (2) indicates that if preauthorization is pursued by an injured employee or requestor other than the prescribing doctor, and the injured employee or other requestor requests a statement of medical necessity, the prescribing doctor shall provide a statement of medical necessity to facilitate the preauthorization submission as set forth in §134.502. Paragraph (3) provides that if preauthorization for a drug excluded from the closed formulary is denied, the requestor may submit a request for medical dispute resolution in accordance with §133.308 of this title. Paragraph (4) states that in the event of an unreasonable risk of a medical emergency, an interlocutory order may be obtained in accordance with §133.306 or §134.550.

Proposed new subsection (e) addresses retrospective review and provides that drugs that do not require preauthorization are subject to retrospective review for medical necessity in accordance with §133.230 and §133.240, and the Insurance Code, Chapter 1305, applicable provisions of Chapter 19, and 10 of this title. Paragraph (1) states that in order for an insurance carrier to deny payment subject to a retrospective review for pharmaceutical services that fall within the treatment parameters of the certified network's treatment guidelines, the denial must be supported by documentation of evidence-based medicine that outweighs the evidence-basis of the certified network's treatment guidelines. Paragraph (2) states that a prescribing doctor who prescribes pharmaceutical services that exceed, are not recommended, or are not addressed by the certified network's treat-

ment guidelines, is required to provide documentation upon request in accordance with §134.500(13) and §134.502(e) and (f).

Proposed new §134.550. Proposed new §134.550 concerns a medical interlocutory order (MIO). Proposed new subsection (a) addresses the purpose of the new section, which is to provide a system by which a prescribing doctor or pharmacy is able to obtain an MIO in cases where preauthorization denials of a previously prescribed and dispensed drug(s) excluded from the pharmacy closed formulary poses an unreasonable risk of a medical emergency to an injured employee. The proposed subsection references the definition of a medical emergency in §134.500(7).

Proposed new subsection (b) states that a request for an interlocutory order that does not meet the criteria described by this section may still be requested pursuant to §133.306 concerning Interlocutory Orders for Medical Benefits. To fulfill the legislative requirements of Labor Code §408.028 to adopt a pharmacy closed formulary, the Division also proposes amendments to §133.306, which are proposed elsewhere in this edition of the *Texas Register.*

Proposed new subsection (c) states that an MIO will be issued if the request for an MIO contains 12 specific pieces of information. The paragraphs (1) through (12) of subsection (c) list those specific information components as: the injured employee name; the date of birth of injured employee; the prescribing doctor's name; the name of drug and dosage; the MIO requestor's name (pharmacy or prescribing doctor); the MIO requestor's contact information; a statement that a preauthorization request for a previously prescribed and dispensed drug(s), which is excluded from the closed formulary, has been denied by the insurance carrier; a statement that an independent review request has been submitted to the insurance carrier or the insurance carrier's utilization review agent in accordance with §133.308; a statement that the preauthorization denial poses an unreasonable risk of a medical emergency; a statement that the potential medical emergency has been documented in the preauthorization process; a statement that the insurance carrier has been notified that a request for an MIO is being submitted to the Division; and a signature with a certification by the MIO requestor stating, "I hereby certify under penalty of law that the previously listed conditions have been met."

Proposed new subsection (d) states that a complete request for an MIO under this section shall be processed and approved by the Division in accordance with this section. At the discretion of the Division, an incomplete request for an MIO under this section may be considered in accordance with this section.

Proposed new subsection (e) provides that the request for an MIO may be submitted on the designated Division form available on the Division's website, http://www.tdi.state.tx.us/wc/indexwc.html. In the event the Division form is not available, the written request must contain the provisions of subsection (c) of this section.

Proposed new subsection (f) states that the MIO requestor shall provide a copy of the MIO request to the insurance carrier, prescribing doctor, injured employee, and dispensing pharmacy, if known, on the date the request for MIO is submitted to the Division.

Proposed new subsection (g) indicates that an approved MIO shall be effective retroactively to the date the complete request for an MIO is received by the Division.

Proposed new subsection (h) provides further specifications for an MIO that is notwithstanding §133.308. Paragraph (1) states that a request for reconsideration of a preauthorization denial is not required prior to a request for independent review when pursuing an MIO under this section. If a request for reconsideration or an MIO request is not initiated within 15 days from the initial preauthorization denial, then the opportunity for an MIO under this section is waived. Paragraph (2) indicates that if pursuing an MIO after denial of a reconsideration request, a complete MIO request shall be submitted within five working days of the reconsideration denial.

Proposed new subsection (i) indicates that if an MIO is ordered by the Division under this section, an appeal of an independent review organization (IRO) decision relating to the medical necessity and reasonableness of the drugs contained in the MIO shall be submitted in accordance with §133.308(t) concerning MDR by Independent Review Organizations.

Proposed new subsection (j) provides that the MIO is to continue in effect until the later of a final adjudication of a medical dispute regarding the medical necessity and reasonableness of the drug contained in the MIO, as noted in paragraph (1); the expiration of the period for a timely appeal, noted in paragraph (2); or an agreement of the parties, noted in paragraph (3).

Proposed new subsection (k) states that withdrawal by the requestor of a request for medical necessity dispute resolution constitutes acceptance of the preauthorization denial.

Proposed new subsection (l) indicates that a party shall comply with an MIO entered in accordance with this section and the insurance carrier shall reimburse the pharmacy for prescriptions dispensed in accordance with an MIO.

Proposed new subsection (m) states that the insurance carrier shall notify the prescribing doctor, injured employee, and the dispensing pharmacy once reimbursement is no longer required in accordance with subsection (j).

Proposed new subsection (n) states that payments made by insurance carriers pursuant to this section may be eligible for reimbursement from the Subsequent Injury Fund in accordance with Labor Code §410.209, §413.055, and applicable rules.

Proposed new subsection (o) states that a decision issued by an IRO is not an agency or Commissioner decision.

Proposed new subsection (p) states that a party may seek to reverse or modify of an MIO issued under this section if a final determination of medical necessity has been rendered and the party requests a benefit contested case hearing from the Division's Chief Clerk no later than 20 days after the date the IRO decision is sent to the party.

Proposed new subsection (q) provides that the insurance carrier may dispute an interlocutory order entered under this title by filing a written request for a hearing in accordance with Labor Code §413.055 and §148.3 concerning Requesting a Hearing.

Mr. Matthew Zurek, Executive Deputy Commissioner for Health Care Management, has determined that for each year of the first five years the proposed new and amended sections will be in effect, there will be minimal fiscal implications for state government as a result of enforcing or administering the proposed new and amended sections.

Increased costs may include expenses associated with the preparation of training materials and presentation of training programs for and by Division staff and other system partici-

pants, and costs associated with monitoring the updates in the Appendix A of *ODG Treatment in Workers' Compensation* that identifies pharmaceuticals with an "N" status, which are excluded from the pharmacy closed formulary. There will be no fiscal implications for local governments as a result of enforcing or administering the proposed new and amended sections because they do not enforce or administer the rule.

Local government and state government as a covered regulated entity will be impacted in the same manner as persons required to comply with the proposed amendments, as described later in this preamble. However, there may be some additional requests for reimbursements made on the Subsequent Injury Fund (SIF) if, at the conclusion of the MIO appeals process under proposed new §134.550 of this title, an insurance carrier is found to have overpaid for previously prescribed and dispensed drugs excluded from the pharmacy closed formulary. Since the pharmacy closed formulary initially only applies to new injuries, it is unlikely that the MIO appeals process and the proposed amendments to §133.306 concerning Interlocutory Orders for Medical Benefits, which are proposed elsewhere in this edition of the *Texas Register,* would result in a significant number of requests for reimbursement from the SIF. However, the potential exposure of the SIF expands significantly in the third and subsequent years until all remaining legacy claims have been fully integrated into the use of the pharmacy closed formulary.

Mr. Zurek has determined that for each year of the first five years the sections are in effect, the proposed new and amended sections will not have a measurable effect on local employment or the local economy.

Mr. Zurek has determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of the proposed sections will be to bring more uniformity and cost certainty to prescribing medications for injured employees subject to the Texas workers' compensation system and to better coordinate delivery of pharmaceuticals pursuant to the Division's or the certified network's treatment guidelines.

All system participants benefit from the proposed pharmacy closed formulary rules because this subchapter establishes a framework to foster, facilitate, and improve understanding of reasonable and necessary health care, including prescriptions for drugs, among injured employees, health care providers, employers, insurance carriers, and the Division by establishing a pharmacy closed formulary, appeals process, and establishing the processes for both the short term and long term implementation of the rules. Application of the pharmacy closed formulary and its associated concepts are expected to result in improved quality of care and potentially improved return-to-work outcomes. Reduced system costs are also anticipated when the pharmacy closed formulary is fully implemented in the Texas workers' compensation system because there will be increased opportunities to review the use of drugs not included in the closed formulary and to prevent potential overutilization. As a result, this proposal will facilitate the use of appropriate prescriptions in the Texas workers' compensation system thereby helping injured employees recover from their injuries or illnesses. These efficiencies should translate to cost savings for the system. Reduced costs benefit all system participants through the potential for reduced premiums and an option for reallocation of savings to other system needs.

Insurance carriers will benefit from additional administrative clarity regarding preauthorization requirements for pharmaceuticals. This improvement should decrease unnecessary disputes because once a drug requiring preauthorization is approved, no dispute exists regarding the medical necessity of the approved drug. This proposal also clarifies when retrospective review is appropriate and when preauthorization is appropriate for pharmaceuticals because the Division's treatment guidelines require preauthorization for any health care provided in excess of the recommendations of the treatment guideline, which include pharmaceuticals. This clarity is important for health care providers, injured employees and insurance carriers who must comply with this rule and the treatment guideline rule. The phased-in application will also facilitate an orderly transition from the existing open formulary to the pharmacy closed formulary. This is important due to the number of injured employees that are currently utilizing drugs that will be excluded from the pharmacy closed formulary. Use of drugs excluded from the pharmacy closed formulary will require preauthorization. This process aids the insurance carrier in the attempt to assure the appropriate use of drugs excluded from the pharmacy closed formulary by prospectively reviewing the medical necessity of the "N" drugs. Preauthorization of "N" drugs for new claims may also encourage the use of alternative pharmaceutical options presumed reasonable by the Division's and certified network's treatment guidelines and discourage the use of drugs excluded from the closed formulary as a first choice option.

There is a potential for some increased administrative cost for insurance carriers. If prescription patterns remain unchanged, it is estimated that approximately 42,000 preauthorization requests for "N" drugs could be processed in the first 12 months after the rule becomes applicable. These claims are currently subject to the retrospective review process. The cost of the change from retrospective review to prospective review is a function of the net difference between the cost of retrospective review and the cost of prospective review and the total number of reviews. A worst case cost scenario for the prospective review of drugs excluded from the pharmacy closed formulary would be 42,000 preauthorization reviews multiplied by $120 per review (a standard industry of estimated average costs for preauthorization reviews has been represented in a range between $60 and $120 per review). This impact could be as much as $5 million. However, if the net cost increase per injury claim is based on the lower end of the range, $60 ($2.5 million for the 42,000 preauthorization reviews), the impact decreases by 50 percent. Reduction of requests to use drugs not included in the pharmacy closed formulary would further reduce the potential impact on the system. There will be additional costs for insurance carriers when the pharmacy closed formulary applies to legacy claims. This could be a significant increase if pharmacological management of legacy claims is not utilized or is unproductive.

Additionally, insurance carriers are likely to realize direct cost savings if the pharmacy closed formulary alters prescribing patterns by using generally less expensive drugs included in the pharmacy closed formulary and reducing any over-utilization of drugs not preferred as a first-line treatment. The long term benefits of this change, however, are more difficult to quantify since they focus on cost avoidance and general system process improvements. It is expected that careful prospective review of the use of "N" drugs will decrease their long term use and inherent associated problems.

The rules also provide the insurance carrier with the potential to access the subsequent injury fund in instances when the insurance carrier has reimbursed a health care provider for a drug that has been dispensed subsequent to an MIO and the insurance carrier subsequently prevails in a medical necessity dis-

pute. This concept supports the good faith efforts of health care providers and insurance carriers to provide medically necessary drugs to an injured employee on a timely basis.

Insurance carriers will likely incur additional administrative costs when identifying injured employees with an injury date prior to January 1, 2011, who are being prescribed drugs excluded from the pharmacy closed formulary and notifying these injured employees, their prescribing doctors, and pharmacies, if known, of the applicability of the pharmacy closed formulary as of January 1, 2013. The methods of insurance carrier notification may vary and may include electronic means or U.S. Mail. The Division estimates the cost range for providing the notice by postage to be $0.40 for postage bulk mail, and $0.44 for general delivery although electronic means may be significantly less expensive than the cost for mailing. Based on 2008 data, approximately 55,000 injured employees were prescribed drugs excluded from the pharmacy closed formulary more than two years post-injury. Therefore, the potential estimate for notification occurring by postage to the injured employees, prescribing doctors, and pharmacies, if known, is approximately $66,000.00 to $72,600.00 by U.S. mail. Despite the potential cost for identification and notification of these injured employees, an orderly transition to the pharmacy closed formulary will benefit all of the parties for these injury claims. The insurance carrier may incur minimal administrative costs for the notification to the prescribing doctor, injured employee, and the dispensing pharmacy when an MIO, issued pursuant to §134.550, expires due to final adjudication, expiration of appeal time period, or by agreement of the parties. The methods of insurance carrier notification may vary and may include electronic means or U.S. Mail. The Division estimates the cost range for providing the notice by postage to be $0.40 for postage bulk mail, and $0.44 for general delivery although electronic means may be significantly less expensive than the cost for mailing.

Injured employees benefit from a system that provides more certainty for the pharmacy dispensing the drug both administratively and financially. The new rules increase injured employees' access to pharmaceutical services by providing consistency in processes for participating pharmacies. Additionally, the formulary continues to offer the injured employee a complete spectrum of reasonable and necessary pharmaceuticals while also advancing appropriate return-to-work.

Quality throughout the system is anticipated to improve. When drugs that are not included in the pharmacy closed formulary are prescribed, injured employees can be assured that the medical necessity of the prescribed drug has been reviewed. By adding this medical review check point, the safe use of the prescription drug increases because the injured employee's use of the prescription is subject to an added level of scrutiny. Collaboration between the pharmacist, prescribing doctor, and the utilization review agent in such situations assures the best interests of the injured employee.

As a protection for injured employees, these rules provide for continued use of a previously prescribed drug that is not included in the pharmacy closed formulary in situations that could result in an unreasonable possibility of a medical emergency if the drug is abruptly discontinued. Since the rules initially apply only to new injury claims, the phased-in applicability allows prescribing doctors, insurance carriers and injured employees to revisit and evaluate the continued use of drugs not included in the pharmacy closed formulary.

Appropriate use of pharmaceuticals is an important component of services necessary to return injured employees to a work ready status. When combined with the other system components, including treatment and return to work guidelines, employers should experience better return-to-work outcomes. Employers will benefit from injured employees' timely return-to-work in either full or limited (modified/alternate) duty capacity. Pre-injury employers will be positively impacted by the improved return-to-work outcomes of trained, experienced employees. This is because safely returning an injured employee to work should directly decrease employers' hiring and training costs, as well as costs related to an injured employee's absence. There may be additional indirect benefits to the employer through decreased premiums as a result of decreased medical benefit and indemnity costs through improved delivery of health care and improved return-to-work outcomes.

Prescribing doctors should benefit from adoption of the pharmacy closed formulary through the clarification of which pharmaceuticals require preauthorization in the Texas workers' compensation system. This knowledge allows prescribing doctors to coordinate the needs of injured employees and facilitate the dispensing of necessary drugs, including the preauthorization process. The prescribing doctors also benefit from the inclusion of the MIO process which allows them to exercise their clinical experience and training and their case specific knowledge of the injured employee in identifying an unreasonable risk of a medical emergency associated with the denial of a previously prescribed and dispensed drug excluded from the pharmacy closed formulary. Although there may be some minimal administrative time, and therefore cost associated with the preauthorization process for a prescribing doctor, the process should for the most part only involve transferring existing information and rationale to the insurance carrier or insurance carrier's utilization review agent in the manner outlined in §134.600 and these proposed rules.

Pharmacists will benefit from system changes based on the adoption of a pharmacy closed formulary. Currently, pharmacists are unclear as to preauthorization requirements for pharmaceuticals and the applicability of treatment guideline recommendations. The new rules clarify that only drugs excluded from the pharmacy closed formulary require preauthorization and that all other prescribed and dispensed drugs are subject to retrospective review of medical necessity based on the recommendations included in the Division's treatment guidelines or under network treatment guidelines or protocols for claims subject to a certified network. This clarification provides an administrative certainty for which drugs require preauthorization and when. This certainty will facilitate the dispensing of pharmaceuticals in the Texas workers' compensation system. Additionally, clear preauthorization requirements will decrease the potential of reimbursement denials for drugs excluded from the pharmacy closed formulary. In CY 2008 approximately 11 percent of prescriptions for drugs excluded from the pharmacy closed formulary were denied retrospectively. Pharmacy charges for these denials were approximately $450,000. Pharmacies' loss of reimbursement for these prescriptions was estimated at $350,000. The preauthorization requirements for drugs excluded from the pharmacy closed formulary should obviate this situation.

Additionally, the clarification regarding the relationship between §134.600 and §137.100 will prevent confusion concerning administrative denials based on lack of preauthorization.

The new rules also provide a vehicle for pharmacists to pursue an MIO for continued use of a previously prescribed and dispensed drug excluded from the pharmacy closed formulary when preauthorization has been denied and an unreasonable risk of a medical emergency is present. The pharmacist is allowed to facilitate this process in order to avoid a potential medical emergency. Issuance of an MIO in this situation also protects the reimbursement interest of the pharmacy during the applicability of the MIO.

Health care providers, other than pharmacists or prescribing doctors, are unlikely to see any additional costs, and benefits would likely be indirect and realized as overall system improvements.

General Economic Impact Statement As required by the Government Code §2006.002(c), the Division has determined that the proposal may have an adverse economic effect on small and micro business. Such businesses impacted would be insurance carriers, prescribing doctors and pharmacies. Department records as of May 2010 show there are 30 insurance carriers licensed in Texas receiving workers' compensation or excess workers' compensation premiums that qualify as a small or micro business. According to fourth quarter 2009 records of the Texas Workforce Commission, there are 18,326 prescribing doctors who reported as small businesses, of which 16,187 are micro businesses. For pharmacies for the same time period, there are 3,628 small businesses, and 2,940 of them are micro businesses.

Insurance Carriers

Insurance carriers may have adverse economic impact because of the preauthorization costs that may occur from preauthorization requests for "N" drugs after the pharmacy closed formulary becomes applicable. Based on prescription year 2008 data, approximately 42,000 prescriptions would require preauthorization during the first year of the applicability of the new rules. These prescriptions are currently subject to retrospective review. After implementation of the rules, the administrative costs estimated to be incurred cumulatively by the insurance carriers in the Texas workers' compensation system for preauthorization costs, assuming that prescription patterns remain consistent, would be between $2.5 and $5 million in the first year the pharmacy closed formulary is in effect. This estimate is taken from the preauthorization review of a medical claim from a low of $60 to a high of $120 multiplied by the approximate number of preauthorization reviews (42,000). Ultimately the net costs to insurance carriers for the prospective review of these claims will be the difference between the new prospective review costs less the existing retrospective review costs. These costs are unique to the individual business practices of each insurance carrier as each utilizes unique retrospective review procedures. Depending on these individual business practices, the retrospective review procedures may also have an ensuing adverse economic effect on pharmacists and prescribing doctors.

Insurance carriers will incur additional costs when the pharmacy closed formulary is fully implemented for legacy claims beginning January 1, 2013. This amount could be sizeable depending on the outcome of the pharmacological management of the legacy claims between January 1, 2011 and December 31, 2012.

Another estimated administrative cost that may have an economic impact would be identifying claimants with dates of injury prior to January 1, 2011. Based on 2008 data, there are approximately 55,000 injured employees who are prescribed drugs not included in the pharmacy closed formulary with more than two years post-injury. The insurance carrier is required to notify the injured employee regarding such claims, their prescribing doctor, and the pharmacy, if known, in order to facilitate a discussion of ongoing pharmacological management regarding dispensing of drugs excluded from the pharmacy closed formulary. Written notification of the impending applicability of the closed formulary to injured employees with dates of injury prior to January 1, 2011 is to be completed by the insurance carriers by July 1, 2012.

According to Division records, there are no self-insured employers that would be considered small or micro businesses. Therefore, there are no self-insured employers impacted by these proposed amendments and new sections.

Prescribing Doctors There is a potential for additional administrative costs for prescribing doctors when the preauthorization begins for drugs excluded from the pharmacy closed formulary. There may be approximately 42,000 preauthorization requests which may translate to 42,000 statements of medical necessity being issued by prescribing doctors. Administrative time and cost incurred by the prescribing doctor may increase if the insurance carrier and prescribing doctor decide to enter into a mutual agreement regarding the pharmacy closed formulary's application for a particular legacy claim or claims. Since there will also be medical involvement in the following instances, there may be additional administrative time and cost when a prescribing doctor contacts the insurance carrier to discuss ongoing pharmacological management of a legacy claim, a dispute occurs regarding the continued use of previously preauthorized drugs, and when the prescribing doctor identifies an unreasonable risk of a medical emergency associated with the denial of a previously prescribed and dispensed drug excluded from the pharmacy closed formulary and he or she requests an MIO.

Pharmacies

Pharmacies may be impacted adversely by incurring more administrative costs if they decide to pursue an MIO as described in the proposed sections.

Summary There will be no difference in the cost of compliance between a large, small or micro business as a result of the proposed amendments and new sections. Based upon the cost of labor per hour, there is not a disproportionate economic impact on small or micro-businesses. Even if the proposed amendments or new sections would have an adverse impact on small or micro-businesses, it is neither legal nor feasible to waive the provisions to all affected entities and individuals.

The Division also considered not adopting the proposed amendments, implementing different requirements or standards for the affected small and micro-businesses, and exempting small and micro-businesses from the requirements of the proposed amendments and new section.

Not adopting the proposed amendments and new sections. The Division rejected this approach because it would not comply with the requirements of Labor Code §408.028(b), which requires the Commissioner to adopt a pharmacy closed formulary. Section 408.028(b) also directs the Commissioner to adopt rules allowing for an appeals process for drugs in which a treating doctor determines and documents that a drug not included in the pharmacy closed formulary is necessary to treat an injured employee's compensable injury.

Implementing different requirements or standards for the affected small or micro-businesses. The Division rejected this

option because implementing different requirements or standards would not be consistent with the new definitions provided under HB 7, which defines "evidence-based medicine" under Labor Code §408.011(18-a) and "health care reasonably required" under §408.011(22-a). Further, implementing different requirements or standards would not comply with the additional HB 7 legislative objectives stated under Labor Code §413.0111, which requires that the rules adopted by the Commissioner for the reimbursement of prescription medications and services must authorize pharmacies to use agents or assignees to process claims and act on the behalf of the pharmacies under the terms and conditions agreed on by the pharmacies.

Exempting small and micro-businesses from the requirements of the proposed amendments and new sections. The Division rejected this approach because it would neither comply with the requirement to adopt a pharmacy closed formulary nor the requirements to comply with the additional legislative objectives of HB 7 and the maintenance of using the standard of evidence-based medicine.

Therefore, it is neither legal nor feasible to waive the requirements of the proposed amendments or new sections for small or micro-businesses.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on August 16, 2010. Comments may be submitted via the internet through the Division's internet website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

A public hearing on this proposal will be held on August 16, 2010 at 9:00 a.m. in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. Those persons interested in attending the public hearing should contact the Texas Department of Insurance, Division of Workers' Compensation, Workers' Compensation Counsel, (512) 804-4703 to confirm the date, time, and location of the public hearing for this proposal. The Division offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Salazar at (512) 804-4403 at least two days prior to the hearing date. The public hearing schedule will also be available on the Division's website at www.tdi.state.tx.us/wc/rules/proposedrules/index.html.

The amendments and new sections are proposed under the Labor Code §§408.028, 401.011, 413.0111, 413.055, 410.209, 413.0141, 402.042, 408.021, 408.027, 408.0271, 413.011, 413.013, 413.014, 413.015, 413.017, 413.020, 413.031, 413.0511, 413.053, 402.00111, 402.00116, 402.00128, and 402.061; Insurance Code Chapters 1305, 4201, and 4202, Occupations Code §§551.003, 562.001 and 562.154 and Occupations Code Chapter 157 and Chapter 563. Labor Code §408.028 requires the adoption of a closed formulary in the workers' compensation system. Section 408.028 also requires an appeals process for the closed formulary as well as the use of generics and clinically-appropriate over-the counter alternatives to prescription medication. Section 401.011 contains definitions used in the Texas workers' compensation system (in particular, §401.011(18-a), the definition of "evidence-based medicine," §401.011(19)(E), the definition of "health care," which includes a prescription drug, medicine or other remedy, and §401.011(42), the definition of "health care reasonably required"). Section 413.0111 requires that a rule on reimbursement of prescription medication or services must authorize pharmacies to use agents or assignees to process claims and act on behalf of pharmacies. Section 413.055 provides that the Commissioner may enter interlocutory orders regarding medical benefits, allows reimbursement under the subsequent injury fund for reversed or modified orders and entitlement to a hearing to dispute the order which is binding during the pendency of the appeal. Section 410.209 requires the subsequent injury fund to reimburse an insurance carrier any benefits overpayment made under an interlocutory order or decision that is reversed or modified. Section 413.0141 sets forth that the Commissioner may by rule provide that an insurance carrier shall provide for payment of specified pharmaceutical services for the first seven days following the date of injury if certain conditions are met. Section 402.042 requires the Commissioner to develop and implement policies clearly defining respective responsibilities of the Commissioner and Division staff. Section 408.021 states that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 408.027 requires a health care provider to submit a claim for payment to the insurance carrier for health care services provided to the injured employee not later than the 95th date on which the health care services are provided and the insurance carrier must pay, reduce, deny or determine to audit the health care provider's claim not later than the 45th day after the date of receipt by the insurance carrier of the health care provider's claim. Section 408.0271 allows for reimbursement by the health care provider if the insurance carrier determines that the health care services provided to the injured employee are inappropriate. Section 413.011 requires the Commissioner by rule to establish medical policies and guidelines relating to necessary treatment for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control. Section 413.013 requires the Commissioner by rule to establish programs related to health care treatments and services for dispute resolution, monitoring and review. Section 413.014 requires preauthorization by the insurance carrier for specified health care treatments and services. This section also provides that a preauthorized treatment or service is not subject to retrospective review of its medical necessity. Section 413.015 requires insurance carriers to pay charges for medical services as provided in the statute and requires that the Commissioner by rule to ensure compliance with the medical policies and fee guidelines through audit and review. Section 413.017 provides a presumption of reasonableness for medical services fees that are consistent with Division medical policies and fee guidelines and medical services that are provided subject to prospective, concurrent or retrospective review as required by Division policies and authorized by the insurance carrier. Section 413.020 requires the Commissioner by rule to establish Division charges for evaluation of an insurance carrier or health care provider's services and fees. Section 413.031 provides for procedures for medical dispute resolution. Section 413.0511 requires that the Medical Advisor

must make recommendations regarding the adoption of rules and policies concerning health care. Section 413.053 requires the Commissioner by rule to establish standards of reporting and billing governing both form and content. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or Commissioner. Section 402.00128 vests general operational powers to the Commissioner to conduct daily operations of the Division and implement Division policy including the duty to delegate, assess and enforce penalties and enter appropriate orders as authorized by Labor Code Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Insurance Code Chapter 1305 is the Workers' Compensation Health Care Network Act and contains treatment guidelines and authorization requirements applicable to certified networks. Chapter 4201 governs utilization review agents and applies to utilization review of health care service provided to a person eligible for workers' compensation medical benefits under Labor Code Title 5. Labor Code Title 5 prevails in the event of a conflict between Chapter 4201 and Labor Code Title 5. Chapter 4202 governs independent review organizations, entities utilized in a dispute over the issue of medical necessity and reasonableness. Occupations Code §551.003 governs pharmacies and pharmacists, and provides the definitions of "compounding" and "substitution." Section 562.001 provides the definition of "generically equivalent." Occupations Code Chapter 157 governs the authority of a physician to delegate certain functions.

The following sections are affected by this proposal: §134.500, Labor Code §§401.011, 408.021, 408.028, 413.011, 413.0111, 413.013,413.014, 413.015, 413.017, 413.031, and 413.0511; Insurance Code Chapter 1305; Occupations Code §551.003, §562.001 and Occupations Code Chapter 157 §134.506, Labor Code §§401.011, 402.042, 408.021, 408.027, 408.0271, 408.028, 413.011, 413.0111, 413.013, 413.014, 413.0141, 413.015, 413.017, 413.020, 413.031, 413.0511, and 413.053; Insurance Code Chapters 1305, 4201 and 4202 §134.510, Labor Code §§401.011, 402.042, 408.021, 408.027, 408.0271, 408.028, 413.011, 413.0111, 413.013, 413.014, 413.0141, 413.015, 413.017, 413.020, 413.031, 413.0511, and 413.051; Insurance Code Chapters 1305, 4201 and 4202; Occupations Code §551.003, §562.001, and Occupations Code Chapter 157 §134.520, Labor Code §§401.011, 402.042, 408.021, 408.027, 408.0271, 408.028, 413.011, 413.0111, 413.013, 413.014, 413.0141, 413.015, 413.017, 413.020, 413.031, 413.0511, and 413.053; Insurance Code Chapters 1305, 4201 and 4202; Occupations Code §551.003, §562.001, and Occupations Code Chapter 157 §134.530, Labor Code §§401.011, 402.042, 408.021, 408.027, 408.0271, 408.028, 413.011, 413.0111, 413.013, 413.014, 413.0141, 413.015, 413.017, 413.020, 413.031, 413.0511, and 413.053; Insurance Code Chapters 1305, 4201 and 4202; Occupations Code §551.003, §562.001, and Occupations Code Chapter 157 §134.540, Labor Code §§401.011, 402.042, 408.021, 408.027, 408.0271, 408.028, 413.011, 413.0111, 413.013, 413.014, 413.015, 413.017, 413.020, 413.031, 413.0511, and 413.053; Insurance Code Chapters 1305, 4201 and 4202; Occupations Code §551.003, §562.001, and Occupations Code Chapter 157 §134.550, Labor Code §§401.011, 402.042, 408.021, 408.028, 410.209, 413.011, 413.013, 413.014, 413.015, 413.020, 413.031, 413.0511, 413.053, and 413.055; Insurance Code Chapters 1305, 4201, and 4202.

§134.500. Definitions.

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

(1) Brand name drug--A drug marketed under a proprietary, trademark-protected name.

(2) Certified workers' compensation health care network (certified network)--An organization that is certified in accordance with Insurance Code Chapter 1305 and department rules.

(3) Closed formulary--All available Food and Drug Administration (FDA) approved prescription and nonprescription drugs prescribed and dispensed for outpatient use, but excludes:

(A) drugs identified with a status of "N" in the current edition of the ODG Treatment in Workers' Comp (ODG) / Appendix A, ODG Workers' Compensation Drug Formulary, and any updates;

(B) any compound that contains a drug identified with a status of "N" in the current edition of the *ODG Treatment in Workers' Comp (ODG) / Appendix A, ODG Workers' Compensation Drug Formulary,* and any updates; and

(C) any investigational or experimental drug for which there is early, developing scientific or clinical evidence demonstrating the potential efficacy of the treatment, but which is not yet broadly accepted as the prevailing standard of care in accordance with Labor Code §413.014.

(4) Compounding--As defined under Occupations Code §551.003(9), the preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug order based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(B) for administration to a patient by a practitioner as the result of a practitioner's initiative based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(C) in anticipation of a prescription drug order based on a routine, regularly observed prescribing pattern; or

(D) for or as an incident to research, teaching, or chemical analysis and not for selling or dispensing, except as allowed under Occupations Code §562.154 or Chapter 563.

(5) Generic--See generically equivalent in the definition of paragraph (6) of this section.

(6) Generically equivalent--As defined under Occupations Code §562.001, a drug that, when compared to the prescribed drug, is:

(A) pharmaceutically equivalent--Drug products that have identical amounts of the same active chemical ingredients in the same dosage form and that meet the identical compendia or other applicable standards of strength, quality, and purity according to the United States Pharmacopoeia or another nationally recognized compendium; and

(B) therapeutically equivalent--Pharmaceutically equivalent drug products that, if administered in the same amounts, will provide the same therapeutic effect, identical in duration and intensity.

(7) Medical emergency--The sudden onset of a medical condition manifested by acute symptoms of sufficient severity, including severe pain that in the absence of immediate medical attention could reasonably be expected to result in:

(A) placing the patient's health or bodily functions in serious jeopardy; or

(B) serious dysfunction of any body organ or part.

[~~(1) Compounding--The combining of a drug with one or more drugs or substances (other than water) as a result of a prescription.~~]

[~~(2) Statement of Medical Necessity--A written statement and supporting documentation from the prescribing doctor to establish the need for treatments or services, or prescriptions, including the need for a brand name drug where applicable. A statement of medical necessity includes the employee's full name, date of injury, social security number or TWCC claim number, and how the services, or prescriptions treat the diagnosis, promote recovery, or enhance the ability of the employee to return to or retain employment.~~]

(8) [~~(3)~~] Nonprescription drug or over-the-counter medication--A non-narcotic drug that may be sold without a prescription and that is labeled and packaged in compliance with state or federal law.

(9) [~~(4)~~] Open formulary--Includes all available Food and Drug Administration (FDA) approved prescription and nonprescription drugs prescribed and dispensed for outpatient use, but does not include drugs that lack FDA approval, or non-drug items.

(10) [~~(5)~~] Prescribing doctor--A physician or dentist [~~doctor~~] who prescribes prescription drugs or over the counter medications in accordance with the physician's or dentist's [~~doctor's~~] license and state and federal laws and rules. For purposes of this chapter, prescribing doctor includes an advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders, under Occupations Code Chapter 157, who prescribes prescription drugs or over the counter medication under the physician's supervision and in accordance with the health care practitioner's license and state and federal laws and rules.

(11) [~~(6)~~] Prescription--An order [~~from a doctor~~] for a prescription or nonprescription drug to be dispensed.

(12) [~~(7)~~] Prescription drug--

(A) A substance for which federal or state law requires a prescription before the substance may be legally dispensed to the public;

(B) A drug that under federal law is required, before being dispensed or delivered, to be labeled with the statement: "Caution: federal law prohibits dispensing without prescription;" "Rx only;" or another legend that complies with federal law; or

(C) A drug that is required by federal or state statute or regulation to be dispensed on prescription or that is restricted to use by a prescribing doctor only.

(13) Statement of medical necessity--A written statement and supporting evidence-based documentation from the prescribing doctor to establish the need for treatments or services, or prescriptions, including the need for a brand name drug where applicable. A statement of medical necessity includes:

(A) the injured employee's full name;

(B) date of injury;

(C) social security number;

(D) diagnosis code(s);

(E) whether the drug has previously been prescribed and dispensed, if known, and whether the inability to obtain the drug poses an unreasonable risk of a medical emergency; and

(F) how the prescription treats the diagnosis, promotes recovery, or enhances the ability of the injured employee to return to or retain employment.

[~~(b) Section 134, Subchapter F applies to all prescriptions that are prescribed or filled on or after March 1, 2002. For prescriptions filled before March 1, 2002 §134.201 of this title (relating to Medical Fee Guideline for Medical Treatments and Services Provided under the Texas Workers' Compensation Act) shall be applicable.~~]

§134.506. Outpatient Open Drug Formulary for Claims with Dates of Injury Prior to January 1, 2011.

(a) For claims with dates of injury prior to January 1, 2011 (for the purposes of this section, referred to as "legacy claims"), the Commissioner of Workers' Compensation [~~The commission~~] hereby adopts an open formulary as defined in §134.500(9) of this title (relating to Definitions). [~~§134.500(a)(4). The carrier shall pay for drugs that are reasonable and medically necessary to treat the compensable injury or occupational disease including prescriptions for off label indications when used in accordance with current medical standards and prescribed in compliance with published contradictions, precautions, and warnings. Over-the-counter medications with a prescription shall be reimbursed in accordance with §134.503 (relating to Reimbursement Methodology).~~]

(b) Health care, including a prescription drug, for legacy claims not subject to a certified network shall be in accordance with the division's adopted treatment guidelines under §137.100 of this title (relating to Treatment Guidelines) except as provided by subsection (d) and (f) of this section.

(c) Health care, including a prescription drug, for legacy claims subject to a certified network shall be in accordance with the certified network's treatment guidelines pursuant to Insurance Code Chapter 1305 and Chapter 10 of this title (relating to Workers' Compensation Health Care Networks).

(d) Drugs included in the open formulary prescribed and dispensed for legacy claims not subject to a certified network do not require preauthorization, except as required by Labor Code §413.014.

(e) Drugs included in the open formulary prescribed and dispensed for legacy claims subject to a certified network shall be preauthorized in accordance with Insurance Code Chapter 1305 and Chapter 10 of this title.

(f) Drugs included in the open formulary prescribed and dispensed without preauthorization for legacy claims are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier.

§134.510. Transition to the Use of the Closed Formulary for Claims with Dates of Injury Prior to January 1, 2011.

(a) Applicability. This section applies to claims with dates of injury prior to January 1, 2011 (for the purposes of this section, referred to as "legacy claims"), which are subject to §134.530 of this title (related to Requirements for Use of the Closed Formulary for Claims Not Subject to Certified Networks), §134.540 of this title (relating to Requirements for Use of the Closed Formulary for Claims Subject to Certified Networks), and §134.550 of this title (relating to Medical Interlocutory Order) on and after January 1, 2013.

(b) Transition of legacy claims.

(1) At any time after January 1, 2011 and prior to January 1, 2013: (A) The prescribing doctor should include a statement of medical necessity as defined in §134.500(13) of this title (relating to Definitions) with the prescription for drugs excluded from the closed formulary.

(B) The prescribing doctor or the insurance carrier may contact each other for a discussion of ongoing pharmacological management of the injured employee's claim.

(C) When contacted by the prescribing doctor, the insurance carrier must provide a name and phone number of the insurance carrier representative that the prescribing doctor may contact for discussions of ongoing pharmacological management.

(2) No later than July 1, 2012, the insurance carrier shall:

(A) identify all legacy claims; and

(B) provide written notification to the injured employee, prescribing doctor, and pharmacy if known, that contains the following:

(i) the notice of the impending date and applicability of the closed formulary for legacy claims;

(ii) the name and phone number of the insurance carrier representative that the prescribing doctor may contact for a discussion of ongoing pharmacological management of specific legacy claims; and

(iii) an identified two-week period of time for the prescribing doctor to initiate a discussion of ongoing pharmacological management for each legacy claim.

(c) Agreement. To ensure continuity of care, notwithstanding subsection (a) of this section, an insurance carrier and a prescribing doctor may enter into a voluntary certification agreement in accordance with §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) regarding the application of the pharmacy closed formulary for individual legacy claims on claim-by-claim basis.

(d) Agreement documentation requirements.

(1) The insurance carrier shall document any agreement and the terms, and share a copy of the agreement with the prescribing doctor and injured employee.

(2) Health care provided as a result of the agreement is not subject to retrospective review of medical necessity.

(3) Denial of a request for a voluntary certification agreement is not subject to dispute resolution.

(4) If no agreement is reached and documented by January 1, 2013 for a legacy claim, the requirements of §§134.530, 134.540, and 134.550 of this title shall apply.

§134.520. Outpatient Closed Drug Formulary for Dates of Injury On or After January 1, 2011.

The Commissioner of Workers' Compensation hereby adopts a closed formulary as defined in §134.500(3) of this title (relating to Definitions) for claims with dates of injury on or after January 1, 2011.

§134.530. Requirements for Use of the Closed Formulary for Claims Not Subject to Certified Networks.

(a) Applicability. The closed formulary applies to all drugs that are prescribed and dispensed for outpatient use for claims not subject to a certified network on or after January 1, 2011 when the date of injury occurred on or after January 1, 2011.

(b) Preauthorization.

(1) For claims in which the closed formulary applies, preauthorization as provided in subsection (d) of this section is required for drugs excluded from the division's closed formulary.

(2) Preauthorization is always required for investigational or experimental services or devices in accordance with Labor Code §413.014.

(3) When §134.600(p)(12) of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care) conflicts with this section, this section prevails.

(4) An intrathecal drug delivery system, prior to its initial use, requires preauthorization in accordance with §134.600 of this title and the preauthorization request must include the prescribing doctor's drug regime plan of care, and the anticipated dosage or range of dosages for the administration of pain medication.

(5) Refills of an intrathecal drug delivery system with drugs excluded from the closed formulary, which are billed using Healthcare Common Procedure Coding System (HCPCS) Level II J codes, and submitted on a CMS-1500 or UB-04 billing form, require preauthorization on an annual basis. Preauthorization for these refills is also required whenever:

(A) the medications, dosage or range of dosages, or the drug regime proposed by the prescribing doctor differs from the medications, dosage or range of dosages, or drug regime previously preauthorized by that prescribing doctor; or

(B) there is a change in prescribing doctor.

(c) Treatment guidelines. Except as provided by this subsection, the prescribing of drugs shall be in accordance with §137.100 of this title (relating to Treatment Guidelines), the division's adopted treatment guidelines.

(1) Prescription and nonprescription drugs included in the division's closed formulary and recommended by the division's adopted treatment guidelines may be prescribed and dispensed without preauthorization.

(2) Prescription and nonprescription drugs included in the division's closed formulary that exceed or are not addressed by the division's adopted treatment guidelines may be prescribed and dispensed without preauthorization.

(3) Drugs included in the closed formulary that are prescribed and dispensed without preauthorization are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier in accordance with subsection (f) of this section.

(d) Appeals process for drugs excluded from the closed formulary.

(1) For situations in which the prescribing doctor determines and documents that a drug excluded from the closed formulary is necessary to treat an injured employee's compensable injury and has prescribed the drug, the prescribing doctor, other requestor, or injured employee must request approval of the drug by requesting preauthorization, including reconsideration, in accordance with §134.600 of this title and applicable provisions of Chapter 19 of this title (relating to Agents' Licensing).

(2) If preauthorization is being requested by an injured employee or a requestor other than the prescribing doctor, and the injured employee or other requestor requests a statement of medical necessity, the prescribing doctor shall provide a statement of medical necessity to facilitate the preauthorization submission as set forth in §134.502 of this title (relating to Pharmaceutical Services).

(3) If preauthorization for a drug excluded from the closed formulary is denied, the requestor may submit a request for medical dispute resolution in accordance with §133.308 of this title (relating to MDR by Independent Review Organizations).

(4) In the event of an unreasonable risk of a medical emergency, an interlocutory order may be obtained in accordance with §133.306 of this title (relating to Interlocutory Orders for Medical Benefits) or §134.550 of this title (relating to Medical Interlocutory Order).

(e) Initial pharmaceutical coverage.

(1) Drugs included in the closed formulary which are prescribed for initial pharmaceutical coverage, in accordance with Labor Code §413.0141, may be dispensed without preauthorization and are not subject to retrospective review of medical necessity.

(2) Drugs excluded from the closed formulary which are prescribed for initial pharmaceutical coverage in accordance with Labor Code §413.0141, may be dispensed without preauthorization, except as referenced in subsection (b)(2) of this section, and are subject to retrospective review of medical necessity.

(f) Retrospective review. Except as provided in subsection (e)(1) of this section, drugs that do not require preauthorization are subject to retrospective review for medical necessity in accordance with §133.230 of this title (relating to Insurance Carrier Audit of a Medical Bill) and §133.240 of this title (relating to Medical Payments and Denials), and applicable provisions of Chapter 19 of this title.

(1) Health care, including a prescription for a drug, provided in accordance with §137.100 of this title is presumed reasonable as specified in Labor Code §413.017, and is also presumed to be health care reasonably required as defined by Labor Code §401.011(22-a).

(2) In order for an insurance carrier to deny payment subject to a retrospective review for pharmaceutical services that are recommended by the division's adopted treatment guidelines, §137.100 of this title, the denial must be supported by documentation of evidence-based medicine that outweighs the presumption of reasonableness established under Labor Code §413.017.

(3) A prescribing doctor who prescribes pharmaceutical services that exceed, are not recommended, or are not addressed by §137.100 of this title, is required to provide documentation upon request in accordance with §134.500(13) of this title (relating to Definitions) and §134.502(e) and (f) of this title.

§134.540. Requirements for Use of the Closed Formulary for Claims Subject to Certified Networks.

(a) Applicability. The closed formulary applies to all drugs that are prescribed and dispensed for outpatient use for claims subject to a certified network on or after January 1, 2011 when the date of injury occurred on or after January 1, 2011.

(b) Preauthorization.

(1) Preauthorization as provided in subsection (d) of this section is required for drugs excluded from the division's closed formulary.

(2) An intrathecal drug delivery system requires preauthorization in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10 of this title (relating to Workers' Compensation Health Care Networks).

(3) Refills of an intrathecal drug delivery system with drugs excluded from the closed formulary, which are billed using Healthcare Common Procedure Coding System (HCPCS) Level II J codes, and submitted on a CMS-1500 or UB-04 billing form, require preauthorization in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10 of this title.

(c) Treatment guidelines. The prescribing of drugs shall be in accordance with the certified network's treatment guidelines and preauthorization requirements pursuant to Insurance Code Chapter 1305 and Chapter 10 of this title. Drugs included in the closed formulary that are prescribed and dispensed without preauthorization are subject to retrospective review of medical necessity and reasonableness of health care by the insurance carrier in accordance with subsection (e) of this section.

(d) Appeals process for drugs excluded from the closed formulary.

(1) For situations in which the prescribing doctor determines and documents that a drug excluded from the closed formulary is necessary to treat an injured employee's compensable injury and has prescribed the drug, the prescribing doctor, other requestor, or injured employee must request approval of the drug in a specific instance by requesting preauthorization in accordance with the certified network's preauthorization process established pursuant to Chapter 10, Subchapter F of this title (relating to Utilization Review and Retrospective Review) and applicable provisions of Chapter 19 of this title (relating to Agents' Licensing).

(2) If preauthorization is pursued by an injured employee or requestor other than the prescribing doctor, and the injured employee or other requestor requests a statement of medical necessity, the prescribing doctor shall provide a statement of medical necessity to facilitate the preauthorization submission as set forth in §134.502 of this title (relating to Pharmaceutical Services).

(3) If preauthorization for a drug excluded from the closed formulary is denied, the requestor may submit a request for medical dispute resolution in accordance with §133.308 of this title (relating to MDR by Independent Review Organizations).

(4) In the event of an unreasonable risk of a medical emergency, an interlocutory order may be obtained in accordance with §133.306 of this title (relating to Interlocutory Orders for Medical Benefits) or §134.550 of this title (relating to Medical Interlocutory Order).

(e) Retrospective review. Drugs that do not require preauthorization are subject to retrospective review for medical necessity in accordance with §133.230 of this title (relating to Insurance Carrier Audit of a Medical Bill), §133.240 of this title (relating to Medical Payments and Denials), the Insurance Code, Chapter 1305, applicable provisions of Chapters 10 and 19 of this title.

(1) In order for an insurance carrier to deny payment subject to a retrospective review for pharmaceutical services that fall within the treatment parameters of the certified network's treatment guidelines, the denial must be supported by documentation of evidence-based medicine that outweighs the evidence-basis of the certified network's treatment guidelines.

(2) A prescribing doctor who prescribes pharmaceutical services that exceed, are not recommended, or are not addressed by the certified network's treatment guidelines, is required to provide documentation upon request in accordance with §134.500(13) of this title (relating to Definitions) and §134.502(e) and (f) of this title.

§134.550. Medical Interlocutory Order.

(a) The purpose of this section is to provide a prescribing doctor or pharmacy an ability to obtain an medical interlocutory order

(MIO) in instances where preauthorization denials of a previously prescribed and dispensed drug(s) excluded from the closed formulary poses an unreasonable risk of a medical emergency as defined in §134.500(7) of this title (relating to Definitions).

(b) A request for an interlocutory order that does not meet the criteria described by this section may still be requested pursuant to §133.306 of this title (relating to Interlocutory Order for Medical Benefits).

(c) An MIO will be issued if the request for an MIO contains the following information:

(1) injured employee name;

(2) date of birth of injured employee;

(3) prescribing doctor's name;

(4) name of drug and dosage;

(5) MIO requestor's name (pharmacy or prescribing doctor);

(6) MIO requestor's contact information;

(7) a statement that a preauthorization request for a previously prescribed and dispensed drug(s), which is excluded from the closed formulary, has been denied by the insurance carrier;

(8) a statement that an independent review request has already been submitted to the insurance carrier or the insurance carrier's utilization review agent in accordance with §133.308 of this title (relating to MDR by Independent Review Organizations);

(9) a statement that the preauthorization denial poses an unreasonable risk of a medical emergency as defined in §134.500(7) of this title;

(10) a statement that the potential medical emergency has been documented in the preauthorization process;

(11) a statement that the insurance carrier has been notified that a request for an MIO is being submitted to the division; and

(12) a signature and the following certification by the MIO requestor for paragraphs (7) - (12) of this subsection, "I hereby certify under penalty of law that the previously listed conditions have been met."

(d) A complete request for an MIO under this section shall be processed and approved by the division in accordance with this section. At the discretion of the division, an incomplete request for an MIO under this section may be considered in accordance with this section.

(e) The request for an MIO may be submitted on the designated division form available on the Texas Department of Insurance's website, http://www.tdi.state.tx.us/wc/indexwc.html. In the event the division form is not available, the written request must contain the provisions of subsection (c) of this section.

(f) The MIO requestor shall provide a copy of the MIO request to the insurance carrier, prescribing doctor, injured employee, and dispensing pharmacy, if known, on the date the request for MIO is submitted to the division.

(g) An approved MIO shall be effective retroactively to the date the complete request for an MIO is received by the division.

(h) Notwithstanding §133.308 of this title:

(1) A request for reconsideration of a preauthorization denial is not required prior to a request for independent review when pursuing an MIO under this section. If a request for reconsideration or an MIO request is not initiated within 15 days from the initial preauthorization denial, then the opportunity to request an MIO under this section does not apply.

(2) If pursuing an MIO after denial of a reconsideration request, a complete MIO request shall be submitted within five working days of the reconsideration denial.

(i) An appeal of the independent review organization (IRO) decision relating to the medical necessity and reasonableness of the drugs contained in the MIO shall be submitted in accordance with §133.308(t) of this title.

(j) The MIO shall continue in effect until the later of:

(1) final adjudication of a medical dispute regarding the medical necessity and reasonableness of the drug contained in the MIO;

(2) expiration of the period for a timely appeal; or

(3) agreement of the parties.

(k) Withdrawal by the requestor of a request for medical necessity dispute resolution constitutes acceptance of the preauthorization denial.

(l) A party shall comply with an MIO entered in accordance with this section and the insurance carrier shall reimburse the pharmacy for prescriptions dispensed in accordance with an MIO.

(m) The insurance carrier shall notify the prescribing doctor, injured employee, and the dispensing pharmacy once reimbursement is no longer required in accordance with subsection (j) of this section.

(n) Payments made by insurance carriers pursuant to this section may be eligible for reimbursement from the Subsequent Injury Fund in accordance with Labor Code §410.209, §413.055, and applicable rules.

(o) A decision issued by an IRO is not an agency or commissioner decision.

(p) A party may seek to reverse or modify an MIO issued under this section if:

(1) a final determination of medical necessity has been rendered; and

(2) the party requests a benefit contested case hearing (CCH) from the division's chief clerk no later than 20 days after the date the IRO decision is sent to the party. A benefit review conference is not a prerequisite to a division CCH under this subsection. Except as provided by this subsection, a division CCH shall be conducted in accordance with Chapters 140 and 142 of this title (relating to Dispute Resolution--General Provisions and Dispute Resolution--Benefit Contested Case Hearing).

(q) The insurance carrier may dispute an interlocutory order entered under this title by filing a written request for a hearing in accordance with Labor Code §413.055 and §148.3 of this title (relating to Requesting a Hearing).

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

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 17. TAX RELIEF FOR PROPERTY USED FOR ENVIRONMENTAL PROTECTION

The Texas Commission on Environmental Quality (commission or TCEQ) proposes to amend §§17.1, 17.2, 17.6, 17.10, 17.12, 17.14, 17.17, 17.20, and 17.25 and repeal §17.15.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The program for providing tax relief for pollution control property was established under a constitutional amendment through the approval of Proposition 2 on the state ballot on November 2, 1993. This amendment added §1-1 to the Texas Constitution, Article VIII. The 73rd Legislature, 1993, added Texas Tax Code, §11.31, Pollution Control Property, and Texas Tax Code, §26.045, Rollback Relief for Pollution Control Requirements, to implement the new constitutional provision. The commission adopted 30 TAC Chapter 277 on September 30, 1994, to establish the procedures for obtaining a tax exemption under Proposition 2. In 1998, Chapter 277 was moved to Chapter 17 to be consistent with the commission's policy of placing general or multimedia rules within 30 TAC Chapters 1 - 100. In 2001, the Texas Legislature enacted House Bill (HB) 3121 during the 77th Legislative Session. HB 3121 amended Texas Tax Code, §11.31 in several respects. First, HB 3121 required that the commission adopt specific standards for considering applications to ensure that use determinations are equal and uniform and to allow for partial determinations. Second, HB 3121 created a process for appealing a use determination from the executive director by the applicant or the chief appraiser of the appraisal district for the county in which the property is located. Third, HB 3121 required the commission's executive director to provide a copy of the use determination to the chief appraiser of the appraisal district for the county in which the property is located.

In 2007, the Texas Legislature enacted HB 3732 during the 80th legislative session. HB 3732 amended Texas Tax Code, §11.31 by adding three new subsections. Texas Tax Code, §11.31(k) required the commission to adopt, by rule, a list of pollution control properties that must include 18 categories of items listed in the statute. Texas Tax Code, §11.31(l) required the commission to adopt a procedure to review the list at least once every three years and allowed the removal of items from the list when there is compelling evidence that the item does not provide pollution control. Finally, Texas Tax Code, §11.31(m) required the executive director to review applications containing items on the adopted list and to issue a determination without regard to the information provided in response to Texas Tax Code, §11.31(c)(1) within 30 days of receipt of the required information.

The current rules contain the two-part Equipment and Categories List (ECL), codified in §17.14(a). Part A of the ECL covers property that the TCEQ has reviewed often enough to establish that it is normally used consistently for pollution control at a listed average percentage of use. This part was adopted under Texas Tax Code, §11.31(g). Texas Tax Code, §11.31(k) required the TCEQ to adopt a list containing the 18 categories of equipment. This list was adopted as Part B of the ECL. However, §11.31(k) did not provide the pollution control percentage for each of the 18 categories of equipment. Staff reviewed these items and determined that the pollution control percentage varies depending upon many different factors, including the type of facility where the property is located and the function of the property. In the existing and proposed rules, applicants are required to calculate an application-specific determination for each piece of equipment, but the method is being changed as is discussed elsewhere in this preamble. The executive director determines the proper use percentage. The inclusion of a piece of equipment on the ECL or the assertion that a piece of equipment falls under a category set forth on the list does not mean that the equipment would receive a positive use determination. The use percentage is calculated for each piece of property on an application-by-application basis.

Prior to the 81st legislative session, the Legislative Budget Board (LBB) prepared a report including recommendations to the legislature on the TCEQ Tax Relief Program for Pollution Control Equipment. The report recommended that the TCEQ use the Cost Analysis Procedure (CAP) contained in its rules for all partial determinations, including applications for property located on the list in Texas Tax Code §11.31(k) (also known as Tier IV applications). The LBB report acknowledged that the CAP took into account the economic benefit of property to the property owner and recommended the creation of a permanent advisory committee for the program. Both HB 3206 and HB 3544 from the 81st Legislature, 2009, contain language requiring the standards and methods established in the rules to be uniformly applied to all applications for determinations, including applications for property listed in Texas Tax Code, §11.31(k), which is codified as Part B of the ECL in the current rules. The legislation specifically does not apply to applications filed prior to January 1, 2009, or to applications filed after January 1, 2009, that received final determinations prior to September 1, 2009.

To implement the uniformity requirements in HB 3206 and HB 3544, the proposed rulemaking would apply the CAP to all partial use determinations for property that does not meet the fixed use percentage criteria established by the commission under §17.14(a) of the rules. The proposed rulemaking would eliminate Tier IV applications. Applying the CAP to all partial use determinations would require Tier III applications for all partial determination requests, including a calculation of the percentage on the use of the property for pollution control. Implementation of this proposal would require items that are found on the current Part A of the ECL that are not at 100% or that are used partially for pollution control to be filed as Tier III applications. Additionally, items listed in the current Part B of the ECL that are used partially for pollution control would be filed in Tier III applications. Although some items on the current Part A of the ECL have use percentages below 100%, the executive director cannot validate that the listed percentages are appropriate in all cases. In most cases, the percentage is an average of the actual partial use from various applications. Items on Part A of the ECL with a percentage less than 100% are proposed to be removed from the new Tier I Table because the executive director does not have information that verifies the use percentage can be consistently applied to every piece of equipment in a specific category. Other items on the current Part A of the ECL are listed

at 100% pollution control although in some cases the equipment could be used for production purposes as well. Therefore, Tier III applications would be required for all of these items to ensure review consistency and to calculate the actual use percentage for each item until the commission has sufficient information to establish partial use percentages appropriate to all property within certain categories of equipment. When sufficient information is available to determine a fixed partial use percentage for a category of property, the commission will consider adding through rulemaking that property to the Tier I Table with the appropriate partial use percentage specified.

The change to Tier III applications for items on the current Part B of the ECL that are used partially for pollution control would change the way that applicants calculate the partial use percentage. The current provision of allowing applicants to choose their own method for calculating a use percentage for these properties has resulted in applications for the same types of property with widely varying calculated use percentages. HB 3206 and HB 3544 specifically require that the standards and methods established in the rules be uniformly applied to all applications for determinations, including applications for property listed in Texas Tax Code, §11.31(k), which is codified as Part B of the ECL in the current rules. For these partial use items, a Tier III application with the calculation of actual use percent would be required in all cases until the commission determines that a specific item is always used for pollution control at the same use percentage within a certain category of use. In these cases, the item will be added to the Tier I Table, such as is proposed for flue gas recirculation. The higher fees for the Tier III applications are appropriate for the partial items removed from the ECL because of the greater review needed for applications for partial determinations and in evaluating whether a fixed partial use percentage is applicable to various categories of use.

To allow the CAP to better fit this new review structure it will be modified, as described elsewhere in this preamble, by replacing the term "byproduct" with "marketable product." Because the term "byproduct" is defined as a waste material, applying the CAP is limited. However, the more expansive term "marketable product" would allow the CAP to more appropriately factor in other products from particular types of equipment (for example, equipment that results in energy production). Currently, the calculation of byproduct value only subtracts costs for transportation and storage, but the calculation of a marketable product value would subtract all costs associated with the production of the marketable product, which would more accurately determine the product value produced by pollution control property.

As discussed elsewhere in this preamble, Tier IV applications are proposed to be eliminated, and for consistency, applicants would be required to use the CAP to determine the appropriate use percentage rather than selecting their own method of calculation. Because Texas Tax Code, §11.31(k) requires the current Part B of the ECL to be in the rules, this list would be moved to §17.17.

Additionally, HB 3544 allows the commission the use of electronic means of transmission of information. As part of the implementation of this legislation, the commission would add provisions for staff sending letters and use determinations to appraisal districts and applicants electronically.

As required by HB 3206 and HB 3544, the commission established a permanent advisory committee to provide input on the implementation of Texas Tax Code, §11.31. The Tax Relief for Pollution Control Property Advisory Committee has provided several recommendations for this proposed rulemaking. Where agency staff had sufficient information to implement the advisory committee's recommendations, they have been included in the proposed rule language. In some cases, there was not sufficient information to implement the advisory committee's recommendations. The commission is soliciting public comment on these recommendations by including them verbatim as follows:

At the May 21, 2010, advisory committee meeting, the committee made the following recommendation: Part B of the ECL should be changed to include descriptions of the property similar to the program's draft guidance document and to set certain use percentages at 100%. The advisory committee's proposed changes are shown in the following table:

Figure: 30 TAC Chapter 17--Preamble

The commission requests public comment on whether these changes to the table would be preferable to moving this list of equipment to §17.17, as discussed elsewhere in this preamble. For the designations of 100% use percentages for certain items on the above table, the commission invites public comment on whether these percentages are appropriate for the property indicated. Commenters are asked to note that item B-4 is on the proposed Tier I Table (discussed elsewhere in this preamble) as item A-83.

At the June 4, 2010, advisory committee meeting, the committee adopted the following two resolutions: 1) "The advisory committee agrees that the uniformity requirement in the governing statute does not require the commission to rely upon a single formula when calculating partial use determinations;" and 2) "The committee recommends that the commission invite public comments during the public comment period regarding alternative methodologies for calculating partial use determinations to supplement or replace the CAP as it is proposed to be revised in the proposed rule." Based on these resolutions, the commission invites public comment on whether multiple formulae should be developed for calculating partial use determinations rather than just the method proposed in §17.17 (discussed elsewhere in this preamble) and, if so, the methodologies that should be added to the rules.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments discussed elsewhere in this preamble, the commission also proposes to make various stylistic non-substantive changes to update rule language to current *Texas Register* style and format requirements, as well as establish more consistency in the rules. These changes are non-substantive and generally are not specifically discussed in this preamble.

§17.1, Scope and Purpose

The commission proposes a non-substantive change to correct a grammatical error.

§17.2, Definitions

The commission proposes to add 30 TAC Chapter 3 to the list of laws with definitions pertinent to this chapter in the introductory paragraph. Chapter 3 contains general definitions that are applicable to all commission rules, and the addition is only for clarity.

The commission proposes to delete the definition of "Byproduct." This term is used as a factor in the CAP in §17.17, but the commission proposes to replace this factor with "Marketable product," as discussed elsewhere in this section. Subsequent paragraphs would be renumbered.

The proposed revisions would expand the definition of "Capital cost old" to include cases where old pollution control property is replaced with new pollution control property. When a piece of equipment is not replacing previous equipment, instead of zero, capital cost old would be the cost of a comparable piece of equipment without the pollution control feature.

The commission proposes to delete the definition of "Decision flow chart" because of the deletion of the two flow charts as discussed elsewhere in this preamble.

At the request of the Tax Relief for Pollution Control Property Advisory Committee, the commission proposes to define "Environmental benefit." The definition approved by the committee and proposed in the rule links environmental benefit to the actions of a person to control pollution but that pollution control or reductions achieved through the use of a product, good, or service is excluded. The definition further states that environmental benefit means the same as pollution control.

The proposed revisions to the rule would delete the definition "ePay" because the use of the term is clear in the rules.

The commission is proposing to delete the definition "Equipment and categories list." Because the list required to be adopted by Texas Tax Code, §11.31(k) will be moved to §17.17(b) and Part A of the ECL will be renamed to the "Tier I Table," this definition is not needed.

The proposed revisions to the rule would delete the definition of "Installation" as the use of the term is consistent with the standard dictionary definition making the inclusion of the definition in this section unnecessary.

As stated elsewhere in this preamble, the commission proposes to include a definition of marketable product. This definition is broader than the existing definition of byproduct, which is proposed for deletion, because of inclusion of things other than wastes recovered and sold (for example, co-products or electricity). The proposed definition of marketable product includes anything produced or recovered from pollution control property that is sold or traded, accumulated for later use by the producer, or used in a manufacturing process, except that emissions credits and emissions allowances are excluded. Since the production of valuable assets by pollution control property is a type of production, the value of these assets should be considered in determining the percentage of environmental use of the property. As discussed elsewhere in this preamble, the value of a marketable product would be used in the CAP for Tier III applications.

The commission proposes to delete the definition "Part B decision flow chart" because the flow chart located in §17.15(b) (the Part B Decision Flow Chart) is proposed to be deleted. Therefore, this definition is no longer needed.

The commission proposes to delete the definition "Production capacity factor." This term is defined within the variables for the equation in the CAP in §17.17(c), and therefore a separate definition in this section is unnecessary.

The commission proposes changes to the definitions to Tier I, Tier II, and Tier III for consistency with the change of the ECL to the new Tier I Table as discussed elsewhere in this preamble. Additional rewording of these definitions for clarity would be made. For the Tier III definition, the rewording is intended to mean that Tier III includes property used partially for pollution control that is similar to items on the Tier I Table but that are used in a different manner or at a different use percentage than shown on the Tier I Table.

The commission proposes to delete the definition of Tier IV. As discussed elsewhere in this preamble, Tier IV applications would be eliminated, with all partial use determinations consolidated into the Tier III level for uniformity and applications for property used wholly for pollution control at the Tier I level if the equipment is on the Tier I Table or at the Tier II level for other property. Therefore, this term would no longer appear in the rules.

The commission proposes to delete the definition "Use determination letter." The meaning of the term is clear, and a definition is unnecessary.

§17.6, Property Ineligible for Exemption from Taxation

Consistent with the recommendations of the Tax Relief for Pollution Control Property Advisory Committee, the commission proposes an amendment to §17.6(1). Paragraph (1) would be amended to specify three additional circumstances that would make property ineligible receive a positive use determination. The three circumstances are the following: 1) the only use of the property is to produce a good or service; 2) the property is not used at all for pollution control; or 3) the only environmental benefit arises from the use or characteristics of the good or service.

The commission proposes to revise the term "Tax Code" to "Texas Tax Code" in §17.6(2) for clarity and uniformity.

§17.10, Application for Use Determination

The commission proposes to amend §17.10(a)(1) to add "completed and signed" before "application form" to clarify that the applications must be complete when submitted. Additionally, "completed and signed" would be added before "copy" to ensure that a completed and signed copy is available to send to the appraisal district.

The commission proposes to revise §17.10(b) such that the wording "facility consisting of" would be deleted before "group of integrated units" for clarity. The use of "facility" could be interpreted as meaning that all environmental property at any site can be placed in a single application resulting in applications covering very large amounts of property and where property has little relation to one another. However, because the program is statutorily required to recover review costs through application fees, the size of applications needs to be limited to reasonable amounts of property. This revision is to clarify the intent of the existing language that property that works together or sequentially to control pollution from one or more specific emission points could be put into the same application. Additionally, "have" would be changed to "has" to emphasize that it is the group of units that serve a common purpose rather than the individual units. As an example of what is intended by the rule, a series of air control devices for a specific vent gas stream would be an integrated unit although the devices may treat different pollutants (such as volatile organic compounds, nitrogen oxides, particulates, etc.), but a baghouse would not be an integrated unit with a vacuum truck even though both are used to control particulates at a facility.

The commission proposes to revise §17.10(c) to delete the word "not" and substitute "as a lower priority than" for "until after review of all." This revision is proposed to remove the implication that all applications postmarked before January 31st would need to be completely processed before applications postmarked after January 31st are started. The proposed change would avoid any delays from a strict interpretation of the plain rule language in the start of processing of later applications while waiting for response

to requests for additional information on applications that were postmarked before January 31st. Therefore, the change would allow more efficient processing of applications.

The commission proposes to delete the wording "except for paragraph (1) of this subsection" in §17.10(d) and the wording "for Tier I, II, and III use determination applications" in §17.10(d)(1) to make the rule consistent with the Texas Tax Code, §11.31(c)(1). In addition, the proposed rulemaking would revise §17.10(d) to replace the word "shall" with "must" to be consistent with the rule drafting standards in the *Texas Legislative Council Drafting Manual* (August, 2008). The word "must" applies to objects and establishes a condition precedent (i.e., in this case, the items listed in this subsection must be present for a submission to be an application), while the word "shall" is used to establish an obligation for a person.

The proposed revisions to the rulemaking would replace "that is pollution control property" with "that is for pollution control" in §17.10(d)(3) to clarify that the executive director, rather than the applicant, determines whether equipment is pollution control property. Additionally, the commission proposes the addition of "such as a detailed description of the pollution source and a detailed and labeled process flow diagram that clearly depicts the pollution control property and the processes and equipment that generate the pollutant(s) being controlled" to clearly list what is normally expected for most property in an application without establishing a requirement for all possible entries in an application. For example, a process flow diagram may not be appropriate for certain pollution control equipment, such as a waste container. In §17.10(d)(4), the commission proposes the addition of "sections of" to clarify that citations requiring use of the equipment should be section specific. In addition, the proposed rulemaking would revise "law, rules, or regulations" to "law(s), rule(s), or regulation(s)" to emphasize that there may be more than one requirement for the use of a specific piece of equipment. An application must show at least one law, rule, or regulation requiring the use of each piece of property listed.

The commission proposes to amend §17.10(d)(5) to change the phrase "Equipment and Categories List" to "Tier I Table" and to modify the citation for the CAP to be consistent with proposed amendments discussed elsewhere in this preamble. This proposed paragraph would continue to require applicants to provide in an application a worksheet showing how they determined the appropriate applicable percentage of partial use pollution control equipment through the use of the CAP.

The commission proposes the deletion of §17.10(d)(6) as a separate worksheet for Tier IV applications because it is not necessary due to the elimination of the Tier IV applications as discussed elsewhere in this preamble. The subsequent paragraphs would be renumbered. The commission proposes the deletion of §17.10(d)(10) because it is not necessary due to the elimination of the two decision flow charts as discussed elsewhere in this preamble.

§17.12, Application Review Schedule

The commission proposes to add the wording "or electronic mail" to §17.12(1) to fulfill the HB 3544 requirement that the commission encourage the utilization of electronic information transmission.

The commission proposes the revision of §17.12(2) to replace "within three days of" with "as soon as practicable after" to allow sufficient time for the review of applications while still allowing payment processing of application fees to occur. The current short time period is not practical in the period around January 31st when large numbers of applications are received. The word "mail" would be replaced with "send" to allow transmittal of the notices by electronic means as allowed by HB 3544.

The commission proposes revisions to §17.12(2)(A) to modify the current process that the commission uses to resolve administrative deficiencies in applications. The new process allows 30 days for the applicant to provide the requested deficient information. By changing the word "will" to "may," the proposed rules would give the executive director the option to continue processing an application. Proposed revisions to §17.12(2)(B) would also modify the procedures through which the executive director would request additional technical information and would remove direct references to Tier levels I, II, and III as they are no longer applicable. The word "will" would be changed to "may" for the same reason as in subparagraph (A). Revisions to §17.12(2)(C) are proposed to maintain program consistency with the application process revisions proposed under subparagraphs (A) and (B) while retaining the applicant's ability to re-file an application.

Proposed revisions to §17.12(3) would reflect the elimination of Tier IV applications while still requiring the statutory deadline and information requirements for processing applications for property listed in Texas Tax Code, §11.31(k). Additionally, the word "documents" would be changed to "information" for consistency with the statutory provision in Texas Tax Code, §11.31(m) specifying that the 30-day period begins when all required information has been received by the commission rather than on the submittal date of the original application form.

The commission proposes to revise for clarity §17.12(4) to replace the phrase "some or all" with "the portion." By statute, the executive director is authorized to grant positive use determinations for the portion of the property used for pollution control. Under proposed §17.12(4)(C), the wording "or electronic" would be added to fulfill the requirement of HB 3544 that the commission encourage the utilization of electronic information transmission.

§17.14, Tier I Pollution Control Property

The commission proposes revisions to §17.14 to rename the section, to reorganize the pollution control tier structure, to add property that has been found to be used wholly for pollution control, and to eliminate the two-part ECL. Under the proposed revisions, Part A of the ECL would be replaced with a Tier I Table of properties used for pollution control at a standard use percentage. Part B of the current ECL list would be relocated to §17.17 and properties currently in Part B would be listed there.

The commission proposes revisions to §17.14(a) to delete the references to the ECL. The proposed new wording for subsection (a) would specify that Tier I applications are only for property that is used for pollution control at a standard use percentage and that a Tier III application is required for any property that is used at a non-standard use percentage, including items on the Tier I Table from which any value is recovered.

The commission proposes the removal of the pollution control property list under §17.14(a), formerly labeled the "Equipment Categories List," and replacing it with a revised Tier I Table. The proposed Tier I Table in §17.14(a) would be a table of the properties determined by the executive director to be used for pollution control purposes at a standard use percentage and with no associated marketable product. Pollution control properties previously included in the Part B section of the ECL would be deleted. Because the use percentages in the ECL cannot be

confirmed to be accurate for all facilities, all properties currently with partial use percentages would be deleted; the items deleted for this reason include the following: A-43, Refrigerant Recycling Equipment; A-93, High-Pressure Fuel Injection System; A-200, Perchloroethylene (Perc) Closed-Loop Dry Cleaning Machines; A-201, Cartridge and Spin Disc Filtration Systems; A-202, Petroleum Dry-to-Dry Cleaning Machines; A-203, Petroleum Reclaimers; and A-204, Refrigerated Vapor Condenser (Includes only the components that recover the vapors). Additionally, any pollution control equipment from which any marketable product or product of value is recovered would be deleted; the items deleted for this reason include the following: A-184, Vapor/Liquid Recovery Equipment for Fugitive Emissions; A-186, Paint Spray Booth Attached to a Final Control Device (Replacement which provides increased pollution prevention or control); A-188, Powder Coating System - Installed to replace an existing paint booth; A-189, Powder Coating System - New construction; and A-206, Direct Coupled Solvent Delivery Systems. Additionally, the following items would be deleted because they are old technology: A-86, Burners Out of Service; A-87, Lean-Burn Gas-Fired Compressor Engines; A-89, Over-Fire Air Systems; and A-90, Low Emissions Conversion Kit for Internal Combustion Reciprocating Compressor Engines.

For the introductory paragraph and for some items on the old ECL that are retained on the new Tier I Table, changes would be made to correct grammar, punctuation, and spelling and to remove unnecessary wording as needed throughout the table. Because of removed items and to provide a consistent numbering pattern throughout the list, the items on the Tier I Table would be renumbered as needed.

The following changes would be made to the introductory paragraph: The first sentence would be changed to specify that a Tier I application is only appropriate if the equipment is used as shown in the description column of the table at the use percentage shown and if there is no marketable product that arises from the use of the property. The current fourth sentence would be changed to provide examples of when items would not be used in a standard manner. The current fifth sentence would be removed because applications would be reviewed based on the information that they contain. The current sixth through eighth sentences would be removed because the provisions for reviewing and amending the table are covered in the rules. The current ninth and tenth sentences would be removed because they are not relevant to a table that contains items used for pollution control. For clarity, the current eleventh sentence would be reordered so that the property on applications is mentioned first. The current twelfth sentence would be changed to remove the reference to "Part A" of the list.

The following significant changes would be made to specific items retained on the new Tier I Table: In the description section of current item A-65, Predictive Emissions Monitors, the word "solely" would be added because use of the monitors for production has a percentage of use that varies by facility; this amendment was suggested by the Tax Relief for Pollution Control Property Advisory Committee. In the description section of current item A-80, Selective Catalytic and Non-catalytic Reduction Systems, the wording "engines/boilers" would be changed to "combustion sources" to allow Tier I applications for this type of pollution control property on other types of equipment. As requested by the Tax Relief for Pollution Control Property Advisory Committee, the description section of current item A-88, Low NO_x burners, would be changed to cover use of this equipment in a new installation rather than only as replacement burners. Current item A-89, Over-Fire Air Systems, would be deleted because the equipment is covered under current item A-85, Overfire Air & Combination of asymmetric over fire air with the injection of anhydrous ammonia or other pollutant-reducing agents. Current items A-110, Activated Carbon Systems, and A-115, Carbon Absorber, would be combined into a single new A-110, Carbon Absorption Systems. In the description section of current item A-138, Photochemical Oxidation, proposed sentence, "These units are only eligible if mercury is removed from flue gas." would be added because these systems only provide an environmental benefit if mercury emissions are reduced. For current item A-187, Paint Spray Booth Attached to a Final Control Device (New Construction), the name would be changed to clarify that the item only covers the control devices attached to a paint booth. Current item A-205, Secondary Containment, would be deleted because this equipment is also covered under current item S-6, Secondary Containment. In the description section of current item W-59, Wastewater Treatment Facility/Plant, wording would be added to clarify that this item includes septic systems. For current item S-1, Stationary Mixing and Sizing Equipment, the phrase "or in-house recycling" would be deleted from the description because this part pertains to a marketable product. The title of S-7, Liners, would have "(Noncommercial Landfills or Impoundments)" added and the title of current S-16, Injection Wells (Including Saltwater Disposal Wells) and Ancillary Equipment, would have "Noncommercial" added to the title to clarify that these items do not pertain to commercial landfills or injection wells because of the statutory prohibition for commercial waste operations. For current item S-23, Double Hulled Barge, the description would be changed to require that the incremental cost of the second hull be calculated, rather than specifying 30% use for pollution control for all of these barges. Because the equipment is used for worker protection rather than pollution control, the phrase "safety equipment" would be deleted from the description of current item M-1, Spill Response/Cleanup Equipment Pre-positioned and Stored for Addressing Future Emergencies, and the phrase "personal protection" would be deleted from the description of current item M-2, Hazardous Air Pollutant Abatement Equipment - required removal material contaminated with asbestos, lead, or some other hazardous air pollutant. The name of current item M-5, Distillation Recycling Systems, would be changed to Solvent Recovery Systems to increase the scope of the item to cover all types of systems that allow the reuse of a solvent within a facility; to be covered on a Tier I application, a system could not provide production benefits or create a marketable product. In the description section of current item M-8, Environmental Paving located at Industrial Facilities, wording would be added to specify that this item does not apply to storm water control (which is covered under current item W-57, Conveyances, Pumps, Sumps, Tanks, Basins) nor does it include dirt or gravel paving, which do not control dust; based on a suggestion from the Tax Relief for Pollution Control Property Advisory Committee, current item M-8 would also have the phrase "environmental rule, regulation, or law" in the description column changed to "air quality rule, regulation, or law." For current item M-12, Structures, Enclosures, Containment Areas, Pads, the wording "for Composting Operations" would be added to the title to specify better the property to which the item applies. In the description section of current item M-13, Methane Capture Equipment, the scope of the item would be increased to allow Tier I applications used to capture methane resulting of decomposition of wastes that were not generated on site; because the use percentage is specified as 100%, the item

would only apply to methane capture equipment used to capture methane that is sent to a control device without providing any production benefits. The changes to current item M-13 would allow landfills and other facilities to submit Tier I applications for methane capture equipment when the methane is routed to a flare or other environmental control device. For clarity in current item M-17, Low NO_x Combustion System, the specification that the item applies to drilling rigs would be moved from the description to the title; based on a recommendation from the Tax Relief for Pollution Prevention Property Advisory Committee, the word "solely" would be added to the description and the wording "components of" would be changed to "equipment on." Additionally, three items (external floating roofs, selective catalytic and non-catalytic reduction systems for sulfur oxides, and landfill fencing for control of windblown trash or access control) would be added to the table because the equipment has been found to be consistently used wholly for pollution control.

Any equipment used partially for pollution control, unless it exactly matches the criteria for an item on the Tier I Table, would be covered under the Tier III application process under §17.17 as discussed elsewhere in this preamble. In addition to the proposed changes, property and descriptions included in the new Tier I Table under §17.14(a) would be updated from the existing ECL Part A list of equipment to remove duplications and outdated technology, to revise for clarity, and to include updated pollution equipment and pollution control device descriptions.

The proposed introductory paragraph preceding the new Tier I Table in §17.14(a) would be revised from the existing ECL introductory description for consistency in describing the new Tier I Table and to replace references to the ECL with those to the Tier I Table. The introduction would clarify that equipment included in the table is property determined to be used for pollution control purposes at a set use percentage and is only applicable to a Tier I application when used as shown in the description section of the table and when no marketable product arises from the property. In addition, the proposed introduction to the table in §17.14(a) specifies that the listed equipment is generic.

The commission proposes to revise §17.14(b) such that the designation "ECL" would be changed to "Tier I Table" to reflect the changes to the list as described previously in this preamble. For clarity and for consistency with the rule drafting standards in the *Texas Legislative Council Drafting Manual,* §17.14(b)(1) and (2) would be amended to state that the commission may remove items from the Tier I Table.

§17.15, Review Standards

The commission proposes to repeal §17.15. The two decision flow charts are not necessary for establishing the eligibility criteria for property because these are provided elsewhere in the rules. The main flow chart will be moved to guidance. The Part B decision flow chart will not be retained in guidance because of the deletion of the Tier IV level of applications as discussed elsewhere in this preamble.

§17.17, Partial Determinations

The commission proposes revisions to §17.17(a) to specify that all requests for partial determinations must be made through the submittal of a Tier III application.

Section 17.17(b) is proposed to itemize the list of pollution control facilities, devices, or methods included in Texas Tax Code, §11.31(k).

Proposed §17.17(c) would be relettered from the existing §17.17(b) and would be revised to reflect the elimination of Tier IV applications. There would no longer be separate calculations for these two current application levels.

Proposed §17.17(c)(1) would codify the modified CAP. This paragraph would apply to applications where there is no marketable product produced by the property used partially for pollution control. The calculation change proposed for the CAP is that the variable for byproduct would be changed to a variable for the net present value of any marketable product(s). Because the current definition of byproduct covers only recovered waste materials, the current CAP does not account for some production benefits provided by certain property used partially for pollution control, such as production of co-products and power generation. The change to marketable product, as discussed elsewhere for §17.2, would allow for implementation of HB 3206 and HB 3544 that requires that the standards and methods that are established in the rules apply uniformly to all applications for determinations, including applications relating to facilities, devices, or methods for the control of air, water, or land pollution as listed in Texas Tax Code, §11.31(k). Another change proposed for the new CAP would be to require that applicants submit copies of any information received from the manufacturer on their pollution control property if that information is used in the CAP calculation. Because of the general use of the CAP equation, the variable for net present value of the marketable product (NPVMP) would be defined in proposed item 4 in the figure located in §17.17(c)(1), although its value is specified as zero for applications under this paragraph. This process does not apply to applications under the next paragraph, which covers applications where a marketable product is generated.

The commission proposes the addition of §17.17(c)(2) for applications that include property that produces a marketable product. In this paragraph, the new equation for calculating NPVMP would be codified. This equation is similar to the current equation for calculating the byproduct value, except for the change from byproduct to marketable product as discussed previously and a change for production costs. Under the current equation for byproduct, only costs for storage and transportation are subtracted from the retail value of the byproduct in the numerator of the equation. In the proposed equation for NPVMP, production costs are defined as "costs directly attributed to the production of the product, including raw materials, storage, transportation, and personnel, but excluding non-cash costs such as overhead and depreciation," and these costs are subtracted from the retail value of the marketable product in the numerator of the equation.

The commission proposes to delete current §17.17(d) due to the elimination of the Tier IV applications and to revise proposed §17.17(d), currently §17.17(e), to delete reference to alternate methods for determining the use determination percentage.

§17.20, Application Fees

Proposed revisions to §17.20(a)(1) and (2), would amend the reference to the current ECL to reference the Tier I Table for rule consistency. In addition, the commission proposes to delete §17.20(a)(4) to remove references to Tier IV applications.

The proposed revisions to §17.20(b) would replace the phrase "which are sent back" with "on which the executive director will take no further action" to maintain consistency with the revisions to application processing proposed for §17.12(2), as discussed elsewhere in this preamble. In addition, new language would be added to codify the process for requiring payment of additional

fees when appropriate, including a provision that previously paid fees may be forfeited if an applicant fails to respond within 30 days of receipt to a request for additional fees.

The commission proposes revisions to §17.20(c) to reference both of the commission's systems for electronic payment of fees and to move the word "or" to clarify that both electronic funds transfers and the commission's ePay system are available.

§17.25, Appeals Process

Revisions to proposed §17.25(a) would replace the current language as it applies to appeals of applications that were administratively complete after September 1, 2001, with the word "all" to clarify that any application processed under the amended rules can be appealed. The current rule language accommodates the effective date of Texas Tax Code, §11.31(e), which provided for appeals of use determinations. Because the period for filing an appeal is 20 days after issuance of a use determination, the language is no longer needed. Section 17.25(a)(2) would be revised to delete the phrase "Persons who may appeal a determination by the executive director" for consistency with the rule drafting standards in the *Texas Legislative Council Drafting Manual.*

Proposed revisions to §17.25(b) would add the word "must" to the first sentence to clarify that both listed requirements are condition precedents for applications.

Proposed §17.25(d) would be added to provide a mechanism for the general counsel to remand appeals back to the executive director without formal action by the commission when the action is requested by the executive director or the public interest counsel. Subsequent subsections would be relettered.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications, although not significant, are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules are expected to increase the amount of fee revenue collected by the agency when reviewing applications to determine whether property is used as pollution control equipment. The proposed rules are not expected to have a fiscal impact on other state agencies, nor are the proposed rules expected to have a direct fiscal impact on local governments. However, determination that property is used for pollution control can exempt property from property tax rolls, and taxing authorities may experience a change in the amount of property that can be taxed. This in turn could affect the amount of tax revenue collected. The effect on revenue collected by a local government depends on the policies of local taxing authorities and appraisal districts.

HB 3206 and HB 3544 amended the Texas Tax Code to require uniform application of standards and methods to determine whether property and equipment can be wholly or partially classified as pollution control property and to authorize the use of electronic means to issue notices, orders, and other information. The Texas Tax Code provides a tax exemption for property if the property is used wholly or partially for pollution control. Owners of property can voluntarily submit an application to the agency to determine the use of the property. The submission of an application is voluntary in nature, and the number of applications can vary from one year to another.

The proposed rules amend Chapter 17 to ensure that uniform standards and methods are applied when determining whether property is wholly or partially used for pollution control. The proposed rules revise the CAP to allow for a more complete evaluation of the portion of property and equipment that is used for pollution control versus the portion that is used for production. The CAP revision will be more comprehensive when determining the proper partial use percentage of equipment and property. The proposed rules may result in a decrease in the number of partial use determinations and thereby increase the amount of property on tax rolls. Until the commission receives sufficient information to determine appropriate partial use percentages that are consistent for certain categories of property, the proposed rules will also require that all property determined to be partial pollution control property be classified as Tier III property and not appear on Tier I applications. The proposed rules will eliminate the current Tier IV category and require most Tier IV property to be evaluated as Tier III property. The proposed rules will also codify current agency guidance that requires property listed on applications be limited to individual units or integrated systems of pollution control equipment installed for a common purpose. In addition, the proposed rules will provide for the electronic transmission of notices.

The proposed rules are expected to increase revenue and decrease postage costs because of the electronic transmission of notices, but any increases in revenue or cost savings are not expected to be significant. Any cost savings will be used to help cover expanded administrative costs for the program. Pollution Control Exemption Application Fees are deposited in Fund 0001 - General Revenue.

The bulk of applications received by the TCEQ are for Tier I property. Historically, partial use pollution control property submitted on Tier I applications has been primarily for gas pipelines. Since 2008, the TCEQ has also received applications for Tier IV property, which is typically used by power plants, chemical plants, or refineries.

Under current rules, fees for evaluation of pollution control property applications are as follows: Tier I is $150 per application, Tier IV is $500 per application, and Tier III application is $2,500. Under the proposed rules, the revenue increase could be $2,350 per application for former partial use Tier I property. For former Tier IV property, the revenue increase is estimated to be $2,000 per application. Based on historical trends and recent manufacturing changes, the TCEQ estimates that an average of 34 Tier IV and 100 Tier I will be filed as Tier III applications, and the estimated revenue increase could be as much as $303,000 per year.

Postage costs are expected to decrease when notices are transmitted electronically. If the TCEQ mails three notices on average for each application, and 1,100 applications are received, the savings in postage costs could be as much as $1,452 per year under the proposed rules.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and a more comprehensive, uniform approach when evaluating pollution control property eligible for tax exemption.

The proposed rules will not have significant fiscal implications for individuals and businesses. The proposed rules apply to pollu-

tion control property, most of which is owned by large businesses such as gas pipelines, power plants, chemical plants, and refineries. Submission of applications for use determination is voluntary, and businesses are not expected to submit applications and pay increased fees unless tax exemption status is economically advantageous. Local taxing authorities and appraisal districts determine tax policies that determine the economic impact of use determinations.

Businesses that submit applications for use determination will see an increase in fees if applying for property formerly classified as Tier I partial use or for property formerly classified as Tier IV. Applications for these types of properties will pay a Tier III fee of $2,500 per application. This charge would be an increase of $2,350 per application for former Tier I partial use pollution control property and $2,000 per application for former Tier IV property.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Submission of applications for use determination is voluntary, and small businesses typically do not own or operate equipment that will be reclassified as Tier III property. If a small business were to submit an application, it would pay the same fees as a large business. As with a large business, a small business would be expected to submit an application only if tax exempt status for pollution control property is more beneficial than the cost of submitting an application.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect. Property affected by the proposed rules is not typically owned by small businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed amendments in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of "a major environmental rule." Under Texas Government Code, §2001.0225, "a major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking amends the Tax Relief for Pollution Control Property rules. Because the proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure but to implement a tax incentive program, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. These rules do not result in any new environmental requirements and should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The commission invites public comment regarding this draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these amended rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply to these adopted amendments. Enforcement of these adopted rules would be neither a statutory nor constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property, because this rulemaking action does not burden, restrict, or limit the owner's rights to property or reduce its value by 25% or more beyond which would otherwise exist in the absence of the proposed regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARINGS

The commission will hold five public hearings on this proposal. The first hearing will be held in Houston on August 9, 2010, at 1:00 p.m. in Conference Room A at the Houston Galveston Area Council (HGAC) located at 3555 Timmons, Suite 120, Houston. The second hearing will be held in Beaumont on August 10, 2010, at 9:00 a.m. in the commission's Beaumont regional office located at 3870 Eastex Freeway, Beaumont. The third hearing will be held in Austin on August 10, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The fourth hearing will be held on August 12, 2010, at 1:00 p.m. in Conference Room 1003 in the NRC Building on the Texas A&M Corpus Christi campus located at 6300 Ocean Drive, Corpus Christi. The fifth hearing will be held in Fort Worth on August 13, 2010, at 1:00 p.m. in the public meeting room of the commission's Dallas/Fort Worth regional office located at 2309 Gravel Drive, Fort Worth. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff mem-

bers will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-050-017-EN. The comment period closes August 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Emmanuel Wada, Air Quality Division, at (512) 239-1917.

30 TAC §§17.1, 17.2, 17.6, 17.10, 17.12, 17.14, 17.17, 17.20, 17.25

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, which authorizes the commission to perform any acts authorized by the TWC or other laws that are necessary and convenient to the exercise of its jurisdiction and powers; and §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The rules are also proposed under Texas Tax Code, §11.31, which authorizes the commission to adopt rules to implement the Pollution Control Property Tax Exemption.

The proposed amendments implement the legislative mandate under HB 3206 and HB 3544, 81st Legislature, 2009, which add new subsections (g-1) and (n) to Texas Tax Code, §11.31. Texas Tax Code, §11.31(g-1) requires uniform application to all applications of the standards and methods for processing, and §11.31(n) allows the commission to use electronic mail for transmitting notices to appraisal districts.

§17.1. Scope and Purpose.

The purpose of this chapter is to establish the procedure and mechanism for an owner of pollution control property[,] to apply to the commission for a determination of pollution control use.

§17.2. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA), the Texas Solid Waste Disposal Act (TSWDA), the Texas Water Code (TWC), the Texas Tax Code (TTC), or the Texas Health and Safety Code (THSC), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the fields of pollution control or property taxation. In addition to the terms that [~~which~~] are defined by Chapter 3 of this title (relating to Definitions), the TCAA, the TSWDA, TWC, TTC, and THSC, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

[~~(1) Byproduct--A chemical or material that would normally be considered a waste material requiring disposal or destruction, but due to pollution control property is now used as a raw material in a manufacturing process or as an end product. The pollution control property extracts, recovers, or processes the waste material so that it can be used in another manufacturing process or an end product.~~]

(1) [~~(2)~~] Capital cost new--The estimated total capital cost of the equipment or process.

(2) [~~(3)~~] Capital cost old--The [~~This is the~~] cost of the equipment that is being or has been replaced by the equipment covered in an application. In a situation where a piece of equipment is not replacing previous equipment, capital cost old can be the cost of comparable equipment or process without the pollution control feature.

(3) [~~(4)~~] Cost analysis procedure--A procedure that [~~which~~] uses cost accounting principles to calculate the percentage of a project or process that qualifies for a positive use determination as pollution control property.

(4) Environmental benefit--The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. For purposes of this chapter, environmental benefit does not include the prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the use or characteristics of the applicant's goods or service produced or provided. For the purpose of this chapter, the terms "environmental benefit" and "pollution control" are synonymous.

(5) Marketable product--Anything produced or recovered using pollution control property that is sold as a product, is accumulated for later use, or is used as a raw material in a manufacturing process. Marketable product includes, but is not limited to, anything recovered or produced using the pollution control property and sold, traded, accumulated for later use, or used in a manufacturing process (including at a different facility). *Marketable product does not include any emission credits or emission allowances that result from installation of the pollution control property.*

[~~(5) Decision flow chart--A flow chart which is used to determine if a property or process, which is not listed in Part B of the figure in §17.14(a) of this title (relating to Equipment and Categories List), is eligible for a whole or partial use determination as pollution control property.~~]

[~~(6) ePay--The commission's electronic payment system which is located on the TCEQ's web page at www.tceq.state.tx.us.~~]

[~~(7) Equipment and Categories List--A list of property or categories of property used either wholly or partially for pollution control purposes or that is listed in TTC, §11.31(k).~~]

[~~(8) Installation--The act of establishing, in a designated place, property that is put into place for use or service.~~]

[~~(9) Part B decision flow chart--A flow chart which is used to determine if a property or process, which falls under a category listed in Part B of the figure in §17.14(a) of this title (relating to Equipment and Categories List), is eligible for a whole or partial use determination or a negative use determination as pollution control property.~~]

(6) [~~(10)~~] Partial Determination--A determination that an item of property or a process is not used wholly as pollution control.

(7) [~~(11)~~] Pollution control property--A facility, device, or method for control of air, water, and/or [~~or~~] land pollution as defined by TTC, §11.31(b).

[~~(12) Production capacity factor--A calculated value used to adjust the value of a partial use determination to reflect capacity considerations.~~]

(8) [~~(13)~~] Tier I--An application containing [~~which contains~~] property that is on the Tier I Table [~~in Part A of the figure~~] in

§17.14(a) of this title (relating to Tier I Pollution Control Property) or that is necessary for the installation or operation of property located on the Tier I Table [Part A of the Equipment and Categories List].

(9) [(14)] Tier II--An application for property that is used wholly for the control of air, water, and/or land pollution, but is not [on the Equipment and Categories List,] located on the Tier I Table in §17.14(a) of this title.

(10) [(15)] Tier III--An application for property used partially for the control of air, water, and/or land pollution and [but] that does not correspond exactly to an item [is not included] on the Tier I Table [Equipment and Categories List located] in §17.14(a) of this title.

[(16) Tier IV--An application containing only pollution control property which falls under a category located in Part B of the figure in §17.14(a) of this title.]

(11) [(17)] Use determination--A finding, either positive or negative, by the executive director that the property is used wholly or partially for pollution control purposes and listing the percentage of the property that is determined to be used for pollution control.

[(18) Use determination letter--The letter sent to the applicant and the chief appraiser which includes the executive director's use determination. In addition to the use determination, the letter will also include at least the following information:]

[(A) the name of the applicant;]

[(B) the name and location of the facility;]

[(C) the property description;]

[(D) in the case of a Tier III application, a copy of the Cost Analysis Procedure worksheet;]

[(E) in the case of a Tier IV application, a copy of the worksheet explaining the calculation of the use percentage; and]

[(F) any other information the executive director deems relevant to the use determination.]

§17.6. Property Ineligible for Exemption from Taxation.

The following are not exempt from taxation and are not entitled to a positive use determination under this chapter:

(1) property is not entitled to an exemption from taxation:

(A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;

(B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;

(C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; or

(D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided.

(2) property that is used for residential purposes, or for recreational, park, or scenic uses as defined by Texas Tax Code, §23.81;

(3) motor vehicles; and

(4) property that was subject to a tax abatement agreement executed before January 1, 1994. However, property acquired, constructed, or installed after expiration of a tax abatement agreement could be eligible for a positive use determination.

§17.10. Application for Use Determination.

(a) To [In order to] be granted a use determination a person shall submit to the executive director:

(1) a completed and signed commission application form [or a similar reproduction] and one copy of the completed, signed form; and

(2) the appropriate fee, under §17.20 of this title (relating to Application Fees).

(b) An application must be submitted for each unit of pollution control property or for each [facility consisting of a] group of integrated units that has [which have] been, or will be, installed for a common purpose.

(c) If the applicant desires to apply for a use determination for a specific tax year, the application must be postmarked no later than January 31 of the following year. Applications postmarked after this date will [not] be processed as a lower priority than [until after review of all] applications postmarked by the due date [are completed] and without regard for any appraisal district deadlines.

(d) All [Except for paragraph (1) of this subsection, all] use determination applications must [shall] contain at least the following:

(1) [for Tier I, II, and III use determination applications,] the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, and/or [or] land pollution;

(2) the estimated cost of the pollution control property;

(3) the purpose of the installation of such facility, device, or method, and the proportion of the installation that is for pollution control, such as a detailed description of the pollution source and a detailed and labeled process flow diagram that clearly depicts the pollution control property and the processes and equipment that generate the pollutant(s) being controlled [property];

(4) the specific sections of the law(s), rule(s), or regulation(s) [law, rules, or regulations that are] being met or exceeded by the use, installation, construction, or acquisition of the pollution control property;

(5) if the installation includes property that is not used wholly for the control of air, water, and/or [or] land pollution, and is not on the Tier I Table [Equipment and Categories List], a worksheet showing the calculation of the Cost Analysis Procedure, §17.17(c) [§17.17] of this title [(relating to Partial Determination)], and explaining each of the variables;

[(6) if the pollution control property contains equipment which falls under one of the categories listed in Part B of the Equipment and Categories List, located in §17.14 of this title (relating to Equipment and Categories List), a worksheet showing the method and the calculation used to calculate the use percentage;]

(6) [(7)] any information that the executive director deems reasonably necessary to determine the eligibility of the application;

(7) [(8)] if the property for which a use determination is sought has been purchased from another owner who previously used the property as pollution control property, a copy of the bill of sale or other information submitted by the person or political subdivision that demonstrates, to the satisfaction of the executive director, that the transaction involves a bona fide change in ownership of the property and is not a sham transaction for the purpose of avoiding tax liability; and

(8) [~~(9)~~] the name of the appraisal district for the county in which the property is located.[~~;~~ ~~and~~]

[~~(10) the appropriate Decision Flow Chart, §17.15 of this title (relating to Review Standards), showing how each piece of pollution control property flows through the applicable diagram.~~]

§17.12. Application Review Schedule.

Following submission of the information required by §17.10 of this title (relating to Application for Use Determination), the executive director shall determine whether the pollution control property is used wholly or partly for the control of air, water, and/or [~~or~~] land pollution. If the determination is that the property is used partly for pollution control, the executive director shall determine the proportion of the property used for pollution control.

(1) As soon as practicable, the executive director shall send notice by regular mail or electronic mail to the chief appraiser of the appraisal district for the county in which the property is located that the person has applied for a use determination under this chapter.

(2) As soon as practicable after [~~Within three days of~~] receipt of an application for use determination, the executive director shall send [~~mail~~] written notification informing the applicant that the application is administratively complete or that it is deficient.

(A) If the application is not administratively complete, the notification will [~~shall~~] specify the deficiencies, and allow the applicant 30 days to provide a revised application with the requested information. If the applicant does not submit the requested information within 30 days, [~~an adequate response, the application will be sent back to the applicant without further action by~~] the executive director may take no further action on the application and the application fee will be forfeited under §17.20(b) of this title (relating to Application Fees).

(B) The executive director may request [~~For Tier I, II and III applications,~~] additional technical information [~~may be requested~~] within 60 days of issuance of an administrative completeness letter. If additional information is requested, the applicant shall provide a revised application with the requested information. If the applicant does not provide the requested technical information within 30 days, [~~the application will be sent back to the applicant without further action by~~] the executive director may take no further action on the application and the application fee will be forfeited under §17.20(b) of this title.

(C) An [~~If an~~] application where the executive director will take no further action [~~is sent back to the applicant~~] under subparagraphs (A) or (B) of this paragraph, may be refiled by the applicant. In such cases, the applicant shall [~~may refile the application and~~] pay the appropriate fee as required by §17.20 of this title.

(3) For [~~Tier IV~~] applications covering property listed in §17.17(b) of this title (relating to Partial Determinations), the executive director will complete the technical review of the application within 30 days of receipt of the required application information without regard to whether the information required by §17.10(d)(1) of this title has been submitted [~~documents~~].

(4) The executive director shall determine whether the property is or is not used wholly or partly to control pollution. The executive director is authorized to grant positive use determinations for the portion [~~some or all~~] of the property included in the application that is deemed pollution control property.

(A) If a positive use determination is made, the executive director shall issue a use determination letter to the applicant that [~~which~~] describes the proportion of the property that is pollution control property.

(B) If a negative use determination is made, the executive director shall issue a denial letter explaining the reason for the denial.

(C) A letter enclosing a copy of the determination shall be sent by regular or electronic mail to the chief appraiser of the appraisal district for the county in which the property is located.

§17.14. Tier I Pollution Control Property [~~Equipment and Categories List~~].

(a) For [~~The Equipment and Categories List (ECL) is a two-part list. Part A is a list of~~] the property listed in the Tier I Table located in this subsection that [~~the executive director has determined~~] is used [~~either~~] wholly [~~or partly~~] for pollution control purposes, a Tier I application is required. A Tier I application must not include any property that is not listed in this subsection or that is used for pollution control purposes at a use percentage that is different than what is listed in the table. If a marketable product is recovered (not including materials that are disposed) from property listed in this subsection, a Tier III application is required. [~~Part B is a list of categories of property which is located in Texas Tax Code (TTC), §11.31(k).~~]

Figure: 30 TAC §17.14(a)

[~~Figure: 30 TAC §17.14(a)~~]

(b) The commission shall review and update the Tier I Table [~~ECL~~] at least once every three years.

(1) The commission may add an [~~An~~] item [~~may be added~~] to the table [~~list~~] only if there is compelling evidence to support the conclusion that the item provides pollution control benefits and a justifiable pollution control percentage is calculable.

(2) The commission may remove an [~~An~~] item [~~may be removed~~] from the table [~~list~~] only if there is compelling evidence to support the conclusion that the item does not render pollution control benefits.

§17.17. Partial Determinations.

(a) A Tier III application requesting a partial determination must be submitted [~~requested~~] for all property that is either not on the Tier I Table [~~Part A of the Equipment and Categories List~~] located in §17.14(a) of this title (relating to Tier I Pollution Control Property), [~~Equipment and Categories List)~~] or does not fully satisfy the requirements for a 100% positive use determination under this chapter. [~~In order to calculate a partial determination percentage for pollution control property submitted in a Tier IV application, the cost analysis procedure described in subsection (d) of this section must be used.~~] For all [~~other~~] property for which a partial use determination is sought, the cost analysis procedure (CAP) described in subsection (c) [~~(b)~~] of this section must be used.

(b) The items in this subsection are adopted as a nonexclusive list of facilities, devices, or methods for the control of air, water, and/or land pollution. This subsection consists of the list located in Texas Tax Code, §11.31(k). The commission shall review and update the items listed in this subsection at least once every three years. The commission may add an item to this subsection only if there is compelling evidence to support the conclusion that the item provides pollution control benefits. The commission may remove an item from this subsection only if there is compelling evidence to support the conclusion that the item does not render pollution control benefits.

(1) Coal Cleaning or Refining Facilities.

(2) Atmospheric or Pressurized and Bubbling or Circulating Fluidized Bed Combustion Systems and Gasification Fluidized Bed Combustion Combined Cycle Systems.

(3) Ultra-Supercritical Pulverized Coal Boilers.

(4) Flue Gas Recirculation Components.

(5) Syngas Purification Systems and Gas-Cleanup Units.

(6) Enhanced Heat Recovery Systems.

(7) Exhaust Heat Recovery Boilers.

(8) Heat Recovery Steam Generators.

(9) Super heaters and Evaporators associated with heat recovery systems.

(10) Enhanced Steam Turbine Systems.

(11) Methanation.

(12) Coal Combustion or Gasification By-product and Co-product Handling, Storage, and Treatment Facilities.

(13) Biomass Cofiring Storage, Distribution, and Firing Systems.

(14) Coal Drying Processes, such as coal drying/moisture reduction, air jigging, precombustion decarbonization, and coal flow balancing technology.

(15) Oxy-Fuel Combustion Technology, Amine or Chilled Ammonia Scrubbing, Catalyst based Fuel or Emission Conversion Systems, Enhanced Scrubbing Technology, Modified Combustion Technology, Cryogenic Technology.

(16) If the United States Environmental Protection Agency adopts a final rule or regulation regulating carbon dioxide as a pollutant, property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in this state that is geologically sequestered in this state.

(17) Fuel Cells generating electricity using hydrocarbon derived from coal, biomass, petroleum coke, or solid waste.

(18) Any other equipment designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant.

(c) [~~(b)~~] Consistent with subsection (a) of this section, the following calculation (cost analysis procedure) must be used to determine the creditable partial percentage for a property that is filed on a Tier III application [~~submitted in a non-Tier-IV application~~]:
[~~Figure: 30 TAC §17.17(b)~~]

(1) If no marketable product results from the use of the property, use the following equation and enter "0" for the net present value of the marketable product (NPVMP):
Figure: 30 TAC §17.17(c)(1)

(2) For property that generates a marketable product (MP), the net present value of the MP is used to reduce the partial determination. The value of the MP is calculated by subtracting the production costs of the MP from the market value of the MP. This value is then used to calculate the net present value (NPV) of the MP (NPVMP) over the lifetime of the equipment. The equation for calculating NPVMP is as follows:
Figure: 30 TAC §17.17(c)(2)

[~~(c) For property that generates a marketable byproduct (BP), the net present value of the BP is used to reduce the partial determination. The value of the BP is calculated by subtracting the transportation and storage of the BP from the market value of the BP. This value is then used to calculate the net present value (NPV) of the BP over the lifetime of the equipment. The equation for calculating BP is as follows:~~]
[~~Figure: 30 TAC §17.17(c)~~]

[~~(d) For applications containing only property falling under a category listed in Part B of the Equipment and Categories List, located in §17.14(a) of this title (relating to Equipment and Categories List), a use determination must be calculated. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the executive director to review the proposed method and make the final determination.~~]

(d) [~~(e)~~] If the cost analysis procedure [~~or the method accepted by the executive director under subsection (d)~~] of this section produces a negative number or a zero, the property is not eligible for a positive use determination.

§17.20. Application Fees.

(a) Fees shall be remitted with each application for a use determination as required in paragraphs (1) - (3) [~~(4)~~] of this subsection.

(1) Tier I Application--A $150 fee shall be charged for applications for property that is located in the Tier I Table located [~~figure~~] in §17.14(a) of this title (relating to Tier I Pollution Control Property [~~Equipment and Categories List~~]), as long as the application seeks no variance from that use determination.

(2) Tier II Application--A $1,000 fee shall be charged for applications for property that is used wholly for the control of air, water, and/or land pollution, but not in the Tier I Table located [~~figure~~] in §17.14(a) of this title [~~(relating to Equipment and Categories List)~~].

(3) Tier III Application--A $2,500 fee shall be charged for applications for property used partially for the control of air, water, and/or land pollution.

[~~(4) Tier IV Application--A $500 fee shall be charged for applications containing only property which is located in Part B of the figure in §17.14(a) of this title (relating to Equipment and Categories List).~~]

(b) Fees will [~~shall~~] be forfeited for applications for use determination on which the executive director will take no further action [~~which are sent back~~] under §17.12(2) of this title (relating to Application Review Schedule). An applicant who submits an insufficient fee will receive a deficiency notice in accordance with the procedures in §17.12(2) of this title. The fee must be remitted with the response to the deficiency notice before the application will be deemed administratively complete. If it is determined during a technical review that an application was submitted at the wrong tier level, the executive director will notify the applicant of the amount in which the fees are deficient or in excess, and if there are deficient fees, the applicant shall remit the deficient amount of fees before review of the application continues. If the deficient fees are not paid in full within 30 days of the applicant being notified of the deficiency, the executive director will take no further action on the application. If the executive director takes no further action on the application, the portion of the fees already paid shall be forfeited by the applicant.

(c) All fees shall either be remitted in the form of a check or money order made payable to the Texas Commission on Environmental Quality (TCEQ), [~~or~~] by electronic funds transfer, or by using the commission's ePay system.

(d) The check, money order, or electronic funds transfer receipt must be delivered with the application to the commission, at the address listed on the application form.

§17.25. Appeals Process.

(a) Applicability.

(1) This subchapter applies to all appeals of use determinations issued by the executive director [~~for use determination applications that are declared administratively complete on or after September~~

~~1, 2001~~]. A proceeding based upon an appeal filed under this subchapter is not a contested case for purposes of Texas Government Code, Chapter 2001.

(2) [~~Persons who may appeal a determination by the executive director.~~] The following persons may appeal a use determination issued by the executive director:

(A) the applicant seeking a use determination; and

(B) the chief appraiser of the appraisal district for the county in which the property for which a use determination is sought is located.

(b) Form and timing of appeal. An appeal must be in writing and must be filed by United States mail, facsimile, or hand delivery with the chief clerk of the commission within 20 days after the receipt of the executive director's determination letter. A person is presumed to have been notified on the third regular business day after the date the notice of the executive director's [~~directors~~] action is mailed by first class mail. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's use determination is final. An appeal filed under this subchapter must:

(1) provide the name, address, and daytime telephone number of the person who files the appeal;

(2) give the name and address of the entity to which the use determination was issued;

(3) provide the use determination application number for the application for which the use determination was issued;

(4) request commission consideration of the use determination; and

(5) explain the basis for the appeal.

(c) Appeal processing. The chief clerk shall:

(1) deliver or mail to the executive director a copy of the appeal;

(2) deliver or mail a copy of the appeal to the applicant if the appeal was filed by the chief appraiser or to the chief appraiser if the appeal was filed by the applicant; and

(3) schedule the appeal for consideration at the next regularly scheduled commission meeting for which adequate notice can be given.

(d) Action by the general counsel. The general counsel may remand a matter from the commission's agenda to the executive director if the executive director or the public interest counsel requests a remand.

(e) [~~(d)~~] Action by the commission.

(1) The person seeking the determination and the chief appraiser may testify at the commission meeting at which the appeal is considered.

(2) The commission may remand the matter to the executive director for a new determination or deny the appeal and affirm the executive director's use determination.

(3) If the commission denies the appeal and affirms the executive director's use determination, the commission's decision shall be final and appealable.

(f) [~~(e)~~] Action by the executive director.

(1) If the commission remands a use determination to the executive director, the executive director shall:

(A) conduct a new technical review of the application that [~~which~~] includes an evaluation of any information presented during the commission meeting; and

(B) upon completion of the technical review, issue a new determination. A copy of the new determination shall be mailed to both the applicant and the chief appraiser of the county in which the property is located.

(2) A new determination by the executive director may be appealed to the commission in the manner provided by this subchapter.

(g) [~~(f)~~] Withdrawn appeals. An appeal may be withdrawn by the entity who requested the appeal. The withdrawal must be in writing, and give the name, address, and daytime telephone number of the person who files the withdrawal, and the withdrawal shall indicate the identification number of the use determination. The withdrawal must be filed by United States mail, facsimile, or hand delivery with the chief clerk of the commission.

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

Filed with the Office of the Secretary of State on July 1, 2010.

TRD-201003699
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 239-6090

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30 TAC §17.15

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, which authorizes the commission to perform any acts authorized by the TWC or other laws that are necessary and convenient to the exercise of its jurisdiction and powers; and §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The rules are also proposed under Texas Tax Code, §11.31, which authorizes the commission to adopt rules to implement the Pollution Control Property Tax Exemption.

The proposed repeal implements the legislative mandate under HB 3206 and HB 3544, 81st Legislature, 2009, which add new subsection (g-1) to Texas Tax Code, §11.31. Texas Tax Code, §11.31(g-1) requires uniform application to all applications of the standards and methods for processing.

§17.15. Review 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 July 1, 2010.

TRD-201003700

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 239-6090

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CHAPTER 106. PERMITS BY RULE
SUBCHAPTER Q. PLASTICS AND RUBBER

30 TAC §106.392

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

The Texas Commission on Environmental Quality (commission or TCEQ) proposes the repeal of §106.392.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The Air Permits Division (APD) requests that the executive director repeal §106.392, Thermoset Resin Facilities. The repeal of the thermoset resin permit by rule (PBR) would ensure that new and modified thermoset resin facilities would use the most technically appropriate and protective method of authorization. The proposed thermoset resin standard permit being developed by APD updates administrative and technical requirements and is intended to replace the permit by rule that currently exists for these facilities.

The executive director recommends that the proposed rule change be adopted only if the associated standard permit is issued by the commission. Existing thermoset resin facilities registered under §106.392 prior to the effective date of the repeal would continue to be authorized under the PBR as long as the owner or operator can continue to follow the requirements of the PBR for the site.

SECTION DISCUSSION

§106.392 - Thermoset Resin Facilities

The commission is proposing to delete this section in order to replace its function with the proposed thermoset resin standard air permit.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The agency will implement the proposed rule using currently available resources. Agency revenue is expected to increase, but the increase is not expected to be significant. Local governments and other state agencies do not typically own or operate thermoset resin facilities; therefore, the proposed rule is not expected to have fiscal implications for these entities.

The proposed rule would amend Chapter 106 to repeal the PBR for thermoset resin facilities. Thermoset resin facilities that do not modify their operations could continue to operate under their current PBR as long as they meet the requirements contained in that PBR. New or modified thermoset resin facilities would be required to obtain a standard permit that is also currently under proposal or a case-by-case new source review (NSR) permit. Thermoset resin is used in fiber-reinforced plastic and cultured (synthetic) marble products such as bathtubs, bathroom countertops, boats, and storage tanks.

The agency estimates an increase in fee revenue due to the repeal of the current PBR if affected facilities have to be authorized under the proposed standard permit or a case-by-case NSR permit. Only new or modified facilities would be affected by the proposed rule. The current PBR fee is $450 for a large business and $100 for a small business. The proposed standard permit is expected to become effective in December 2010 and will cost $900 per registration. The standard permit would require renewal every ten years. The agency conservatively estimates that there will be ten approved standard permit registrations per year at $900 for a total of $9,000 per year. In the past, approximately eight small businesses have registered for a PBR and paid $100 each while two large businesses have paid $450 each for a PBR for a total of $1,700 per year. The estimated net increase in agency revenue is expected to be $7,300 per year as a result of the proposed rule and proposed standard permit and is not expected to be significant.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be more detailed permit conditions and requirements than the PBR for improved air quality in the vicinity of thermoset resin facilities.

Fiscal implications are anticipated for individuals or businesses that propose a new facility or modify an existing one. Businesses that do not modify an existing facility or propose a new one will be able to continue to operate under the PBR for thermoset resin facilities as long as they continue to comply with the permit provisions.

The proposed repeal of the thermoset resin PBR will require businesses that own or operate new or modified facilities to register for the new proposed thermoset resin standard permit or apply for a NSR permit on a case-by-case basis. The proposed standard permit or case-by-case NSR permit would have more detailed permit conditions and requirements than the current PBR. The proposed thermoset resin standard permit would require a stack that is at least twice the height of the building where production takes place. Such a stack could be between 40 and 75 feet, and staff estimates that a new structurally supported stack could be as much as $22,000 per facility and a structurally self-supported stack could cost as much as $75,000 to $80,000 per facility. Stacks required by the current PBR are roughly six to 20 feet and are estimated to have cost $6,000 to $11,000 per facility. The estimated cost increase for stacks could range between $16,000 to $69,000 depending on the type of stack and the required height. Staff conservatively estimates that ten approved thermoset resin facilities per year will be affected by these proposed requirements. In addition, a large business will be required to pay $450 more to register for the proposed standard permit, which cost $900, as opposed to a PBR, which cost $450.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for those small or micro-businesses that construct new or modify existing thermoset resin businesses as a result of the proposed rule. Staff estimates that eight out of ten approved thermoset resin businesses ex-

pected to modify existing facilities or build new ones will be small businesses. Small businesses that build new facilities or modify existing ones will be required to register for a proposed standard permit or a NSR permit. These permits will have the same stack requirements as those required for large businesses. The estimated increased cost for stacks could range between $16,000 to $69,000 depending on the type of stack and the required height. A small business that paid $100 for the current PBR will also be required to pay $800 more for the proposed standard permit, which costs $900.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to protect the environment. The compliance and registration requirements for thermoset resin facilities are already designed to minimize the regulatory burden while still protecting the public from odor nuisance issues. The proposed standard permit allows for a range of designs and operating parameters to maximize flexibility. Thermoset resin facilities using less than one ton per year are exempt from all requirements except recordkeeping requirements. If no modification of a thermostat resin facility is made, a business can continue to operate under the repealed PBR.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that this proposal is not subject to §2001.0225 because it does not meet the definition of a major environmental rule as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking is not a major environmental rule because it is mainly an administrative action only, to repeal the PBR thermoset resin facilities which is in §106.392. The proposed repeal will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, a draft regulatory impact analysis is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory impact analysis of a major environmental rule as defined in the Texas Government Code. Texas Government Code, §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. This rulemaking does not exceed a standard set by federal law. In addition, this proposal does not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to repeal the PBR for thermoset resin facilities, which is in §106.392. This repeal does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Promulgation and enforcement of this proposed repeal is neither a statutory nor a constitutional taking because it does not affect private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in real property because this rulemaking does not burden (constitutionally); nor restrict or limit the landowner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule(s) include: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. The proposed rulemaking will indirectly benefit the environment because the repeal of §106.392 is expected to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies. Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at

the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this proposal are minor sources and not subject to the Federal Operating Permits Program. In addition, this proposal would not directly affect existing authorized sources unless those sources are modified and require new authorization. Therefore, there should be no direct effect on sites subject to the federal operating permits program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 9, 2010 at 10:00 a.m. in 201S of Building E, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-012-106-PR. The comment period closes August 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Ms. Becky Southard, Technical Program Support Section, (512) 239-1638.

STATUTORY AUTHORITY

The repeal is proposed under the Texas Health and Safety Code, Texas Clean Air Act, §§382.002, Policy and Purpose; 382.011, General Powers and Duties; 382.012, State Air Control Plan; 382.017, Rules; 382.051, Permitting Authority of Commission; Rules; 382.05196, Permits by Rule; and 382.057, Exemption. The repeal is also be proposed under the commission's general authority under Texas Water Code, §§5.102, General Powers; 5.103, Rules; and 5.105, General Policy.

The proposed repeal implements Texas Health and Safety Code, §§382.017, 382.051, 382.05196, and 382.057.

§106.392. Thermoset Resin 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 July 1, 2010.

TRD-201003712

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 19. OIL SPILL PREVENTION AND RESPONSE

SUBCHAPTER F. DERELICT VESSELS AND STRUCTURES

31 TAC §§19.70 - 19.79

The General Land Office (GLO) proposes new Subchapter F, including §§19.70 - 19.79 relating to the authority of the Commissioner of the GLO (Commissioner) under §40.108 of the Oil Spill Prevention and Response Act of 1981, Chapter 40 of the Texas Natural Resources Code (OSPRA) to order the removal and disposal of a derelict vessel or structure left in a wrecked, derelict, or substantially dismantled condition and to contract for the removal and disposal of such vessels and structures. This new subchapter is proposed to implement H.B. 2096 (Acts 2005, 79th Legislature, Chapter 216, effective September 1, 2005) and H.B. 3306 (Acts 2009, 81st Legislature, Chapter 1324, effective September 1, 2009).

BACKGROUND AND ANALYSIS OF PROPOSED RULES

Section 40.108 of OSPRA as amended provides the Commissioner with authority to order the removal of a derelict vessel or structure abandoned (without the consent of the Commissioner) in coastal waters where the Commissioner finds the structure or vessel to be: (1) involved in an actual or threatened unauthorized discharge of oil; (2) a threat to public health, safety, or welfare; (3) a threat to the environment; or (4) a navigation hazard. The proposed rules seek to provide definition to some of the terms found in §40.108 and to establish procedures for the findings and orders required for removal.

§19.70 Applicability and Purpose

This section outlines the vessels and structures to which the new sections apply and references the fact that there has been an increase in the number of derelict and abandoned vessels that are either grounded or anchored upon publicly or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Texas costal waterways, and threaten the environment with the potential release of oil and hazardous substances.

§19.71 Definitions

This section provides definitions for words, terms, and phrases used in the new subchapter. Key terms include the definition of "abandoned vessel" which means a vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the submerged lands below or on which the vessel is located for either a period of more than 21 consecutive days or for more

than a total of 90 days in any 365-day period, and the vessel's owner is: (a) not known or cannot be located; or (b) known and located but is unwilling to take control of the vessel. The term "authorized public entity" includes the Commissioner of the GLO or a local government with jurisdiction over submerged land on or over which a derelict vessel is located that has adopted a local ordinance relating to removal and disposal of derelict vessels and has contracted with the Commissioner for such removal or disposal.

"Derelict structure" references other defined terms where it presents, in the Commissioner's sole determination a "threat to public health, safety or welfare." In making such determination, the Commissioner shall consider whether or not a structure: is fit for its intended purpose; is safe for its foreseeable use by the public; is hidden or not visibly apparent to the public; or possesses other characteristics or conditions which threaten public safety, health, or welfare. Similarly "derelict vessel" references a vessel that is either "wrecked" or "substantially dismantled" which are also defined terms. "Wrecked" means a vessel that is fully or partially submerged, resting fully or partially on submerged land, or is in danger of sinking. Whereas, "substantially dismantled" is defined in terms of the absence of elements required for normal transportation of the vessel, including the following: rigging; transom; helm; engine; or intact hull. "Intact hull" is also a defined term, which means a vessel that has no openings or perforations in the bottom or side below the deck. Barges do not need a functional engine or helm.

In order to justify a removal order, the Commissioner must make a finding that a derelict vessel or structure is: (1) involved in an actual or threatened unauthorized discharge of oil; (2) a threat to public health, safety, or welfare; (3) a threat to the environment; or (4) a navigation hazard. The term "threatened unauthorized discharge of oil" is defined as the condition of a derelict vessel that has either a history of an actual unauthorized discharge of oil or the presence of oil on the vessel. The term "threat to the environment" refers to the condition of a derelict vessel that has either a history of an actual release of a hazardous substance or the presence of a hazardous substance on the vessel. The term "navigation hazard" is defined as any vessel or structure that presents, in the Commissioner's sole determination, an obstruction which impedes or stops navigation; or poses an immediate and significant threat to life, property, or a structure that facilitates navigation. The term includes a vessel or structure without appropriate navigational markers or a vessel that is not moored to a dock, mooring buoy, or other appropriate navigational structure.

The term "person claiming ownership" includes an insurance company that obtains title to a vessel or structure as the result of payment of a total loss claim in addition to a person who provides evidence of ownership pursuant to these rules. The term "person responsible or responsible person" includes the owner or operator of a vessel or structure. In the case of an abandoned vessel or terminal facility, the person who would have been the responsible person immediately prior to the abandonment. The term includes a person that owns a controlling interest in the entity that is considered a person responsible. This provision allows the GLO to assess persons or entities that control an undercapitalized corporate entity with liability for removal, storage, and disposal costs of abandoned vessels or structures, as well as administrative penalties where appropriate.

"Disposal" is defined in terms of various options for disposition of a derelict vessel or structure in a reasonable and environmentally sound manner pursuant to these rules and applicable law. "Removal" means that a derelict vessel or structure must be removed from waters of the state to a secure storage area such as a VMS Site or place of disposal. The term "VMS Site" means a vessel management storage site used for the purpose of providing a means of dry-land access to vessels for removal from state waters, temporary storage, and disposal offsite after appropriate processing of the vessel. Finally, other terms including "hazardous substance," "no intrinsic value," and "numbered vessel" have the same meaning assigned by §40.003 of OSPRA.

§19.72 Authority of Authorized Public Entity

This section allows an authorized public entity (a local government with jurisdiction over the land on or over which a derelict vessel is located) that has contracted with the Commissioner, to remove and dispose of a derelict vessel within its jurisdiction in accordance with these rules. The section makes it clear that the primary responsibility to remove a derelict or abandoned vessel belongs to the owner, operator, or lessee of the moorage facility or lessee of the submerged lands where the vessel is located. An authorized public entity that contracts for the removal and disposal of derelict vessel or structure must require the contractor to maintain a policy of insurance to cover the cost of response to and removal of any unauthorized discharge of oil caused by the contractor during the removal and storage of the vessel or structure. The section also provides that nothing in this Subchapter limits the authority of a municipality or law enforcement agency to remove and dispose of an abandoned motor vehicle, watercraft, or outboard motor taken into custody by the agency or the disposal under Chapter 683 of the Texas Transportation Code. Finally, the section provides that the removal authority is permissive, and no authorized public entity has a duty to exercise the authority.

§19.73 Procedures for Removal or Disposal by an Authority of Authorized Public Entity

The new section requires an authorized public entity to obtain an order for removal or disposal after notice and an opportunity for hearing as provided OSPRA before undertaking the removal or disposal action, except that the Commissioner may remove a vessel or structure involved in an actual or threatened unauthorized discharge of oil as part of a response action without a hearing. The authorized public entity must remove the derelict vessel or structure to a VMS Site unless provided otherwise in the removal order issued by the Commissioner. The rule outlines the factors to be considered by the Commissioner in determining whether removal to a VMS Site should be waived. The authorized public entity must give preference to disposal options that generate a monetary benefit from the vessel or structure. Proceeds from the sale of the vessel or structure in accordance with these rules shall be used for removal, storage, and disposal costs with any excess deposited to the credit of the coastal protection fund.

§19.74 Claim of Ownership

This new section requires a person claiming ownership of a vessel or structure prior to its disposal to demonstrate to the satisfaction of the Commissioner that the person has a lawful right to possession of the vessel or structure. Evidence must include either a sworn statement asserting ownership that details the manner in which ownership was acquired, evidence of registration or documentation from an authorized federal or state agency, or evidence of assessed value from the appropriate taxing authority. The person claiming ownership must reimburse the authorized

public entity for costs incurred for the removal and storage before delivery of possession and no later than the time specified in a notice of intention to dispose of the vessel or structure. Finally, in order to discourage repeated violations, the person claiming ownership must sign an agreement not to abandon the same vessel, with the understanding that breach of such agreement will subject the person to administrative penalties not to exceed $125,000.

§19.75 Lien Holder Rights

This new section provides procedures for a person claiming the right to possession as a lien holder of a vessel or structure subject to removal or disposal to obtain possession of the vessel or structure prior to its disposal to protect the security interest of the lien holder. If the Commissioner has actual knowledge of the security interest, notice must be given to the person in the same manner provided by Texas Natural Resources Code §40.254 with a reasonable time specified in the preliminary report for removal of the vessel or structure. However, the GLO has no obligation to check lien records. Although the lien holder is not considered a responsible party liable for the removal costs, it may undertake removal of the vessel in order to protect the collateral. In addition, the interest of the state in recovering removal, storage, and disposal costs shall have priority by statute over the interest of the holder of a security interest in a vessel or structure, and those costs must be paid prior to delivery of possession of the vessel or structure to the lien holder. Salvage sale proceeds in excess of the cost of removal, storage, and disposal must be paid to the lien holder to the extent necessary to satisfy the secured debt.

§19.76 Sale of Derelict Vessel or Structure

This new section allows an authorized public entity to sell a vessel or structure that is the subject of a removal action as provided by law, if possession of the vessel is not claimed by the owner or lien holder. The owner or lien holder who fails to claim possession and pay removal costs waives all rights and interests in the vessel or structure and consents to the sale or transfer of the item by the authorized public entity. The purchaser takes title free and clear of all liens and claims of ownership and is entitled to register the vessel and apply for a certificate of title from Texas Parks and Wildlife Department for the vessel as property seized by a governmental entity. Finally, the purchaser of the vessel or structure must sign an agreement not to abandon the same vessel, with the understanding that breach of such agreement will subject the person to administrative penalties not to exceed $125,000. This is intended to discourage the purchaser from stripping the vessel of usable parts and abandoning the vessel again.

§19.77 Disposal of Derelict Vessel or Structure

This new section allows an authorized public entity to contract for the transportation and disposal of waste generated from the removal of a vessel or structure with no intrinsic value to an authorized landfill, recycling center, or hazardous waste management facility. The authorized public entity may disqualify a potential disposal contractor from consideration for award of a disposal contract if the credit for salvage, if any, is not stated separately. The purpose of this provision is to meet the statutory requirement of using the least costly method of disposal. The authorized public entity may also require the contractor to provide copies of manifests, run tickets, invoices, or other written documentation that shows the name and address of the waste disposal facility and the date the waste was transported to it.

This new section also allows the authorized public entity to transfer a watercraft that is not claimed by the owner or lien holder to the Texas Parks and Wildlife Department for use as part of an artificial reef under Chapter 89, Texas Parks and Wildlife Code, only with the consent of the department.

§19.78 Determination of No Intrinsic Value

This new section establishes criteria for a determination by the Commissioner that a vessel or structure subject to a removal action has "no intrinsic value." The determination that a vessel or structure has no intrinsic value is relevant to whether personal service of the notice provided by Texas Natural Resources Code §40.254 is required. The determination of no intrinsic value also allows the Commissioner to waive the requirement of removal to a VMS Site prior to disposal. The factors considered by the Commissioner include the condition of the vessel or structure, the cost for removal relative to the salvage value of the vessel or structure, and the cost of conducting a sale to a third party relative to the salvage value of the vessel.

§19.79 Prioritization of Derelict Vessel and Structure Removal

This new section establishes factors the Commissioner may consider in determining the priority for removal of a derelict vessel or structure. These factors are not listed in any order of importance and include consideration of the nature and seriousness of the threat posed by the vessel or structure, local government and private financial participation in the removal project (including in-kind contributions), and, most importantly, the availability of appropriated funds. In order to encourage local government adoption of an ordinance relating to removal and disposal of derelict vessels, the Commissioner may consider such a local ordinance in prioritizing removal projects.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Greg Pollock, Deputy Commissioner for the GLO's Oil Spill Prevention and Response Division, has determined that for each year of the first five years the new sections as proposed are in effect there will be no fiscal implications for state government as a result of enforcing or administering the new sections because the GLO anticipates being able to absorb the additional costs associated with the removal program not covered by new revenue within existing resources. There will be no fiscal impact on local governments for each of the first five years the new sections as proposed are in effect as a result of enforcing or administering the rules since participation is voluntary.

Mr. Pollock has determined that the proposed new rules will not increase the costs of compliance for small or large businesses or individuals required to comply with the new rules. Current law prohibits a person from abandoning a vessel or structure in or on coastal waters in a derelict condition without the consent of the Commissioner. These new rules simply establish procedures for removal and disposal actions.

The GLO has determined that a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect. The GLO has also determined that an economic impact statement and regulatory flexibility analysis on these proposed regulations is not required, because the proposed regulations do not have a material adverse economic effect on small businesses.

PUBLIC BENEFIT

Mr. Pollock has determined that the public will benefit from the proposed regulations because the new rules provide for a more efficient procedure for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures. The proposed new rules allow the Commissioner to prioritize removal projects and respond to those derelict vessels and structures that pose the most severe threat to public health, safety, and welfare, as well as the environment. The rules also encourage local government and private participation in removal projects, which will benefit the public as well.

In addition, the public will benefit from the procedures that provide due process notice to owners and holders of a security interest in derelict structures and vessels, but ensure that the state has priority for recovery of removal, storage, and disposal costs to limit the expenditure of public funds. The rules also establish procedures requiring the Commissioner to give preference to a disposal method that generates a monetary benefit to the state or, where no value may be generated, the least costly method to further limit the expenditure of public funds. Requiring prospective disposal contractors to separately state the salvage credit, if any, allows the Commissioner to select the least costly method. By including in the definition of "person responsible or responsible person" those persons that have a controlling interest in the entity that is considered a person responsible, the GLO will be able to assess persons or entities that control an undercapitalized corporate entity with liability for removal, storage, and disposal costs of abandoned vessels or structures. This will also limit the expenditure of public funds for removal projects.

Finally, the new sections ensure that disposal of waste generated from the removal of a vessel or structure with no intrinsic value is undertaken in an environmentally sound manner by transportation to an authorized landfill, recycling center, or hazardous waste management facility in accordance with Chapter 361 Texas Health and Safety Code.

CONSISTENCY WITH CMP

The proposed new rules concerning procedures for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures implement §40.108 of OSPRA as amended by H.B. 2096 and H.B. 3306 and are not subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. Therefore, consistency review is not required.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the new rules to determine whether Texas Government Code, Chapter 2007 (Private Real Property Rights Preservation Act), is applicable and a detailed takings assessment is required. The GLO has determined that the proposed amendments and new rules do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19 of the Texas Constitution. Therefore, a detailed takings assessment is not required.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the 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 the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed new rules are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §40.108 and §40.254. These sections as amended by H.B. 2096 and H.B. 3306, provide the GLO with the authority to adopt rules for identification, notice to owners and lien holders, findings, hearings, and orders for removal, and disposal of derelict vessels and structures.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register, Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The new sections are proposed under OSPRA, Texas Natural Resources Code, §40.007(a), which gives the Commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA, and §40.108(e), which authorizes the Commissioner of the GLO to adopt regulations relating to a system for prioritizing the removal or disposal of derelict vessels or structures.

Texas Natural Resources Code §40.108 and §40.254 are affected and implemented by the proposed new rules.

§19.70. Applicability and Purpose.

(a) Applicability. This subchapter applies to any structure or vessel in or on coastal waters, on public or private lands or at a public or private port or dock if the structure or vessel is in a wrecked, derelict, or substantially dismantled condition.

(b) Purpose. There has been an increase in the number of derelict and abandoned vessels that are either grounded or anchored upon publicly or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Texas costal waterways, and threaten the environment with the potential release of oil and hazardous substances. The costs associated with the disposal of derelict and abandoned vessels are substantial, and in many cases there is no way to track down the current vessel owners in order to seek compensation. As a result, the costs associated with the removal of derelict vessels becomes a burden on public entities and the taxpaying public. This subchapter is adopted to implement H.B 2096 (Acts 2005, 79th Legislature, Chapter 216, effective September 1, 2005) and H.B. 3306 (Acts 2009, 81st Legislature, Chapter 1324, effective September 1, 2009).

§19.71. Definitions.

The following words, terms and phrases, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other terms are defined in §19.2 of this title (relating to Definitions).

(1) Abandoned vessel--a vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the submerged lands below or on which the vessel is located for either a period of more than 21 consecutive days or for more than a total of ninety days in any three hundred sixty-five-day period, and the vessel's owner is:

(A) Not known or cannot be located; or

(B) Known and located but is unwilling to take control of the vessel. For the purposes of this subchapter only, "in the same area" means within a radius of five miles of any location where the vessel was previously moored or anchored on submerged lands.

(2) Authorized public entity--the commissioner of the General Land Office or a local government with jurisdiction over submerged land on or over which a derelict vessel is located that has adopted a local ordinance relating to removal and disposal of derelict vessels and has contracted with the commissioner for such removal or disposal.

(3) Derelict structure--any structure or facility in or on coastal waters that presents, in the commissioner's sole determination, an imminent and unreasonable threat to public health, safety or welfare.

(4) Derelict vessel--a vessel that is either wrecked or in a substantially dismantled condition.

(5) Disposal--disposition of a derelict vessel or structure in a reasonable and environmentally sound manner. The term includes:

(A) delivery of possession to a person claiming ownership in accordance with §19.74 of this title (relating to Claim of Ownership);

(B) delivery of possession to a lien holder claiming a right to possession in accordance with §19.75 of this title (relating to Lien Holder Rights);

(C) sale to a third party in accordance with §19.76 of this title (relating to Sale of Derelict Vessel or Structure);

(D) transportation of waste generated from the removal of a vessel or structure with no intrinsic value to an authorized landfill, recycling center, or hazardous waste management facility for in accordance with Chapter 361 Texas Natural Resources Code.

(6) Hazardous substance--any substance, except oil, designated as hazardous by the Environmental Protection Agency pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §9601 et seq.) and designated by the Texas Commission on Environmental Quality.

(7) Intact hull--a vessel that has no openings or perforations in the bottom or side below the deck.

(8) Lien holder--the holder of a security interest in a vessel or structure created by statute or contract to secure the payment of a debt or performance of some other obligation, where the security interest is perfected in accordance with the laws of this State or some other jurisdiction.

(9) Navigation hazard--any vessel or structure that presents, in the commissioner's sole determination, an obstruction which impedes or stops navigation; or poses an immediate and significant threat to life, property, or a structure that facilitates navigation. The term includes a vessel or structure without appropriate navigational markers or a vessel that is not moored to a dock, mooring buoy, or other appropriate navigational structure.

(10) No intrinsic value--the condition of a vessel or structure where the cost of removal and disposal of a vessel or structure that has been abandoned or left in or on coastal waters exceeds the salvage value of the vessel or structure.

(11) Numbered vessel--a vessel:

(A) for which a certificate of number has been awarded by this state as required by Chapter 31, Texas Parks and Wildlife Code; or

(B) covered by a number in full force and effect awarded under federal law or a federally approved numbering system of another state.

(12) Person claiming ownership--a person listed as the last known owner of a numbered vessel or who provides evidence of ownership as provided in §19.72 of this title (relating to Authority of Authroized Public Entity). The term includes an insurance company that obtains title to a vessel or structure as the result of payment of a total loss claim.

(13) Person responsible or responsible person--the owner or operator of a vessel or structure. In the case of an abandoned vessel or terminal facility, the person who would have been the responsible person immediately prior to the abandonment. The term includes a person that owns a controlling interest in the entity that is considered a person responsible.

(14) Removal--the removal of a derelict vessel or structure from waters of the state to a secure storage area or place of disposal.

(15) Substantially dismantled--a vessel that lacks any of the following elements:

(A) rigging;

(B) transom;

(C) helm;

(D) engine; or

(E) intact hull For purposes of this subchapter only, a barge constructed and used for the transportation of cargo does not require a functional helm or engine, provide that is not wrecked or abandoned.

(16) Threatened unauthorized discharge of oil--the condition of a derelict vessel that has either a history of an actual unauthorized discharge of oil or the presence of oil on the vessel.

(17) Threat to public health, safety, or welfare--any vessel or structure in or on coastal waters which presents, in the commissioner's sole determination, an imminent and unreasonable threat to public health, safety or welfare. In making such determination, the commissioner shall consider whether or not a structure or facility:

(A) is fit for its intended purpose;

(B) is safe for its foreseeable use by the public;

(C) is hidden or not visibly apparent to the public; or

(D) possesses other characteristics or conditions which threaten public safety, health, or welfare.

(18) Threat to the environment--the condition of a derelict vessel that has either a history of an actual release of a hazardous substance or the presence of a hazardous substance on the vessel.

(19) VMS Site--a vessel management storage site used for the purpose of providing a means of dry-land access to vessels for re-

moval from state waters, temporary storage, and disposal offsite after appropriate processing of the vessel.

(20) Wrecked--a vessel that is fully or partially submerged, resting fully or partially on submerged land, or is in danger of sinking.

§19.72. Authority of Authorized Public Entity.

(a) An authorized public entity has the authority, subject to the processes and limitations of this Subchapter, to store, strip, use, auction, sell, salvage, scrap, or dispose of a derelict vessel found on or above submerged lands within the jurisdiction of the authorized public entity. A vessel disposal must be done in an environmentally sound manner and in accordance with all federal, state, and local laws, including the state solid waste disposal provisions provided for in Chapter 361, Texas Health and Safety Code. Scuttling or sinking of a vessel is only permissible after obtaining the express permission of the owner or owners of the submerged lands below where the scuttling or sinking would occur, and obtaining all necessary state and federal permits or licenses.

(b) The primary responsibility to remove a derelict or abandoned vessel belongs to the owner, operator, or lessee of the moorage facility or the lessee of the submerged lands where the vessel is located. If the authorized public entity with jurisdiction is unwilling or unable to exercise the authority granted by this section, it may request the General Land Office to assume the authorized public entity's authority for a particular vessel. The General Land Office may, at its discretion, assume authority for a particular vessel after being requested to do so. For vessels not at a moorage facility, an authorized public entity with jurisdiction over the submerged lands where the vessel is located may, at its discretion, request to assume primary responsibility for that particular vessel from the owner of the submerged lands where the vessel is located.

(c) An authorized public entity that contracts for the removal and disposal of derelict vessel or structure shall require the contractor to maintain a policy of insurance to cover the cost of response to and removal of any unauthorized discharge of oil caused by the contractor during the removal and storage of the vessel or structure.

(d) Nothing in this subchapter shall limit the authority of a law enforcement agency to use agency personnel, equipment, and facilities or contract for other personnel, equipment, and facilities to remove, preserve, store, send notice regarding, and dispose of an abandoned motor vehicle, watercraft, or outboard motor taken into custody by the agency or the disposal under Texas Transportation Code, §§683.011-683.016, or the authority of a municipality or county for the abatement and removal from private or public property or a public right-of-way of a junked vehicle or part of a junked vehicle as a public nuisance under Texas Transportation Code, §§683.071- 683.078.

(e) The authority granted by this subchapter is permissive, and no authorized public entity has a duty to exercise the authority. No liability attaches to an authorized public entity that chooses not to exercise this authority.

§19.73. Procedure for removal or disposal by an authorized public entity.

(a) Before removing or disposing of a derelict vessel or structure, an authorized public entity must obtain an order from the commissioner for removal or disposal after notice and an opportunity for hearing as provided in §40.254, Texas Natural Resources Code, except that the commissioner may remove a vessel or structure involved in an actual or threatened unauthorized discharge of oil as part of a response action without a hearing.

(b) The authorized public entity shall remove the derelict vessel or structure to a VMS Site unless provided otherwise in the removal order issued by the commissioner. In determining whether removal to a VMS Site should be waived, the commissioner may consider:

(1) that the size or condition of the vessel or structure makes it impractical to store at a VMS Site;

(2) that an urgent public necessity exists that requires immediate removal and disposal; or

(3) that the derelict vessel or structure has no intrinsic value as determined by the commissioner in the removal order. In determining whether the vessel or structure has no intrinsic value, the commissioner shall consider the factors described in §19.78 of this title (relating to Determination of No Intrinsic Value).

(c) The authorized public entity may dispose of the vessel or structure in any reasonable and environmentally sound manner. The authorized public entity shall give preference to disposal options that generate a monetary benefit from the vessel or structure. Proceeds from the sale of the vessel or structure in accordance with §19.76 of this title (relating to Sale of Derelict Vessel or Structure) shall be used for removal, storage, and disposal costs; however, any proceeds in excess of the cost of removal, storage, and disposal shall be deposited to the credit of the coastal protection fund, except as provided by §19.75 of this title (relating to Lien Holder Rights). If no value may be generated from the vessel or structure, the authorized public entity shall select the least costly method of disposal in accordance with §19.77 of this title (relating to Disposal of Derelict Vessel or Structure).

§19.74. Claim of Ownership.

(a) A person claiming ownership of a vessel or structure must demonstrate to the satisfaction of the commissioner that the person has a lawful right to possession of a vessel or structure by purchase, exchange, gift, lease, inheritance, or legal action whether or not the vessel is subject to a security interest. The evidence must include either a sworn statement asserting ownership that details the manner in which ownership was acquired, evidence of registration or documentation from an authorized federal or state agency, or evidence of assessed value from the appropriate taxing authority.

(b) The authorized public entity may deliver possession of a vessel or structure that has been the subject of a removal action in accordance with Texas Natural Resources Code §40.108, to a person claiming ownership prior to its disposal. The person claiming ownership must reimburse the authorized public entity for costs incurred for the removal and storage before delivery of possession and no later than the time specified in a notice of intention to dispose of the vessel or structure.

(c) A person claiming ownership that obtains delivery of possession of a vessel or structure that has been the subject of a removal action must agree that the person will not abandon the same vessel or structure in violation of Texas Natural Resources Code §40.108 and that breach of such agreement will subject the person to an civil penalty in the amount specified in Texas Natural Resources Code §40.251(f).

§19.75. Lien Holder Rights.

(a) If the commissioner has actual notice that a person holds a security interest in a vessel or structure subject to removal or disposal under Texas Natural Resources Code §40.108, notice must be given to the person in the manner provided by Texas Natural Resources Code §40.254. The preliminary report sent to the lien holder shall specify a reasonable time for removal of the vessel or structure. The GLO has no obligation to check lien records for security interests in a vessel before its removal and disposal.

(b) If the vessel or structure is not removed within a reasonable time as specified in the preliminary report under, Texas Natural

Resources Code §40.254, the commissioner may remove and dispose of, or contract for the removal and disposal of, a derelict vessel or structure described by subsection (a) of this section.

(c) The interest of the state in recovering removal, storage, and disposal costs shall have priority over the interest of the holder of a security interest in a vessel or structure described by subsection (a) of this section.

(d) A person claiming the right to possession as a lien holder of a vessel or structure subject to removal or disposal must demonstrate to the satisfaction of the commissioner that the security interest of the person has been perfected in accordance with the laws of this State or some other jurisdiction.

(e) The authorized public entity may deliver possession of a vessel or structure that has been the subject of a removal action in accordance with Texas Natural Resources Code §40.108, to a lien holder prior to its disposal. The lien holder must reimburse the authorized public entity for costs incurred for the removal and storage before delivery of possession and no later than the time specified in a notice of intention to dispose of the vessel or structure.

(f) Proceeds from the sale of the vessel or structure in excess of the cost of removal, storage, and disposal shall be paid to the holder of the security interest in the vessel or structure in an amount not to exceed the amount necessary to satisfy the secured debt.

§19.76. Sale of Derelict Vessel or Structure.

(a) If a derelict vessel or structure is not claimed under §19.74 of this title (relating to Claim of Ownership) or §19.75 of this title (relating to Lien Holder Rights):

(1) the owner or lien holder:

(A) waives all rights and interests in the vessel or structure, except that in the case of a security interest, the lien holder is entitled to be paid from the proceeds that exceed the cost of removal, storage, and disposal, an amount necessary to satisfy the secured debt; and

(B) consents to the sale of the item by the authorized public entity, transfer the item, if a watercraft, or the disposal of the item; and

(2) the authorized public entity may sell the vessel or structure as provided by law or dispose of the vessel or structure as provided in §19.77 of this title (relating to Disposal of Derelict Vessel or Structure).

(b) The purchaser of a vessel:

(1) takes title free and clear of all liens and claims of ownership;

(2) shall receive a sales receipt from the authorized public entity and a copy of the commissioner's order authorizing disposal of the vessel after notice and an opportunity for hearing has occurred; and

(3) is entitled to register the vessel and apply for a certificate of title from Texas Parks and Wildlife Department for the vessel as property seized by a governmental entity.

(c) The purchaser of a vessel or structure that has been the subject of a removal action must agree that the person will not abandon the same vessel or structure in violation of Texas Natural Resources Code §40.108 and that breach of such agreement will subject the person to an civil penalty in the amount specified in Texas Natural Resources Code §40.251(f).

§19.77. Disposal of Derelict Vessel or Structure.

(a) The authorized public entity may contract for the disposal and transportation of waste generated from the removal of a vessel or structure with no intrinsic value to an authorized landfill, recycling center, or hazardous waste management facility for in accordance with Chapter 361 Texas Health and Safety Code.

(b) The authorized public entity shall require the contractor for disposal and transportation under this section to state separately in its invoice the credit for salvage value of the vessel or structure, if any, and other costs for removal, storage, and disposal. The authorized public entity may disqualify a potential disposal contractor from consideration for award of a disposal contract if the credit for salvage, if any, is not stated separately.

(c) The authorized public entity may require the contractor for disposal and transportation under this section to provide copies of manifests, run tickets, invoices, or other written documentation that shows the name and address of the waste disposal facility and the date the waste was transported to it. This request will be made in writing and include a deadline for submittal of the disposal information.

(d) With the consent of the Texas Parks and Wildlife Department, the authorized public entity may transfer a watercraft that is not claimed under §19.74 of this title (relating to Claim of Ownership) or §19.75 of this title (relating to Lien Holder Rights) to the Parks and Wildlife Department for use as part of an artificial reef under Chapter 89, Texas Parks and Wildlife Code, or for other use by the Texas Parks and Wildlife Department permitted under the Texas Parks and Wildlife Code. On transfer of the watercraft, the Texas Parks and Wildlife Department:

(1) takes title free and clear of all liens and claims of ownership; and

(2) is entitled to register the watercraft and receive a certificate of title.

§19.78. Determination of No Intrinsic Value.

In making a determination that a vessel or structure has no intrinsic value, the commissioner shall consider the following factors:

(1) the condition of the vessel or structure, including whether the derelict vessel or structure:

(A) is substantially dismantled and lacks more than one of the major components listed in §19.71(15) of this title (relating to Definitions);

(B) has any salvageable major components including, but not limited to, engine, hull, fuel tank, or rigging;

(C) is unnumbered or lacks current registration; or

(D) has any other relevant condition affecting its value.

(2) the cost for removal, storage, and disposal of the vessel relative to the salvage value of the vessel or structure;

(3) the cost of conducting a sale to a third party relative to the salvage value of the vessel or structure; and

(4) any other matter deemed relevant by the commissioner.

§19.79. Prioritization of Derelict Vessel and Structure Removal.

This subchapter does not impose a duty on an authorized public entity to remove or dispose of a derelict vessel or structure. The commissioner may consider the following factors in determining the priority for removal of a derelict vessel or structure:

(1) whether there is an imminent threat of the unauthorized discharge of oil or release of a hazardous substance from the vessel or structure;

(2) whether there is an imminent threat that the vessel or structure will break apart;

(3) proximity of the vessel or structure to a navigational channel;

(4) proximity of the vessel or structure to a critical natural resource area;

(5) whether the local government with jurisdiction over submerged land on or over which a derelict vessel or structure is located has adopted a local ordinance relating to removal and disposal of derelict vessels and has contracted with the commissioner for such removal or disposal;

(6) whether federal and local governmental financial participation in the removal project is maximized, including in-kind contributions;

(7) whether financial participation by private beneficiaries of the removal project is maximized, including in-kind contributions;

(8) whether the removal project achieves efficiencies and economies of scale;

(9) the cost of the proposed project in relation to the amount of money available from appropriated funds; and

(10) any other matter deemed relevant by the commissioner.

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

Filed with the Office of the Secretary of State on June 30, 2010.

TRD-201003682
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER O. ADVISORY COMMITTEES

The Texas Parks and Wildlife Department (the department) proposes amendments to §§51.606 - 51.611, 51.631, 51.643, 51.671, and 51.672, concerning advisory committees. The proposed amendments would establish an expiration date of October 1, 2014 for the following advisory committees: White-tailed Deer Advisory Committee (WTDAC), Migratory Game Bird Advisory Committee (MGBAC), Upland Game Bird Advisory Committee (UGBAC), Private Lands Advisory Committee (PLAC), Bighorn Sheep Advisory Committee (BSAC), Wildlife Diversity Advisory Committee (WDAC), Freshwater Fisheries Advisory Committee (FFAC), Historic Sites Advisory Committee (HSAC), State Parks Advisory Committee (SPAC), and Coastal Resources Advisory Committee (CRAC). Under current rules, entities advising the department are referred to as either "boards" or "committees." To be consistent, the proposed amendments would also designate all advisory entities in the rules as "committees."

Parks and Wildlife Code, §11.062, authorizes the Chairman of the Texas Parks and Wildlife Commission (the Commission) to "appoint committees to advise the Commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute.

In 2009, the Commission adopted an amendment to §51.601, concerning General Provisions, that established a generic expiration date of October 1, 2010 for advisory committees of the department, unless otherwise specifically specified. The department seeks to extend their expiration dates of the listed committees so that they may continue to function. The change in the title of some committees from "Board" to "Committee" is for the purpose of consistency.

Scott Boruff, Deputy Executive Director for Operations, has determined that for each of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Boruff has also determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be to ensure proper management and effective use of department advisory committees.

There will be no adverse economic effect on persons required to comply with the amendments as proposed.

The department has determined that small or micro-businesses will not be affected by the proposed rules. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not filed a local impact statement with the Texas Workforce Commission as required by the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed rules.

Comments on the proposed rules may be submitted to Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558; or ann.bright@tpwd.state.tx.us.

DIVISION 2. WILDLIFE

31 TAC §§51.606 - 51.611

The amendments are proposed under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

The proposed amendments affect Parks and Wildlife Code, §11.0162.

§51.606. White-tailed Deer Advisory Committee (WTDAC).

(a) The WTDAC is created to advise the department on issues relevant to white-tailed deer and all programs involving white-tailed deer management in Texas, including problems, options, goals and planning regarding white-tailed deer.

(b) The WTDAC membership shall represent, at a minimum:

(1) the ecological range of white-tailed deer in Texas;

(2) landowners;

(3) conservation and management organizations; and

(4) hunters.

(c) The WTDAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The WTDAC shall expire on October 1, 2014.

§51.607. Migratory Game Bird Advisory Committee (MGBAC) [~~Board (MGBAB)~~].

(a) The MGBAC [~~MGBABC~~] is created to advise the department regarding the following

(1) the management, research and habitat acquisition needs of migratory game birds.

(2) development and implementation of migratory game bird regulations, research, and management.

(3) education and communications with various constituent groups and individuals interested in migratory game birds.

(b) The MGBAC [~~MGBAB~~] consists of members selected from members of the general public with an interest in migratory game bird management.

(c) The MGBAC [~~MGBAB~~] shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The MGBAB shall expire on October 1, 2014.

§51.608. Upland Game Bird Advisory Committee (UGBAC) [~~Board (UGBAB)~~].

(a) The MGBAC [~~UGBAB~~] is created to advise the department on matters pertaining to the following:

(1) regulation, management, research, and funding needs regarding upland game bird species that occur in Texas;

(2) management, research and habitat acquisition needs of upland game bird; and

(3) education and communications with various constituent groups and individuals interested in upland game bird species of Texas.

(b) The composition of the UGBAC [~~UGBAB~~] shall represent:

(1) the ecological range of upland game bird species in Texas;

(2) landowners;

(3) conservation organizations;

(4) representatives of appropriate state and federal agencies; and

(5) upland game bird hunters.

(c) The UGBAC [~~UGBAB~~] shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The UGBAC shall expire on October 1, 2014.

§51.609. Private Lands Advisory Committee (PLAC) [~~Board (PLAB)~~].

(a) The PLAC [~~PLAB~~] is created to advise the department on all matters pertaining to wildlife programs, management, and research on private lands in Texas, including the following:

(1) the development of an ecosystem approach to management of habitats;

(2) financing options for private lands programs;

(3) development and dissemination of information regarding management and research of wildlife habitat and ecosystems; and

(4) any other matters at the request of the chairman.

(b) The PLAC [~~PLAB~~] shall be composed of not fewer than 5 members representing private landowners from the various ecological regions of the state.

(c) The PLAC [~~PLAB~~] shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The PLAC shall expire on October 1, 2014.

§51.610. Bighorn Sheep Advisory Committee (BSAC).

(a) The BSAC is created to advise the department about problems, alternatives, solutions, and goals regarding the restoration of desert bighorn sheep to Texas.

(b) The composition of the BSAC will be comprised of the following:

(1) at least two members of the Texas Bighorn Society;

(2) at least two persons who own land in the historic range of desert bighorn sheep;

(3) university faculty and staff as necessary and appropriate; and

(4) representatives of government agencies as necessary and appropriate.

(c) The BSAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The BSAC shall expire on October 1, 2014.

§51.611. Wildlife Diversity Advisory Committee (WDAC).

(a) The WDAC shall advise the department on matters pertaining to management, research, and outreach activities related to nongame and rare species in the State of Texas, including the following:

(1) development and implementation of the wildlife diversity related projects, grants, and policy;

(2) wildlife diversity conservation and regulations;

(3) education and communications with various constituent groups and individuals interested in wildlife diversity in the state of Texas.

(b) The composition of the WDAC shall represent landowner and conservation organizations in Texas.

(c) The WDAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The WDAC shall expire on October 1, 2014.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003723
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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DIVISION 4. INLAND FISHERIES

31 TAC §51.631

The amendment is proposed under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

The proposed amendment affects Parks and Wildlife Code, §11.0162.

§51.631. Freshwater Fisheries Advisory Committee (FFAC) [~~Board (FFAB)~~].

(a) The FFAC [~~FFAB~~] is created for the purpose of advising the department regarding all matters pertaining to freshwater fisheries management and research in the state. The FFAC [~~Board~~] shall also advise the department regarding the following:

(1) the development and implementation of freshwater fisheries management programs throughout the state;

(2) the development of management and research priorities;

(3) the development of priorities for expenditures of angler financed programs; and

(4) the dissemination of information regarding freshwater fisheries management and research.

(b) The FFAC [~~FFAB~~] shall consist of individuals representing the state's freshwater angling public, the aquaculture industry, the freshwater fishing industry, fisheries educators, and conservation groups. Each member shall serve two-year or four-year terms as designated by the chairman, and terms may be staggered to ensure continuity.

(c) The FFAC [~~FFAB~~] shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The FFAC shall expire on October 1, 2014.

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

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TRD-201003724
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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DIVISION 5. STATE PARKS

31 TAC §51.643

The amendment is proposed under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

The proposed amendment affects Parks and Wildlife Code, §11.0162.

§51.643. Historic Sites Advisory Committee (HSAC).

(a) The HSAC is created to advise the department regarding the issues related to state historic sites and the needs of the state historic sites.

(b) The HSAC shall consist of professionals in the following fields: historic sites education, museums management, historic architecture, history, archeology, and related disciplines.

(c) The HSAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The HSAC shall expire on October 1, 2014.

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

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TRD-201003725
Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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DIVISION 8. COMMITTEES OF THE COMMISSION

31 TAC §51.671, §51.672

The amendments are proposed under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

The proposed amendments affect Parks and Wildlife Code, §11.0162.

§51.671. State Parks Advisory Committee (SPAC).

(a) The SPAC is appointed to advise the chairman and the commission regarding state parks.

(b) The SPAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(c) The SPAC shall expire on October 1, 2014.

§51.672. Coastal Resources Advisory Committee (CRAC).

(a) The CRAC is created to advise the chairman and the commission on issues that cross fishery and geographic boundaries on the coast of Texas.

(b) The CRAC shall consist of members in the public who have an interest in coastal resources issues.

(c) The CRAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The CRAC shall expire on October 1, 2014.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003726
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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CHAPTER 57. FISHERIES
SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION
DIVISION 3. STATEWIDE COMMERCIAL FISHING PROCLAMATION

The Texas Parks and Wildlife Department (the department) proposes the repeal of §57.994, concerning Individual Fishing Quota (IFQ), and new §57.994, concerning Individual Fishing Quota (IFQ). The proposed repeal and new rule would eliminate the current repetition of federal rule language and instead adopt the provisions of 50 CFR §622.16 and §622.20 by reference.

The IFQ is a federal regulatory program governing the commercial harvest of certain species of fish in federal waters. Federal rules require a federal permit and a federal Individual Fishing Quota (IFQ) vessel endorsement for the harvest of Gulf of Mexico Reef Fish. The IFQ is an allocation of a percentage of the total allowable harvest to individuals engaged in commercial fishing for certain species in federal waters, who in turn must comply with certain documentation and reporting requirements. Until recently, federal IFQ rules impacted Texas only with respect to the commercial harvest of red snapper; however, recent federal action amended 50 CFR Part 622, Subpart B to extend the applicability of federal IFQ rules to include two additional species in the Gulf of Mexico (gulf groupers and tilefish). The final rule was published in the *Federal Register* on March 1, 2010 (75 FR 9116) and took effect on March 31, 2010. The new rule is necessary to allow enforcement of these requirements in state as well as federal jurisdiction and to insure that fish landed in Texas are landed in compliance with federal limits.

Mr. Robin Riechers, Coastal Fisheries Division Director, has determined that for each of the first five years the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Riechers also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be a single enforcement standard that eliminates potential confusion in enforcement and compliance.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that since under federal law it is illegal to land red snapper, grouper, or tilefish in Texas that are not harvested, possessed, transported, or landed in compliance with federal law, there is no direct adverse economic effect on small or micro-businesses or persons required to comply as a result of the proposed rule, since it creates a state regulation mirroring the federal regulations that must be complied with anyway.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Jeremy Leitz, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4333; or jeremy.leitz@tpwd.state.tx.us.

31 TAC §57.994

(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 Parks and Wildlife Department or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under Parks and Wildlife Code, §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish that the department considers necessary to manage the species.

The proposed repeal affects Parks and Wildlife Code, Chapter 67.

§57.994. Individual Fishing Quota (IFQ).

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003717
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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31 TAC §57.994

The new rule is proposed under Parks and Wildlife Code, §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish that the department considers necessary to manage the species.

The proposed new rule affects Parks and Wildlife Code, Chapter 67.

§57.994. Individual Fishing Quota (IFQ).

The Texas Parks and Wildlife Department adopts by reference the provisions of 50 CFR §§622.16 and 622.20, which shall govern the take, possession, transportation, and landing of red snapper, grouper, and tilefish in Texas waters.

This agency hereby certifies that the proposal has been reviewed by 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 2, 2010.

TRD-201003718
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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CHAPTER 58. OYSTERS AND SHRIMP
SUBCHAPTER B. STATEWIDE SHRIMP FISHERY PROCLAMATION

31 TAC §58.160

The Texas Parks and Wildlife Department (the department) proposes an amendment to §58.160, concerning Taking or Attempting to Take Shrimp (Shrimping)--General Rules.

The proposed amendment would update the reference to federal regulations governing the dimensions and specifications of approved Bycatch Reduction Devices (BRDs) to accommodate changes to the federal rules.

Bycatch reduction devices (BRDs) reduce the mortality of non-target aquatic organisms that occurs during shrimping, especially among juvenile finfish and invertebrate populations. The use of BRDs reduces shrimp-trawl bycatch fishing mortality for recreationally important species such as red snapper, flounder, Atlantic croaker, sand seatrout, and blue crab. The use of BRDs also allows the escapement of other organisms, which enhances the overall viability of the ecosystem and has the potential to increase populations of finfish and invertebrates impacted by trawling.

The state rules requiring shrimp trawls to be equipped with BRDs have been in effect since 2000 and specify that only those BRDs classified by the National Marine Fisheries Service (NMFS) as "approved devices" are lawful for use in waters under state jurisdiction. From time to time NMFS engages in federal rulemaking to designate new or modified BRD types as "approved devices." In a final rule published in the *Federal Register* on May 24, 2010 (75 FR 28760), NMFS extended the effectiveness of provisional BRDs authorized by a previous rulemaking on February 13, 2008 (73 FR 8219), which added three new BRD types to the list of BRDs approved for use in the federal waters of the Gulf of Mexico. The extended approval is until May 24, 2012 and the effective date of the federal rule change is June 23, 2010.

The proposed amendment to §58.160 would allow the approved BRDs to continue to be used in state as well as federal waters. By creating regulatory consistency between state and federal rules, the department intends to enable shrimp vessels that fish in both federal and state waters to continue to do so without having to switch BRDs. The proposed rule also would permit an increased variety of BRDs to be lawfully used by shrimp vessels, giving fishermen more options in terms of what type of BRD to use. The rule as proposed also would provide for greater economic efficiency in the fishery and would eliminate potential confusion that could result from different regulations enforced by state and federal authorities.

As required by Parks and Wildlife Code, §77.077, the department finds that the use of BRDs demonstrably reduces bycatch of fish species by shrimp trawls and that the approval of additional types of BRDs neither jeopardizes bycatch species nor causes hardship for shrimpers.

Mr. Robin Riechers, Coastal Fisheries Division Director, has determined that for each of the first five years the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Riechers also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be a more sustainable shrimp fishery because increasingly efficient BRDs will reduce the impact of that fishery on other bycatch species.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. The department has determined that there will be no direct economic effect on small or micro-businesses or persons required to comply as a result of the proposed rule. The rule would not compel or mandate any action on the part of any entity, including small businesses or microbusinesses. Instead, the rule would create additional flexibility for the shrimp fishing industry by allowing three additional BRD designs to be used. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rule may be submitted to Jeremy Leitz, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4333; or jeremy.leitz@tpwd.state.tx.us.

The amendment is proposed under Parks and Wildlife Code, §77.007, which authorizes the commission to regulate the catching, possession, purchase, and sale of shrimp, including the times, places, conditions, and means and manner of catching shrimp.

The proposed amendment affects Parks and Wildlife Code, Chapter 77.

§58.160. Taking or Attempting to Take Shrimp (Shrimping)--General Rules.

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

(e) Bycatch Reduction Device (BRD) requirements.

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

(4) Approved BRDs:

(A) In outside waters: Any BRD that meets the dimensions and specifications of an approved device as described in 50 Code

Federal Regulations (CFR) Part 622 §622.41 in effect as of June 23, 2010 [~~on February 13, 2008~~].

(B) In inside waters:

(i) Any BRD (other than an extended funnel devices similar to "Jones/Davis" and "large mesh" devices) that meets the dimensions and specifications of an approved device as described in 50 Code Federal Regulations (CFR) Part 622 §622.41 as of June 23, 2010 [~~on February 13, 2008~~]; or

(ii) - *(iii)* (No change.)

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

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

Filed with the Office of the Secretary of State on July 2, 2010.

TRD-201003719
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 15, 2010
For further information, please call: (512) 389-4775

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 174. TELEMEDICINE

22 TAC §§174.2, 174.7, 174.9, 174.11

The Texas Medical Board withdraws the proposed amendment to §174.2 and new §§174.7, 174.9, and 174.11 which appeared in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3390).

Filed with the Office of the Secretary of State on July 6, 2010.

TRD-201003766
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Effective date: July 6, 2010
For further information, please call: (512) 305-7016

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 323. POWERS AND DUTIES OF THE BOARD

22 TAC §323.3

The Texas Board of Physical Therapy Examiners adopts amendments to §323.3, Adoption of Rules, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2273). The amendments will make this rule consistent in terminology with changes to rules regarding continuing competency.

The amendments replace the term continuing education with continuing competency, and delete a reference to specific fees charged by the organization approved by the board to accredit continuing competency activities and providers of those activities.

There were no comments on the proposed amendments.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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Proposal publication date: March 19, 2010
For further information, please call: (512) 305-6900

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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.1

The Texas Board of Physical Therapy Examiners adopts amendments to §341.1, Requirements for Renewal, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2273). The amendments will make this rule consistent in terminology with changes to other rules regarding continuing competency, and add a reference to another rule.

The amendments would update language to reflect changes made to the PT Practice Act regarding continuing competency during the 81st legislative session, and add a reference to another rule regarding the continuing competence activity audit.

There were no comments on the proposed amendments.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §341.2

The Texas Board of Physical Therapy Examiners adopts amendments to §341.2, Continuing Competence Requirements, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2274). The amendments will update language to reflect changes made to the PT Practice Act regarding continuing competence during the 81st legislative session.

The amendments replace the term continuing education with continuing competence in the appropriate places, define continuing competence, change the way units for continuing competence activities are counted, and delete the reference to supplemental approval of courses in ethics and professional responsibility.

There were no comments on the proposed amendments.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 305-6900

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22 TAC §341.3

The Texas Board of Physical Therapy Examiners adopts amendments to §341.3, Qualifying Continuing Competence Activities, with changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2275). The amendments will update language to reflect changes made to the PT Practice Act regarding continuing competence during the 81st legislative session. The changes correct a reference to self-directed study and delete the abbreviation "CE" in one section and replace an outdated acronym in another.

The amendments replace the term continuing education with continuing competence in the appropriate places, add references to accredited providers along with course sponsors, and add information about required components for courses in ethics and professional responsibility.

The Board received comments from the Texas Physical Therapy Association on these proposed changes. In §341.3(a)(3)(C), it questioned the use of the abbreviation "CE." The Board agrees that this abbreviation is incorrect, and is deleting it. In §341.3 (a)(4)(A), the TPTA asks whether it is the Board's intention for the TPTA to continue to maintain the list of approved specialty examinations and suggests clarification if so. The Board does expect the TPTA to continue maintaining this information, and believes that the clarification is unnecessary, as the TPTA is specifically named in a different section of the rule. The TPTA also noticed the use of an outdated acronym in §341.3(b)(3); this acronym has been deleted. In the same section, the TPTA questions the use of the term "real" as the opposite of "hypothetical;" the Board disagrees with the TPTA and will leave the language as is.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

§341.3. Qualifying Continuing Competence Activities.

(a) Licensees may select from a variety of activities to fulfill the requirements for continuing competence. These activities include, but are not limited to:

(1) Continuing education (CE) courses/programs.

(A) Program content and structure must be approved by the board-approved organization, or be offered by a provider accredited by that organization. Programs must meet the following criteria:

(i) Program content must be easily recognizable as pertinent to the physical therapy profession and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management.

(ii) The content must be identified by instructional level, i.e., basic, intermediate, advanced. Program objectives must be clearly written to identify the knowledge and skills the participants should acquire and be consistent with the stated instructional level.

(iii) The instructional methods related to the objectives must be identified and be consistent with the stated objectives.

(iv) Programs must be presented by a licensed health care provider, or by a person with appropriate credentials and/or specialized training in the field.

(v) Program providers are prohibited from self-promotion of programs, products, and/or services during the presentation of the program.

(vi) The participants must evaluate the program. A summary of these evaluations must be made available to the board-approved organization upon request.

(vii) Records of each licensee who participates in the program must be maintained for four years by the CE sponsor/provider and must be made available to the board-approved organization upon request.

(B) CE programs subject to this subsection include the following:

(i) Traditional on-site programs.

(I) Documentation for CE programs must include the name and license number of the licensee; the title, sponsor/provider, date(s), and location of the course; the number of CCUs awarded, the signature of an authorized signer, and the accredited provider or program approval number.

(II) If selected for audit, the licensee must submit the specified documentation.

(ii) Home study programs (paper or web-based).

(I) Documentation must include the name and license number of the licensee; the title, sponsor/provider, date(s), and instructional format of the course; the number of CCUs awarded, the signature of an authorized signer, and the accredited provider or program approval number.

(II) If selected for audit, the licensee must submit the specified documentation.

(iii) Regular inservice-type programs over a one-year period where individual sessions are granted 2 CCUs or less.

(I) Documentation must include the name and license number of the licensee; the title, sponsor/provider, date(s), and location of the inservice; the signature of an authorized signer, and the accredited provider or program approval number with the maximum CCUs granted and the CCU value of each session or group of sessions specified and justified.

(II) Additionally, proof of attendance to any or all inservice sessions must be provided so that individual CCUs earned can be calculated by the program sponsor/provider for submission to the board-approved organization.

(III) If selected for audit, the licensee must submit the specified documentation.

(iv) Large conferences with concurrent programming.

(I) Documentation must include the licensee's name and license number; title, sponsor/provider, date(s); and location of the conference; the number of CCUs awarded, the signature of an authorized signer, and the accredited provider or course approval number.

(II) If selected for audit, the licensee must submit the specified documentation and proof of attendance.

(2) College or university courses.

(A) College or university courses easily recognizable as pertinent to the physical therapy profession and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management may be submitted by licensees for consideration of their CC requirement.

(i) Documentation required for submission includes the course syllabus for each course and an official transcript. To be considered, the course must be at the appropriate educational level for the physical therapist or physical therapist assistant.

(ii) The licensee should submit the request to the board-approved organization at least 60 days prior to the license expiration date.

(B) 10 CCUs are credited for each satisfactorily (grade of C or higher) completed credit hour.

(C) Documentation must include the approval letter from the board-approved organization. If selected for an audit, the licensee must submit the specified documentation.

(D) College or university sponsored CE programs (no grade, no official transcript) must comply with paragraph (1)(A) of this subsection.

(3) Self-directed study.

(A) Publications.

(i) Publication(s) pertinent to physical therapy and in the areas of ethics, professional responsibility, clinical application, clinical management, behavioral science, science, or risk management written for the professional or lay audience published within the 24 months prior to the license expiration date may be submitted by the author(s) for consideration of their CC requirement. The author(s) are prohibited from self-promotion of programs, products, and/or services in the publication.

(ii) Publication(s) must be approved and CCU value determined by the board-approved organization.

(iii) Maximum CCU values for types of original publications are as follows:

(I) A newspaper article may be worth up to 3 CCUs.

(II) A regional/national magazine article may be worth up to 10 CCUs.

(III) A case study in a peer reviewed publication, monograph, or book chapter(s) may be worth up to 20 CCUs.

(IV) A research article in a peer reviewed publication or an entire book may be worth up to 30 CCUs.

(iv) The request and final publication(s) should be sent to the board-approved organization at least 60 days prior to the license expiration date. In the event that the publication's release will occur in the 60 days prior to the license expiration date, the author(s) may submit the request, publication in revision form, and letter from the publisher or editor which includes the expected publication release date. In the event that the publication is an entire book or book chapter(s), the author must submit the following: title page, copyright page, entire table of contents, preface or forward if present, and one book chapter authored by the licensee.

(B) Program/Course development, consultation, or teaching.

(i) First time development or presentation of, and teaching or consultation in, programs such as CE courses, institutes, seminars, workshops, conferences, and college or university courses which are designed to increase professional knowledge in the field of physical therapy or other related fields may be submitted for consideration of the CC requirement. CCUs are not available for subsequent development, consultation, or teaching of the same CE program or college or university course.

(ii) Program/Course development, consultation, or teaching must be approved and CCU value determined by the board-approved organization.

(iii) Maximum CCU value cannot exceed twice the value of the CE program or college or university course.

(iv) If the licensee is requesting approval for activities associated with an approved CE program, he should submit the request with explanation and evidence of his role and responsibilities, along with the program approval number, to the board-approved organization at least 60 days prior to the license expiration date. In the event that the licensee is requesting approval for activities not associated with an approved CE program, the licensee must submit the request along with the program/course objectives, outline, date(s), and location(s).

(C) Documentation for self-directed study must include supporting evidence for application to the board-approved organization and the resulting approval letter. If selected for audit, the licensee must submit the specified documentation.

(4) Residencies, Fellowships, Examinations, and Practice Review Tools.

(A) The successful completion of a specialty examination may be submitted for consideration for the CC requirement. A list of the specialty examinations that qualify for CC will be maintained by the board.

(B) The successful completion of an American Physical Therapy Association credentialed residency or fellowship program may be submitted for consideration for the CC requirement.

(C) The completion of a Practice Review Tool of the Federation of State Boards of Physical Therapy may be submitted for consideration for the CC requirement unless the activity is required as a part of a disciplinary action.

(D) Maximum CCU values for Residencies, Fellowships, Examinations, and Practice Review Tools shall be as follows but shall not meet the ethics requirement for license renewal:

(i) Successful completion of a specialty examination shall be worth up to 30 CCUs.

(ii) Successful completion of an American Physical Therapy Association credentialed residency or fellowship program shall be worth up to 30 CCUs.

(iii) Completion of a Practice Review Tool of the Federation of State Boards of Physical Therapy shall be worth up to 15 CCUs.

(E) The licensee should submit the request to the board-approved organization with explanation and evidence designated by the Board to verify successful completion of the residency, fellowship, or examination.

(b) In addition to the appropriate criteria noted above, activities submitted to meet the ethics and professional responsibility requirements for license renewal shall include at a minimum the following components.

(1) The theoretical basis for ethical decision-making;

(2) APTA's Code of Ethics and Guide for Professional Conduct;

(3) Legal standards of behavior (including but not limited to the Act and Rules of the board); and

(4) Application of content to real and/or hypothetical situations.

(c) Accreditation of providers or approval of continuing competence activities by the board-approved organization.

(1) Pursuant to a Memorandum of Understanding (MOU) with the board, the Texas Physical Therapy Association (TPTA) shall act as the board-approved organization and shall be authorized to accredit providers and to evaluate and approve continuing competence activities for purposes of compliance with mandatory CC requirements as set by the board. This authority shall include authority to give, deny, withdraw and limit accreditation of providers and approval of competence activities, and to charge and collect fees as set forth in the MOU and in the statute and rules governing the board and the practice of physical therapy in Texas.

(2) To be recognized as qualifying for continuing competence credit an activity must be evaluated and approved by the TPTA, or be offered by a provider accredited by the TPTA. A program may be approved before or after the licensee attends it.

(3) To apply for continuing competence review, the licensee or sponsor/provider must submit a fee as approved by the board with the CC review application and any additional documentation as specified in this section to the TPTA. Interested parties may contact the TPTA in Austin, Texas, (512) 477-1818, www.tpta.org.

(4) Use of statements for publicity.

(A) Sponsors of approved activities may use the following statement in publicity: "This activity has been approved by the Texas Board of Physical Therapy Examiners as meeting continuing competence requirements for physical therapists and physical therapist assistants."

(B) Sponsors of programs receiving approval specifically for content in ethics/professional responsibility may use the following statement in publicity: "This activity has been approved by the Texas Board of Physical Therapy Examiners as fulfilling ____ unit(s) of the ethics and professional responsibility requirement for license renewal purposes for physical therapists and physical therapist assistants."

(C) Accredited providers may use the following statement in publicity: "This activity is provided by the Texas Board of Physical Therapy Examiners Accredited Provider #_____ and meets continuing competence requirements for physical therapist and physical therapist assistant licensure renewal in Texas."

(5) Interested parties may contact the TPTA to inquire if a particular activity is approved. A list of approved activities is available on the TPTA web site.

(6) Pursuant to the MOU, the TPTA shall provide quarterly reports to the board of its activities. Additionally, the TPTA shall report to the board the results of periodic quality assurance follow-up or review of a representative sample of approved continuing competence activities. In the event of sponsor/provider noncompliance, results will be reported to the board in writing for further investigation and direction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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John P. Maline
Executive Director
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For further information, please call: (512) 305-6900

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22 TAC §341.5

The Texas Board of Physical Therapy Examiners adopts amendments to §341.5, Waiver of Continuing Competence Units (CCUs), without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2277). The amendments will make this rule consistent in terminology with changes to other rules regarding continuing competency.

The amendments would update language to reflect changes made to the PT Practice Act regarding continuing competency during the 81st legislative session, replacing the term "continuing education units (CEUs)" with continuing competence units (CCUs).

There were no comments on the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §341.8

The Texas Board of Physical Therapy Examiners adopts amendments to §341.8, Inactive Status, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas*

Register (35 TexReg 2278). The amendments will make this rule consistent in terminology with changes to other rules regarding continuing competency.

The amendments would update language to reflect changes made to the PT Practice Act regarding continuing competency during the 81st legislative session, replacing the term "continuing education" with "continuing competence activities" and updating a reference to another rule.

There were no comments on the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §341.9

The Texas Board of Physical Therapy Examiners adopts amendments to §341.9, Retired Status, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2279). The amendments will make this rule consistent in terminology with changes to other rules regarding continuing competency. The changes corrected the format of rule citation.

The amendments would update language to reflect changes made to the PT Practice Act regarding continuing competency during the 81st legislative session, replacing the term "continuing education" with "continuing competence activities" and updating a reference to another rule.

There were no comments on the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §341.20

The Texas Board of Physical Therapy Examiners adopts amendments to §341.20, Licensees Called to Active Military Service, without changes to the proposed text as published in the March 19, 2010, issue of the *Texas Register* (35 TexReg 2280). The amendments will make this rule consistent in terminology with changes to other rules regarding continuing competency.

The amendments would update language to reflect changes made to the PT Practice Act regarding continuing competency during the 81st legislative session, replacing the term "continuing education" with "continuing competence activities" and updating a reference to another rule.

There were no comments on the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 70. ENFORCEMENT

SUBCHAPTER A. ENFORCEMENT GENERALLY

30 TAC §§70.1, 70.9 - 70.11

The Texas Commission on Environmental Quality (commission or agency) adopts the amendments to §§70.1 and 70.9 - 70.11.

Section 70.9 is adopted *with change* to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1022). Sections 70.1, 70.10, and 70.11 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2009, the 81st Legislature passed Senate Bill (SB) 1693. SB 1693, Sections 4 and 5 relate to the enforcement authority of the commission.

SB 1693, Section 4 amends Texas Water Code (TWC), §5.1175, relating to payment of administrative penalties in installments. Prior to SB 1693, TWC, §5.1175 allowed only small businesses to pay the penalty in periodic installments of up to 12 months. SB 1693 expanded TWC, §5.1175 to allow a person to apply for permission to pay the penalty in periodic installments of up to 36 months.

SB 1693, Section 5 amends TWC, §7.002, by allowing the commission to delegate to the executive director the authority to issue an administrative order. The use of the term administrative order in SB 1693 is broad and can conceivably include default orders as well as agreed orders. However, at this time the commission proposes to amend only those rules that relate to the issuance of agreed orders. Furthermore, the adopted amendments only allow for the issuance of agreed orders by the executive director upon delegation of that authority by the commission. The adopted rules do not affirmatively delegate to the executive director the authority to issue agreed orders.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 80, Contested Case Hearings.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout the rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines concerning acronym usage.

§70.1, Purpose

The commission adopts amended §70.1 to expand the applicability of the general rules governing enforcement actions to the executive director. This modification reflects the delegation granted in SB 1693 which allows the commission to delegate to the executive director the authority to issue administrative orders.

§70.9, Installment Payment of Administrative Penalty

The commission adopts amended §70.9 which modifies subsection (a) to make the rule more consistent with current commission practice by allowing installment payments upon request. Subsection (a) is also modified to allow for installment payments in an administrative penalty imposed by an executive director order. This change is necessary in case the commission delegates to the executive director authority to issue administrative orders in accordance with SB 1693. The commission adopts amended §70.9(b)(1) and (2) which delete the existing language that defines qualified small businesses to ensure consistency with TWC, §5.1175, as amended by SB 1693. Subsection (b)(3) is relettered to subsection (b) and modified to apply the requirement to specify the amount and payment schedule of monthly installments to executive director orders. This modification is needed in the event the commission delegates to the executive director authority to issue administrative orders in accordance with SB 1693. In addition, subsection (b)(4) is relettered to subsection (c) and is amended to increase payment schedules from a 12-month period to a 36-month period to reflect the corresponding change in TWC, §5.1175, as amended by SB 1693.

§70.10, Agreed Orders

The commission adopts amended §70.10 which modifies subsection (a) to: 1) remove the limitation that agreed orders be recommended to the commission for approval; 2) broaden the scope of effective legal orders by replacing commission orders with agency orders; and 3) add the executive director as an entity who may approve and issue agreed orders. Subsection (c) is modified to provide a separate and additional mechanism for consideration of an agreed order that is issued by the executive director. The amendment clarifies that after publication of the agreed order in the *Texas Register,* agreed orders issued by the executive director will be posted on the executive director's agenda whereas agreed orders issued by the commission will continue to be scheduled during a commission meeting. In addition, subsection (c) is amended to extend the above dual mechanism of considering agreed orders to those cases that are settled at the State Office of Administrative Hearings. The modifications in subsections (a) and (c) are required if the commission grants to the executive director the authority to issue administrative orders as set out in SB 1693.

§70.11, Notice of Decisions and Orders

The commission adopts amended §70.11 which modifies subsections (a), (a)(1), and (b) to extend the notice requirements to those orders that are issued by the executive director. These changes are necessary in the event the commission delegates to the executive director the authority to issue administrative orders as set out in SB 1693. In addition, the commission adopts amended §70.11(a) which deletes extraneous language specifying that public notice will be given either personally or by first class mail. This language is redundant because the rule already references Texas Government Code, §2001.142 which outlines the requirements for notice of decisions and orders.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from 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 has determined that the rulemaking does not fall under the definition of a major environmental rule because the amendments are primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The amendments concern procedural requirements of the agency, such as providing for executive director authority to issue administrative orders upon commission delegation of that authority and revising installment payments of administrative penalties. These amendments allow for greater flexibility in the enforcement process while maintaining appropriate protection of human health and the environment. The amendments do not rise to the level of material, but rather are limited to incorporating modifications to the current regulatory framework based upon the implementation of the rules to date.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) 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 because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rules and performed an assessment of whether these rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement the statutory provisions of TWC, §5.1175 and §7.002, concerning Payment of Penalty by Installment and Enforcement Authority, respectively. The rules provide for increased flexibility in payment of administrative penalties by installment and also provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

Promulgation and enforcement of the amendments would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the proposed clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only establish a new procedural mechanism for administrative enforcement orders. Therefore, the rules do not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on March 9, 2010 at 2:00 p.m. No comments were received at the hearing. The comment period closed on March 15, 2010. The commission received written comments from the City of Houston (the City) and Lloyd Gosselink, Attorneys at Law.

RESPONSE TO COMMENTS

The City commented that §70.9(a), does not appear to comport with the permissive intent of the legislation to allow the commission to order extended penalty payments rather than to mandate the option.

The commission respectfully disagrees that §70.9(a) mandates the penalty option. Specifically, the insertion of the word "may" makes installment payments a discretionary grant of authority. No change was made in response to this comment.

The City commented that the term "person" in §70.9(a) makes the terms "firm or business" superfluous.

The commission agrees that the term "person" makes the terms "firm or business" superfluous since 30 TAC §3.2 includes these terms within the definition of "person." In response to this comment, the commission has struck these terms from the rule.

The City suggested rule language which inserts the requirement that the person must demonstrate an ability to pay before they may request a penalty payment installment plan to make the language permissive. The City also commented that the extension of an installment payment option must rest on a finding of need for the extension. The City suggested language in §70.9(b)(3) that requires "an articulated reason for the option consistent with the inability to pay."

The City's suggested changes to the rule language go beyond the intent of the legislation which does not require that a person must demonstrate a financial inability to pay and to articulate a reason for the request in order to receive a payment plan. No changes have been made in response to these comments.

Lloyd Gosselink supported the overall revisions and implementation of the legislative intent of SB 1693 of the 81st Legislature. Lloyd Gosselink noted that the state's proposal does not address implementation in conjunction with TWC, §7.034, regarding deferral for municipally owned utilities claiming financial inability to pay. Lloyd Gosselink commented that the commission has not applied the provisions of TWC, §7.034 in a manner that truly benefits the utilities that were the intended beneficiary of this provision. Lloyd Gosselink expressed concern that if the rules were adopted without consideration of implementation in conjunction with TWC, §7.034, the ability for utilities to engage in the relief envisioned in the provision would be further diluted.

Lloyd Gosselink's suggested changes are outside the scope of the rulemaking which is to specifically address payment of the penalty by installment and delegation to the executive director the authority to issue an administrative order. With regard to Lloyd Gosselink's concerns, the commission appropriately applies the provisions of TWC, §7.034, consistently adhering to the language in the statute. No changes were made to the rules in response to this comment.

STATUTORY AUTHORITY

The amendments are adopted under the following statutory authority: Texas Water Code (TWC), §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedures

or practice requirements of an agency; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §§7.001 *et seq.,* which establish the commission's enforcement authority and provide specific requirements governing that authority. Additionally, the amendments are adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation. The amendments are also adopted under Senate Bill 1693, Sections 4 and 5, which require the commission to adopt rules to implement new TWC, §5.1175 and §7.002, respectively.

The adopted amendments implement TWC, §5.1175 and §7.002, which direct the commission to adopt rules to provide for increased flexibility in payment of administrative penalties by installment and provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

§70.9. Installment Payment of Administrative Penalty.

(a) Any person(s) may, upon request, be allowed to make installment payments of an administrative penalty imposed in a commission or executive director order.

(b) The amount and payment schedule of monthly installments must be specified by a commission or executive director order.

(c) Payment schedules issued may not exceed a 36-month period.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kathleen Decker
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CHAPTER 80. CONTESTED CASE HEARINGS SUBCHAPTER F. POST HEARING PROCEDURES

30 TAC §80.254

The Texas Commission on Environmental Quality (commission or agency) adopts the amendment to §80.254 *with changes* to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1026) and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In 2009, the 81st Legislature passed Senate Bill (SB) 1693, relating to the enforcement authority of the commission. SB 1693 amends Texas Water Code (TWC), §7.002, by allowing the commission to delegate to the executive director the authority to issue an administrative order.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 70, Enforcement.

SECTION DISCUSSION

§80.254, Settlement of Enforcement Cases

The commission adopts amended §80.254 to clarify a procedure for settlement and issuance of enforcement cases at hearing when the executive director and the respondent reach an agreement, or settlement, in an enforcement action and no party dissents from the proposed settlement. When both conditions are met, the amendment provides that an agreed order is entered into in accordance with §70.10. In addition, §80.254 is amended by deleting language instructing the executive director and the respondent to submit the agreed settlement in writing to the judge who shall forward the proposed settlement agreement to the commission for consideration. This language will be deleted to clarify the procedure for settlement of enforcement cases at hearing that is consistent with rules already in place.

The commission will also replace the acronym "SOAH" with "State Office of Administrative Hearings" to reflect the agency's current practices and to conform to *Texas Register* and agency guidelines.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from 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 has determined that the rulemaking does not fall under the definition of a major environmental rule because the amendment is primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The amendment concerns procedural requirements of the agency, such as clarifying a procedure for settlement of enforcement cases at hearing that is consistent with rules already in place. This amendment allows for greater flexibility in the enforcement process while maintaining appropriate protection of human health and the environment. The amendment does not rise to the level of material, but rather is limited to incorporating modifications to the current regulatory framework based upon the implementation of the rules to date.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), 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 because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) does not exceed a requirement of a delegation agreement or contract

between the state and an agency or representative of the federal government to implement any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether this rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to clarify a procedure for settlement of enforcement cases at hearing that is consistent with rules already in place.

Promulgation and enforcement of the rule would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the regulations do not affect a landowner's rights in real property because the clarification in the rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the proposed clarification of the regulations. In other words, there are no burdens imposed on private real property under this rulemaking because they only establish a procedural mechanism for administrative enforcement orders that is already in place elsewhere in the rules. Therefore, the rule does not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that it is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on March 9, 2010 at 2:00 p.m. The public hearing was not formally opened due to the fact that no one signed in to provide public comment. The comment period closed on March 15, 2010. The commission received written comments from Lloyd Gosselink, Attorneys At Law.

RESPONSE TO COMMENTS

Lloyd Gosselink supported the overall revisions and implementation of the legislative intent of SB 1693 of the 81st Legislature. Lloyd Gosselink noted that the state's proposal does not address implementation in conjunction with TWC, §7.034 regarding deferral for municipally owned utilities claiming financial inability to pay. Lloyd Gosselink commented that the commission has not applied the provisions of TWC, §7.034 in a manner that truly benefits the utilities that were the intended beneficiary of this provision.

Lloyd Gosselink expressed concern that if the rule were adopted without consideration of implementation in conjunction with TWC, §7.034, the ability for utilities to engage in the relief envisioned in the provision would be further diluted.

Lloyd Gosselink's suggested changes are outside the scope of the rulemaking which is to specifically address payment of the penalty by installment and delegation to the executive director the authority to issue an administrative order. With regard to Lloyd Gosselink's concerns, the commission appropriately applies the provisions of TWC, §7.034, consistently adhering to the language in the statute. No changes were made to the rule in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.228, which establishes that the executive director shall be named a party in hearings before the commission in a matter in which the executive director bears the burden of proof.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; and §§7.001 *et seq.,* which establish the commission's enforcement authority and provide specific requirements governing that authority.

Additionally, the amendment is adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The adopted amendment implements TWC, §7.002, which directs the commission to adopt rules to provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

§80.254. Settlement of Enforcement Cases.

The executive director and the respondent may reach an agreement, or settlement, in an enforcement action such that an agreed order is entered into in accordance with §70.10 of this title (relating to Agreed Orders). If there is a party to the case that dissents from the proposed settlement, the judge shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the commission together with the proposed settlement. After any required public notice and opportunity for comment on proposed settlements and consideration of the record, the commission or the executive director may either approve the proposed settlement, or disapprove it and remand the case to the State Office of Administrative Hearings for hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 307. TEXAS SURFACE WATER QUALITY STANDARDS

30 TAC §§307.1 - 307.10

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figures in Chapter 307 are not included in the print version of the Texas Register. The figures are available in the on-line version of the July 16, 2010, issue of the Texas Register.)

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§307.1 - 307.10, concerning the Texas Surface Water Quality Standards.

Sections 307.2 - 307.10 are adopted *with changes* to the proposed text as published in the January 29, 2010, issue of the *Texas Register* (35 TexReg 578). Section 307.1 is adopted *without change* to the proposed text and will not be republished.

The rules are amended to satisfy Texas Water Code (TWC), §26.023, which requires the commission to set water quality standards by rule for water in the state and allows the commission to amend the standards. The rules are also amended to satisfy the Clean Water Act (CWA), §303, which requires states to adopt water quality standards and to review and revise those standards at least once every three years.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Federal Water Pollution Control Act, §303 (commonly referred to as the CWA, 1972, 33 United States Code, §1313(c)), requires all states to adopt water quality standards for surface water. A water quality standard consists of the designated beneficial use or uses of a water body or a segment of a water body and the water quality criteria that are necessary to protect the use or uses of that particular water body. Water quality standards are the basis for establishing discharge limits in wastewater and storm water discharge permits, setting instream water quality goals for total maximum daily loads (TMDLs), and providing water quality targets to assess water quality monitoring data.

The states are required under the CWA to review their water quality standards at least once every three years and revise them, if appropriate. States review standards because new scientific and technical data may be available that have a bearing on the review. Further, environmental changes over time may also warrant the need for a review. Where standards do not meet established uses, the standards must be periodically reviewed to see if uses can be attained. Additionally, water quality standards may have been previously established for the protection and propagation of aquatic life and for recreation in and on the water without sufficient data to determine whether the uses were attainable. Finally, changes in the TWC, CWA, or in the United States Environmental Protection Agency's (EPA) regulations may necessitate reviewing and revising standards to ensure compliance with current statutes and regulations.

Following adoption of revised water quality standards by the commission, the governor or designee must submit the officially adopted standards to the EPA Region 6 Administrator for review. The Regional Administrator reviews the state's standards to determine compliance with the CWA and implementing regulations. Standards are not applicable to regulatory actions under the CWA until approved by EPA.

The Texas statewide surface water quality standards were last amended in July 2000. The EPA approved the majority of the state's revised standards by 2007 and completed its final action on all revisions in October 2009.

Reviews and revisions of the water quality standards address many provisions that apply statewide, such as criteria for toxic pollutants. Other revisions address the water quality uses and/or criteria that are applicable to individual water bodies. An extensive review of water quality standards for individual water bodies is often initiated when the existing standards appear to be inappropriate for water bodies that are listed as impaired under the CWA, §303(d), or that are potentially affected by permitted wastewater discharges or other permitting actions.

States may modify non-existing designated uses when it can be demonstrated through a use-attainability analysis (UAA) that attaining the current designated uses and/or criteria is not appropriate. Most changes in designated uses are based on a demonstration that natural characteristics of a water body cannot attain the currently designated uses and/or criteria. Natural characteristics include temperature, pH, dissolved oxygen, diversity of aquatic organisms, amount of streamflow, physical conditions such as depth, or natural background pollutant levels. Conversely, a UAA might demonstrate that the currently designated uses and criteria are appropriate or that they should be more stringent.

UAAs can require several years of additional sampling studies, or they may focus on a long-term evaluation of existing historical data. For UAAs on water bodies that are potentially impacted by pollutant loadings above natural background, sampling and evaluation is often conducted on similar but relatively unimpacted water bodies in order to determine reference conditions that can be applied to the water body of concern.

The focus of UAAs depends on the uses and criteria that need to be re-evaluated. The applicable category of aquatic life use is determined by repeatedly sampling fish or invertebrates in relatively unimpacted areas and by applying quantitative indices such as indices of biotic integrity to the sampling data of the biological communities. UAAs to assign aquatic recreational uses include assessing physical and hydrological conditions; observing existing recreation; and collecting information on current and historical recreational activities. Dissolved oxygen criteria are evaluated by monitoring dissolved oxygen over numerous (usually ten) 24-hour periods in relatively unimpacted areas. Site-specific criteria for toxic pollutants are evaluated by placing selected small aquatic organisms in water samples from the site and exposing them to different doses of the toxic pollutant of concern. Criteria for pH, dissolved minerals, and temperature are often evaluated by analyzing extensive long-term recent and historical data for the water body of concern and similar water bodies in the same area.

The commission adopts changes to the general criteria that are intended to improve statewide qualitative and quantitative crite-

ria; and to ensure that the general criteria are compatible with other revisions. Numerous revisions of toxic criteria are adopted to incorporate new data on toxicity effects, and changes are adopted to provide clarity to the basic requirements for toxicity effluent testing. Other adopted changes provide additional categories of recreational uses and provide more definition on assigning recreational uses. New criteria are adopted to protect numerous reservoirs from excessive growth of aquatic vegetation related to nutrients. The adopted changes provide clarity on how water quality standards apply under different stream flow conditions and on how attainment of water quality standards is assessed using instream monitoring data. Numerous revisions are adopted for the uses and criteria of individual water bodies in order to incorporate new data and the results of recent UAAs.

In conjunction with the adoption of the rules, the commission is completing revisions to the implementation procedures for applying the adopted standards to wastewater discharge permits. These revisions incorporate the adopted changes to the water quality standards contained in the rules. Revisions to the implementation procedures also include numerous updates to incorporate more recent data and information. The implementation procedures are contained in a guidance document entitled *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194). Revisions include updates to minimum analytical levels for chemicals in wastewater effluent, whole effluent toxicity testing procedures, and critical low-flows in streams to determine standards applicability. Extensive new procedures are included to evaluate the need for nutrient effluent limits for wastewater discharges to reservoirs, streams, and rivers; and a new process is added to assess recreational uses.

An overview of the standards implementation procedures and a description of the steps to revise the procedures are presented in Series 23 of the commission's Continuing Planning Process for the Water Quality Management Program. The procedures must be approved by the commission and submitted to EPA for approval. Although not part of the regulatory action covered by the adopted revisions to the water quality standards, the revisions to the implementation procedures are being completed at the same time as the revisions to the standards to allow for a more coordinated and consistent review by the commission and the public.

SECTION BY SECTION DISCUSSION

To conform to commission and *Texas Register* formatting requirements, non-substantive revisions were adopted throughout the sections to correct citations, acronym usage, and other minor issues.

The commission adopts editorial revisions as well as substantive changes. Editorial revisions are adopted to improve clarity, to correct grammatical errors, and to renumber or reletter subdivisions, as appropriate.

§307.1, General Policy Statement

The commission adopts the amendment to §307.1 to reflect changes made in 2001 by House Bill 2912, §1.26, which amends TWC, §26.003 by adding the words "taking into consideration" before the words "economic development."

§307.2, Description of Standards

The commission adopts the amendment to §307.2 that includes adopted Appendix B in §307.2(a)(10)(B), relating to sole-source surface drinking water supplies. Adopted Appendix F in §307.2(a)(10)(F) lists numeric chlorophyll *a* criteria for selected reservoirs, and adopted Appendix G in §307.2(a)(10)(G) relates to site-specific recreational uses and criteria for unclassified water bodies. Presumed uses are adopted for inclusion with narrative provisions, designated uses, and numerical criteria as standards that can be changed to account for local conditions. Temporary variances are adopted to include storm water permits as well as discharge permits, and wording is adopted to clarify that temporary variances can only apply to existing discharge permits.

In response to comments, the adoption of amended §307.2 includes a change that deletes all references to supplemental screening levels for nutrients from the proposed language.

§307.3, Definitions and Abbreviations

Adopted changes to §307.3 include revisions to the definitions for "criteria," "designated use," "incidental fishery," "mixing zone," "nonpersistent toxic," "persistent toxic," "presumed use," "segment," "standards," "standards implementation procedures," and "surface water in the state." New definitions are adopted for "aquatic vegetation," "commission," "main pool station," "protection zone," "sole-source surface drinking water supply," "thalweg," "toxic equivalency," and "toxic equivalency factor." Definitions are also adopted to clarify changes being adopted in the standards. The adopted changes add new abbreviations in §307.3(b) for "aquatic life use (ALU)," "Assessment Tools for the Evaluation of Risk (ASTER)," "bioconcentration factor (BCF)," "cubic feet per second (cfs, ft^3/s)," "county road (CR)," "farm to market road (FM)," "Health Effects Assessment Summary Tables (HEAST)," "International Boundary and Water Commission (IBWC)," "Integrated Risk Information System (IRIS)," "kilometer (km)," "minimal aquatic life use (M)," "multiplier (m)," "meters per kilometer (m/km)," "method detection limit (MDL)," "mile (mi)," "primary contact recreation (PCR)," "reference dose (RfD)," "ranch road (RR)," "secondary contact recreation (SCR)," "state highway (SH)," "standard units (SU)," "Texas Commission on Environmental Quality (TCEQ)," "toxic equivalency factor (TEF)," "toxicity reduction evaluation (TRE)," "United States (US)," and "water-effect ratio (WER)."

In response to comments, the commission changed the definitions of several terms in the adoption of the amendments to this section. The revised definitions are for "critical low-flow," "non-contact recreation," "nutrient criteria," "nutrient," "primary contact recreation," "secondary contact recreation 1," "secondary contact recreation 2," "total dissolved solids," and "total suspended solids."

In response to comments, the adoption of amended §307.3 includes renaming the proposed definition for "baseflow conditions" to "dry weather flows" in order to more accurately describe the normal range of conditions over which recreational surveys would be appropriate.

§307.4, General Criteria

Adopted changes to §307.4 include clarifying that general criteria apply to surface water in the state and specifically applies to substances attributed to waste discharges or human activities. "Sheen" is adopted for inclusion with the general criteria for "oil, grease, and related residue." The adopted changes include the location of site-specific numeric criteria for chlorophyll *a.* The revision of the temperature portion is adopted for clarification. The inclusion of "presumed uses" with "existing, designated, and attainable uses" for the aquatic life uses and dissolved oxygen portion of this section are adopted. In addition, language regarding perennial streams is adopted to reference applicable dissolved

oxygen criteria in §307.7(b)(3)(A). The revised aquatic life uses and habitat portion is adopted for clarification. The revision to this section is adopted to clarify that intermittent streams not listed in Appendix A or D, which are located in §307.10, are considered to have a minimal aquatic life use.

The aquatic recreation portion was adopted to include four categories of recreational use (primary contact recreation, secondary contact recreation 1, secondary contact recreation 2, and noncontact recreation waters), and a reference to §307.7(b)(1). The adopted revisions to this section also include that classified segments are designated for primary contact recreation unless site-specific information, such as a UAA, demonstrates that different recreational uses and/or criteria may be justified. This section was adopted to explain that primary contact recreation is a presumed use and that secondary contact recreation 1 is a presumed use for certain types of unclassified waters if primary contact recreation does not occur and certain depth characteristics are met. Adopted changes also include descriptions for secondary contact recreation 2 and noncontact recreation, and the new provisions stipulate that no water bodies are presumed to have these two uses. The adopted section includes an explanation of how presumed recreational uses are applied and assigned, and how uses less stringent than presumed uses are assigned to water bodies.

Adopted changes to this section also include clarification that the assessment of unclassified waters pertains to aquatic life uses and that waters that are not in Appendix A or D, which are located in §307.10, are assigned specific uses that are attainable or characteristic of those waters. This section was adopted to include general criteria for pH.

In response to comments, the adoption of amended §307.4(e) and (h)(4) includes the addition of the term "presumed" and the replacement of the term "absolute" with the term "24-hour," respectively. Also, the adopted language includes changes to clarify to what water depths the secondary contact recreation 1 provision applies and replaces the term "base flow conditions" with "dry weather flows" in §307.4(j)(2)(B)(i).

§307.5, Antidegradation

Adopted changes to §307.5 are strictly editorial revisions to improve clarity. In response to comments, the adoption of amended §307.5(b)(2) and (c)(2)(B) includes changing the term "wildlife" to "terrestrial life."

§307.6, Toxic Materials

Adopted changes to §307.6 clarify that chronic aquatic life criteria apply to all water bodies with a designated aquatic life use of limited, intermediate, high, or exceptional; and to allow for the use of other methodologies for deriving data to predict the lethal concentration that has a 50% chance of causing death to aquatic organisms (LC_{50}) in order to calculate aquatic life criteria for substances not listed in Table 1 of §307.6(c)(1). The allowance of the biotic ligand model to develop site-specific aquatic life criteria for copper is also adopted.

In response to comments, the adoption of amended §307.6 includes the addition of language to further clarify under what circumstances toxic criteria would not apply where surface water, as a result of natural phenomena, exhibits characteristics beyond the limits established by this section.

Section 307.6(c)(1), Table 1, which lists numeric criteria for the protection of aquatic life, includes adopted revisions to criteria for arsenic, cadmium, chromium, copper, dieldrin, endrin, hexachlorocyclohexane, mercury, nickel, pentachlorophenol, tributlytin, and zinc. New criteria for nonylphenol and diazinon are also adopted. The conversion factors for both cadmium and lead are revised to include hardness-based equations as opposed to being calculated on a presumed hardness.

In response to comments, the adoption of amended §307.6(c)(2) clarifies that other options are available to recalculate aquatic life numeric criteria. Also, the adopted language in §307.6(c)(7)(C) corrects a typographical error.

Adopted revisions to human health criteria in §307.6(d) include: (1) changing fish consumption rates from ten grams per person per day for freshwater fish and 15 grams per person per day for saltwater fish to 17.5 grams per person per day for all types of fisheries; and (2) revising the consumption rate for incidental fisheries to 1.75 grams per person per day. Human health criteria for all noncarcinogens are adopted to incorporate childhood exposure, with a fish and shellfish consumption rate of 5.6 grams per child per day, drinking water consumption rate of 0.64 liters per child per day, and a child body weight of 15 kilograms (33.1 pounds). Adopted revisions in §307.6(d)(5), in conjunction with related adopted revisions in §307.8(a)(4), clarify the flow conditions when human health criteria are applied.

Table 2 in §307.6(d)(1), which contains human health toxic criteria, is adopted to reflect the latest data provided by the EPA. The adopted criteria for mercury, dichlorodiphenyltrichloroethane (DDT), chlordane, and dioxins/furans/polychlorinated biphenyls (PCBs) are expressed as fish tissue concentrations. Adopted mercury criteria are based on the EPA's 2001 national criteria document and the fish consumption level of concern that was established by the Texas Department of State Health Services. The arsenic criterion for fish and water consumption is adopted to reflect the new drinking water maximum contaminant level. Eight congeners for dioxin were added to the congener list, which now includes dioxin-like PCBs. The dioxin and dioxin-like PCB congener list is adopted to reflect the World Health Organization's latest updates. Human health criteria are adopted for antimony, anthracene, bis(2-chloroethyl)ether, bis(2-ethylhexyl)phthalate, m-dichlorobenzene, o-dichlorobenzene, 3-3'-dichlorobenzidine, dichloromethane, 1,2-dichloropropane, 2,4-dimethylphenol, di-n-butyl phthalate, ethylbenzene, hexachlorocyclopentadiene, nickel, 1,1,2,2-tetrachloroethane, thallium, toluene, and 1,1,2-trichloroethane, and chemical-specific human health criteria are adopted for bromodichloromethane and bromoform. Human health criteria for DDT, dichlorodiphenyldichloroethane (DDD), dichlorodiphenyldichloroethylene (DDE), dioxins/furans, mercury, and PCBs are adopted as tissue-based criteria. In the adopted Table 2, the chemical name "chlorodibromomethane" is substituted for "dibromochloromethane" in order to be consistent with 40 Code of Federal Regulations Part 122.

In response to comments, the adoption of amended Table 2 of §307.6(d)(1) includes a correction to a typographical error for n-nitro-di-n-butylamine. Also in response to comments, the adopted language includes changes from the proposed language in order to correct criteria for benzo(a)anthracene, and to clarify testing methodology in the PCB footnote.

In response to comments, the adoption of amended §307.6(e) includes further clarification that requirements will be added to permits to control toxicity and additional explanation regarding provisions that may be added to a permit if toxicity is not controlled.

§307.7, Site-Specific Uses and Criteria

Adopted changes to §307.7 include editorial changes to the general provisions in §307.7(a). Changes are adopted in §307.7(b) to expand recreational use categories to include primary contact recreation, secondary contact recreation 1, secondary contact recreation 2, and noncontact recreation waters. The adopted revisions to this section also clarify that classified segments are designated for primary contact recreation, unless site-specific information demonstrates that different recreational uses and/or criteria may be justified based on specific reasons provided in this section. Other adopted changes include the option of applying noncontact recreation to classified segments where contact recreation is considered unsafe for reasons unrelated to water quality.

Adopted changes to the freshwater criteria in §307.7(b)(1)(A) include revising the primary contact recreation single sample criterion for *Escherichia coli (E. coli)* based on new calculations using updated information, adding criteria for secondary contact recreation 1 and 2, and revising the noncontact recreation geometric-mean criterion for *E. coli* to be based on a higher risk level.

In response to comments, the adoption of amended §307.7(b)(1)(A) includes retaining the primary contact recreation geometric mean criterion for *E. coli* of 126 colonies per 100 milliliter (ml).

Adopted revisions to this section also include a change in the bacteria indicator for certain high saline inland classified segments from *E. coli* to Enterococci. As part of this change, freshwater criteria for Enterococci were added for the four subcategories of recreational uses.

In response to comments, the adoption of amended §307.7(b)(1)(A)(v) includes changes from proposed revisions in order to clarify when *E. coli* can be used as an indicator for unclassified water bodies in certain classified high saline inland segments. Also, in response to comments, the freshwater Enterococci geometric mean criterion for primary contact recreation was changed from 54 per 100 ml to 33 per 100 ml.

Adopted changes to the saltwater criteria in §307.7(b)(1)(B) include revising the primary contact recreation single sample number for Enterococci to the recommended federal criterion. Language is adopted to clarify that a secondary contact recreation 1 category for tidal streams and rivers can be established on a site-specific basis if a use or criteria change is justified by a UAA, and if the water body is not considered to be a coastal recreation water as defined in the Beaches Environmental Assessment and Coastal Health Act of 2000 (commonly referred to as the Beach Act). Also, a secondary contact recreation 1 geometric mean criterion for Enterococci based on a higher risk level is adopted; and the noncontact recreation geometric mean criterion for Enterococci is adopted based on a higher risk level.

Adopted changes in §307.7(b)(1)(C) specify that fecal coliform can be used as an alternative indicator in certain high saline inland water bodies for a transition period of two years after the adoption of the Standards. Adopted changes to this section include adding fecal coliform criteria for primary contact recreation and secondary contact recreation 1 and 2, rewording the noncontact recreation geometric mean language for clarification purposes, and removing fecal coliform as a surrogate indicator for effluent limits in wastewater discharge permits.

The commission adopts changes in §307.7(b)(2)(A) to add a sole-source surface drinking water supply use, as required by TWC, §26.0286. The adopted section updated the reference to the title of 30 TAC Chapter 290.

Adopted changes to §307.7(b)(3) include rewording of the general provisions that describe aquatic life uses as six categories (minimal, limited, intermediate, high, and exceptional aquatic life and oyster waters). The Aquatic Life Subcategories table was renumbered to Table 3 in §307.7(b)(3)(A)(i) and adopted to include a "minimal" aquatic life use subcategory with corresponding dissolved oxygen criteria. Adopted changes to §307.7(b)(3)(B) clarify the description of criteria for oyster waters and add additional narrative provisions that allow the consideration of other information related to human health protection instead of solely relying on federal recommendations. General provisions are adopted in §307.7(b)(4) to add numerical nutrient criteria for reservoirs.

In response to comments, the adoption of amended Table 3 of §307.7(b)(3)(A)(i) includes the replacement of the term "daily minima" with "24-hour minimum dissolved oxygen concentration." Also in response to comments, the adopted version of §307.7(b)(4)(E) deleted references to screening levels for phosphorus and transparency; and nutrient criteria are expressed as "stand-alone" concentrations of chlorophyll *a* in reservoirs.

§307.8, Application of Standards

Adopted changes to §307.8 replace the phrase "seven-day, two-year low-flows" with the term "critical low-flow," which is defined in §307.3. Adopted revisions clarify what standards do not apply below the critical low-flow, remove the rule provision stating that aquatic recreational criteria for unclassified waters do not apply below the 7Q2, refer to the new location of the low-flow values table, and clarify that the specific low-flow values were calculated from historical daily streamflow records from the United States Geological Survey or International Boundary and Water Commission. Additionally, the adopted revisions specify that these low-flow values apply only to river basin and coastal basin waters; and not to bays, gulf waters, reservoirs, or estuaries. Adopted language is added to explain that the flow values are set to 0.1 cubic foot per second when the calculated critical low-flow or harmonic mean flow is equal to or less than 0.1 cubic foot per second. Adopted revisions include an alternative method to calculate critical low-flows for classified segments that are dominated by springflow. A provision is adopted to clarify that the harmonic mean flow is the applicable upstream flow when calculating wastewater permit limits for criteria that are assessed as long-term means. The adopted revision clarifies that "discharge points" means permitted discharge points.

In response to comments, the adoption of amended §307.8(a)(2)(A) includes changing the term "probability" to "percentile." Also, the adopted language includes the addition of a cross-reference to §307.9 to clarify under what flow conditions criteria can be used for assessment purposes in §307.8(a)(4).

§307.9, Determination of Standards Attainment

Adopted changes to §307.9 clarifies that procedures listed in this section would be solely for the purpose of assessing water quality monitoring data to determine if water quality standards are attained in individual water bodies. A reference to laboratory accreditation requirements is adopted in this section. Adopted revisions also include an elaboration on what makes a sample representative of a water body, clarification of depth collection for bacteria and temperature, and depth collection for chlorophyll *a* samples. Procedures are adopted to simplify collection of dissolved oxygen samples for non-tidal flowing streams, impoundments, and tidal water. Another adopted revision clarifies that the term "radioactive discharges" refers to radioactive

sources; and this revision also stipulates that impacts of radioactive sources are evaluated in accordance with applicable rules in 30 TAC Chapter 290 and Chapter 336.

Revised procedures are adopted to assess standards attainment for recreation criteria; and bacteria samples are now assessed using the geometric mean criteria, rather than both geometric mean and single-sample criteria. A high-flow exemption for bacteria is adopted in this section so that samples taken during extreme hydrologic conditions immediately after heavy rains would not be used for assessment purposes.

Adopted revisions to standards attainment for dissolved oxygen clarify that the minimum criteria are based on the lowest measurement observed during a 24-hour period. New provisions are adopted to describe how new criteria for nutrients for reservoirs would be assessed. A new provision is adopted to clarify that site-specific criteria for certain constituents (aquatic recreation indicators, total dissolved solids (TDS), chloride, and sulfate) do not apply when perennial streams are flowing below 0.1 cubic feet per second, or when intermittent streams have pools that cover less than 20% of the stream bed in a 500 meter reach, or when extremely dry conditions are indicated by comparable observations of flow severity.

Adopted revisions on assessing biological integrity specify that water bodies that are not meeting the applicable index of biotic integrity or dissolved oxygen criteria for a presumed high aquatic life use are not listed as impaired until a site-specific study confirms that the presumed use is appropriate. The adopted revisions clarify how impairment listings would be deferred, specify the timeframe that water bodies might be deferred from listing as impaired, and describe how site-specific aquatic life use standards will be established.

In response to comments, the adoption of amended §307.9 includes the removal of all proposed references to screening levels for total phosphorus and transparency and the removal of all references to the minimum number of samples and the minimum period of record required for assessment purposes. Also, the adopted language indicates that dissolved minerals criteria and human-health toxic criteria will be based on a "mean," rather than the proposed "median."

In response to comments, the adoption of amended §307.9(e)(3)(B) includes clarification as to how a high-flow exemption applies to freshwater and tidal streams; and the proposed phrase "indicates that swimming is not practical or safe" is replaced with "of flood or an equivalent category."

§307.10, Appendices A - G

Adopted changes to §307.10 include the addition of a new Appendix B, Sole-source Surface Drinking Water Supplies; the addition of Appendix F, Site-specific Nutrient Criteria for Selected Reservoirs; and Appendix G, Site-specific Recreational Uses and Criteria for Unclassified Water Bodies.

Adopted changes to the narrative section in Appendix A of §307.10 clarify that dissolved oxygen absolute minima and seasonal criteria are listed in §307.7, unless different criteria are specified in Appendix A. The language for recreational use is adopted to reflect the revisions in §307.7 and language regarding segments that include reaches that are dominated by springflow are also adopted.

Additional adopted changes to Appendix A of §307.10 include changes to aquatic life uses for Black Bayou (Segment 0406) and James' Bayou (Segment 0407) from intermediate to high and from high to intermediate for the West Fork Trinity River Above Bridgeport Reservoir (Segment 0812), the Clear Fork Trinity River Above Lake Weatherford (Segment 0833), and the North Sulphur River (Segment 0305). A footnote is adopted to clarify that a limited aquatic life use is appropriate for assessment of the benthic community located in the North Sulphur River. In addition, site-specific dissolved oxygen criteria for the following segments are adopted: Little Wichita River (Segment 0211), Black Bayou (Segment 0406), James' Bayou (Segment 0407), Little Cypress Bayou (Creek) (Segment 0409), West Fork Trinity River Above Bridgeport Reservoir (Segment 0812), Clear Fork Trinity River Above Lake Weatherford (Segment 0833), Clear Fork Trinity River Below Lake Weatherford (Segment 0831), Upper Oyster Creek (Segment 1245), Caney Creek Above Tidal (Segment 1305), Oso Bay (Segment 2485), and Laguna Madre (Segment 2491). An adopted footnote includes a site-specific multiple regression equation that must be used for predicting dissolved oxygen in Black Bayou, James' Bayou, Little Cypress Bayou (Creek), and Black Cypress Bayou (Creek). Additional footnotes are adopted to explain that the North Sulphur River, Black Bayou, James' Bayou, West Fork Trinity River above Bridgeport Reservoir, and Clear Fork Trinity River above Lake Weatherford are intermittent streams with perennial pools. Adopted footnotes also provide the site-specific 24-hour dissolved oxygen criteria for Little Wichita River, West Fork Trinity River above Bridgeport Reservoir, Clear Fork Trinity River below Lake Weatherford, Clear Fork Trinity River above Lake Weatherford, Upper Oyster Creek, Caney Creek above Tidal, Oso Bay, and Laguna Madre.

In response to comments regarding the use of the regression equation in the Cypress Creek Basin, the adoption of amended Appendix A of §307.10 includes clarification on the notation for the average 24-hour dissolved oxygen concentrations and modifications in the footnote to the minimum 24-hour dissolved oxygen concentrations, including a watershed size limitation where the regression equation is applied. Also, the adopted language includes modifications to the minimum 24-hour dissolved oxygen concentrations for Oso Bay (Segment 2485) and Laguna Madre (Segment 2491).

Adopted aquatic life use and dissolved oxygen criteria changes to the Angelina River/Sam Rayburn Reservoir (Segment 0615) from intermediate to high are due to the EPA's disapproval of the intermediate aquatic life use and associated dissolved oxygen criteria for the segment in the 2000 Texas Surface Water Quality Standards.

The critical low-flows for 15 spring-fed segments (Segments 0218, 1243, 1415, 1424, 1430, 1808, 1811, 1813, 1814, 1817, 1905, 2109, 2113, 2309, and 2313) and the method for calculating those critical low-flows are adopted.

Adopted changes in Appendix A of §307.10 include the creation of a new segment (Black Cypress Bayou (Creek)) (Segment 0410) and name changes in three segments (Segments 0307, 1428, and 1429). An acute aquatic life use criterion for zinc is adopted for the Nueces Bay (Segment 2482) for assessment purposes only after the completion and approval of a TMDL and TMDL Implementation Plan. Mission Lake is adopted as an addition to the name for Segment 2462. The maximum temperature criteria are adopted for specified portions of the Comal River (Segment 1811) and Upper San Marcos River (Segment 1814). Dissolved minerals criteria changes are adopted for the following 20 segments: Cooper Lake (Jim L. Chapman Lake) (Segment 0307), Lake Tawakoni (Segment 0507), Lake Livingston (Seg-

ment 0803), West Fork Trinity River above Bridgeport Reservoir (Segment 0812), Lavon Lake (Segment 0821), Brazos River below Possum Kingdom Lake (Segment 1206), Nolan River (Segment 1227), Salt Fork Brazos River (Segment 1238), White River Lake (Segment 1240), Double Mountain Fork Brazos River (Segment 1241), Brazos River Below Whitney Lake (Segment 1257), E.V. Spence Reservoir (Segment 1411), Colorado River below Lake J.B. Thomas (Segment 1412), Lake J.B. Thomas (Segment 1413), Concho River (Segment 1421), Colorado River Below E.V. Spence Reservoir (Segment 1426), O.H. Ivie Reservoir (Segment 1433), Nueces/Lower Frio River (Segment 2106), and Choke Canyon Reservoir (Segment 2116). A footnote for Segment 0507 is also adopted.

In response to comments, the adoption of amended Appendix A of §307.10 includes a change that deletes the revisions to the dissolved minerals criteria for White River (Segment 1239). Also, the adopted language includes a change in the footnote for Nueces/Lower Frio River (Segment 2106) to note that a site-specific conversion factor was used in the dissolved minerals calculation.

The pH range for Upper South Sulphur River (Segment 0306), Cooper Lake (Jim L. Chapman Lake) (Segment 0307), Caddo Lake (Segment 0401), Big Cypress Creek below Lake O' the Pines (Segment 0402), Black Bayou (Segment 0406), James' Bayou (Segment 0407), and Village Creek (Segment 0608) are adopted.

In response to comments, the adoption of amended Appendix A of §307.10 includes retaining the freshwater primary contact recreation geometric mean criterion for *E. coli* of 126 colonies per 100 ml. Also in response to comments, the adoption of amended Appendix A of §307.10 includes the freshwater Enterococci geometric mean of 33 per 100 ml for the following 15 classified high saline inland water bodies: Red River above Lake Texoma (Segment 0204), Red River below Pease River (Segment 0205), Red River above Pease River (Segment 0206), Lower Prairie Dog Town Fork Red River (Segment 0207), Lake Kemp (Segment 0217), Wichita/North Fork Wichita River (Segment 0218), Upper Pease/North Fork Pease River (Segment 0220), South Fork Wichita River (Segment 0226), Pease River (Segment 0230), Brazos River above Possum Kingdom Lake (Segment 1208), Salt Fork Brazos River (Segment 1238), Double Mountain Fork Brazos River (Segment 1241), Colorado River below Lake J.B. Thomas (Segment 1412), Upper Pecos River (Segment 2311), and Red Bluff Reservoir (Segment 2312).

The primary contact recreation use and corresponding Enterococci geometric mean criterion (35 colonies/100 ml) for tidal waters, bays, and estuaries is adopted. A footnote is adopted for bays, estuaries, and Gulf of Mexico to clarify that in oyster waters, Enterococci is the indicator bacteria to measure recreational suitability and fecal coliform is the indicator bacteria for oyster waters purposes only. A footnote is adopted for segments that are high saline inland waters to clarify that Enterococci are the indicator bacteria, but that fecal coliform may still be used as an alternate indicator during a transition period of two years until sufficient data are available for Enterococci for monitoring purposes.

In response to comments, the adoption of amended Appendix B of §307.10 includes language to clarify that the same level of protection that applies to sole-source surface drinking water supplies designated in Appendix B of §307.10 may be applied to a water body that has been identified as a sole-source surface drinking water supply, but is not yet included in Appendix B. Also, the adopted language includes a modification to one entry in Appendix B replacing "Guadalupe River" with "Terminal Reservoir" and replacing Segment "(1801)" with "(1802)."

Adopted changes to Appendix C of §307.10 include descriptions for new segments, revisions due to name changes, updated normal pool elevations, and revised descriptions for those segments affected by the creation of the new segments in Appendix A of §307.10. Black Cypress Bayou (Creek) is adopted as new Segment 0410 and segment boundary revisions are adopted for Clear Fork Trinity River above Lake Weatherford (Segment 0833), Spring Creek (Segment 1008), Lavaca River above Tidal (Segment 1602), and Salado Creek (Segment 1910). The description of the Neches River above Lake Palestine (Segment 0606), Lake Weatherford (Segment 0832), Lake Waco (Segment 1255), the Neches River Tidal (Segment 0601), the Neches River below B.A. Steinhagen Lake (Segment 0602), Bastrop Bayou Tidal (Segment 1105), Tres Palacios Creek Tidal (Segment 1501), Tres Palacios Creek above Tidal (Segment 1502), Gulf of Mexico (Segment 2501), and South, Middle, and North Bosque rivers (Segments 1246 and 1226) are adopted. The normal pool elevations are adopted for Farmers Creek Reservoir (Segment 0210), Diversion Lake (Segment 0215), Wright Patman Lake (Segment 0302), Sam Rayburn Reservoir (Segment 0610), Lake Worth (Segment 0807), Lake Palo Pinto (Segment 1230), Lake Graham (Segment 1231), Fort Phantom Hill Reservoir (Segment 1236), White River Lake (Segment 1239), Lake Lyndon B. Johnson (Segment 1406), Lake Buchanan (Segment 1408), Lake Brownwood (Segment 1418), and Medina Lake (Segment 1904). The name or description for the Sulphur/South Sulphur River (Segment 0303), Cooper Lake (Segment 0307), Colorado River below Town Lake (Segment 1428), Town Lake (Segment 1429), and Barton Creek (Segment 1430) are adopted.

In response to comments, the adoption of amended Appendix C of §307.10 includes changes to the county name for the upper boundary of Caney Creek above Tidal (Segment 1305).

Adopted changes to Appendix D of §307.10 include updating the title and narrative language to further clarify the purpose of this appendix. Designated aquatic life uses, dissolved oxygen criteria, and descriptions for where these apply are adopted for numerous water bodies. All water bodies are tributaries within the watershed of the listed segment numbers. Adopted new entries are: Dixon Creek (Segment 0101); Anderson Creek (Segment 0302); White Oak Creek (Segment 0303); Harrison Bayou (Segment 0401); Meddlin Creek (Segment 0403); Black Cypress Bayou/Creek (Segment 0410); Prairie Creek (Segment 0504); Campbells Creek (Segment 0505); Mill Creek and No. 5 Branch (Segment 0506); Sandy and Shawnee Creeks (Segment 0604); Linney Creek and Spring Branch (Segment 0801); Crooked Creek and an unnamed tributary of Crooked Creek (Segment 0802); Bassett Creek, Town Creek, and Walnut Creek (Segment 0804); Walnut Creek and Ash Creek (Segment 0809); Spring Creek (Segment 0840); Woodsons Gully and an unnamed tributary to Woodsons Gully (Segment 1004); Arnold Branch, Mink Branch, and Sulphur Branch (Segment 1008); Mound Creek (Segment 1009); Dry Creek and White Oak Creek (Segment 1010); Mound Creek (Segment 1015); Big Creek, Bessies Creek, and Clear Creek (Segment 1202); North Fork Rocky Creek (Segment 1217); Gonzales Creek (Segment 1232); Deer Creek (Segment 1242); Cluck Creek (Segment 1244); Tonk Creek (Segment 1246); Dry Creek, Harris Branch, and an unnamed tributary of Harris Branch (Segment 1428); Maha Creek (Segment 1434); Wilson Creek (Segment 1501);

Lavaca River (Segment 1602); Camp Meeting Creek (Segment 1806); Salado Creek (Segment 1910); and West Prong Atascosa River (Segment 2107).

Site-specific dissolved oxygen criteria for the following water bodies are adopted based on the results of UAAs. The water bodies are: Dixon Creek (Segment 0101); Harrison Bayou (Segment 0401); Black Cypress Bayou/Creek (Segment 0410); North Fork Rocky Creek (Segment 1217); Lavaca River (Segment 1602); Camp Meeting Creek (Segment 1806); and Salado Creek (Segment 1910). Footnotes are adopted that define site-specific dissolved oxygen criteria for these water bodies.

In response to comments regarding the use of the regression equation for Harrison Bayou and Black Cypress Creek/Bayou in the Cypress Creek Basin, the adoption of amended Appendix D of §307.10 includes clarification on the notation for the average 24-hour dissolved oxygen concentrations and modifications in the footnote to the minimum 24-hour dissolved oxygen concentrations; and the watershed size limitation where the regression equation is applied.

Adopted changes to Appendix D of §307.10 also include: segment number updates for water bodies in Segments 0402, 0501, 0503, and 0610; the addition of newly described portions of Gilleland Creek in Segment 1428 and Thompsons Creek in Segment 1242; and a change in aquatic life use from limited to high for Sandy Creek in Segment 0604.

Other adopted changes to Appendix D of §307.10 include boundaries for existing entries. Corrections are adopted for the description of the following water bodies: Rocky Creek (Segment 0505); Turkey Creek (Segment 0803); Pin Oak Creek (Segment 0836); Dry Creek (Segment 1009); South Mayde Creek (Segment 1014); Garners Bayou (Segment 1016); Rabbs Bayou, Brookshire and New Year Creeks (Segment 1202); Comanche Creek (Segment 1221); Palo Pinto Creek (Segment 1230); and Gilleland Creek (Segment 1428). Lake Fayette is adopted as another name for Cedar Creek Reservoir (Segment 1402).

Channelized streams in Harris County that drain to the San Jacinto Basin (Basin 1000), the San Jacinto-Brazos Coastal Basin (Basin 1100), and Bays and Estuaries (Basin 2400), were described in a UAA sent to the EPA for the 1995 standards. Specific streams were listed in the 1995 standards; however, a generic listing to cover these types of streams in the county was inadvertently excluded. A generic list with uses, criteria, and descriptions is adopted for channelized water bodies in Harris County that drain to these basins.

Adopted changes to Appendix E of §307.10 include revising the title and narrative language to further clarify the purpose of this appendix. The commission adopts the new format of the Appendix E table in §307.10 and the enhanced water body descriptions for 11 entries that better define where the site-specific studies are applied. Footnotes are adopted for the "Parameter" column to clearly state if the site-specific parameter applies to an entire water body or only a portion of the water body. The commission also adopts the column that describes additional site-specific considerations (such as hardness and total suspended solids).

The commission adopts the single copper water-effect ratio entry for five segments that make up the Houston Ship Channel. Twenty new site-specific copper water-effect ratio results are adopted in addition to four site-specific aluminum water-effect ratio results.

In response to comments, the adoption of amended Appendix E in §307.10 includes a change that adjusts the lower boundary for the site description for Buck Creek located in the watershed of Segment 0604. The adopted lower boundary is located at the confluence with Clayton Creek in Angelina County.

In response to comments, the adoption of amended Appendix F of §307.10 includes stand-alone chlorophyll *a* criteria and modifications to the narrative and footnote to reflect the use of stand-alone chlorophyll *a* criteria that were calculated using a 0.01 confidence level. Also, the adopted table includes the default criterion and the chlorophyll *a* calculated values are shown in parentheses.

In response to the comments concerned about trends over time in reservoirs, the commission re-evaluated the data used for criteria calculations. This re-evaluation indicated trends over time that appears to be anomalous and potentially artificial for fifteen reservoirs; and as a result fifteen reservoirs were removed. The adoption of amended Appendix F of §307.10 includes changes that delete the following fifteen reservoirs: Lake Meredith (Segment 0102), Farmers Creek Reservoir (Segment 0210), Diversion Lake (Segment 0215), Lake O' the Pines (Segment 0403), Lake Mackenzie (Segment 0228), Lake Arlington (Segment 0828), Lake Weatherford (Segment 0832), Lake Amon G. Carter (Segment 0834), Lake Houston (Segment 1002), Leon Reservoir (Segment 1224), Lake Palo Pinto (Segment 1230), Fort Phantom Hill Reservoir (Segment 1236), Inks Lake (Segment 1407), E. V. Spence Reservoir (Segment 1411), Lake Brownwood (Segment 1418).

Also, the adoption of amended Appendix F of §307.10 includes changes that delete Buffalo Springs Lake, an unclassified water body in Segment 1241; and two boundary waters, International Falcon Reservoir (Segment 2303) and International Amistad Reservoir (Segment 2305). In response to the comments that the commission received that setting criteria on these three reservoirs may not be appropriate at this time; the commission removed these water bodies from Appendix F of §307.10.

Appendix G of §307.10 is adopted to track site-specific changes to recreational uses and criteria for unclassified water bodies where recreational UAAs or other sufficient site-specific information exists to provide a recreational use designation. Three unclassified water bodies are incorporated into Appendix G. The commission adopts changing the presumed contact recreation use and corresponding criteria of 126 colonies per 100 ml for these water bodies to a secondary contact recreation use and corresponding criteria of 630 colonies per 100 ml based on results from a Recreational UAA.

FINAL REGULATORY IMPACT ANALYSIS

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule changes are not subject to §2001.0225, because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" is defined in Texas Government Code, §2001.0225(a) as applying to rules adopted by a state agency that: 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 pro-

gram; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The amendments were developed in order to be consistent with the water quality standard rules in the CWA and the TWC. The amendments do not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of the National Pollutant Discharge Elimination System (NPDES) delegation agreement between TCEQ and EPA. The amendments were not developed solely under the general powers of the agency, but were specifically developed to meet water quality standards established under federal and state law. In addition, the standards are under authority of the TWC, which authorizes the commission to set water quality standards by rule. The TWC directs TCEQ to consider the existence and effects of nonpoint source pollution, toxic materials, and nutrient loading in developing water quality standards. Therefore, the rulemaking is not subject to the regulatory analysis provisions in Texas Government Code, §2001.0225(b).

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The Texas Surface Water Quality Standards (Chapter 307) establishes instream water quality standards for Texas streams, rivers, lakes, estuaries, and other water bodies such as wetlands. The commission is required to establish water quality standards in TWC, §26.023. The CWA, §303 requires states to publicly review and revise their surface water quality standards every three years. The revisions will satisfy the federal requirement for a triennial review.

These revised criteria are more protective of human health and provide a public benefit. The site-specific standards were needed to incorporate new sampling data and to establish the appropriate revisions in the rules so that permit issues related to specific water bodies may be resolved. Site-specific standards more accurately describe the ambient quality of the water body. These site-specific standards also provide more accurate permit requirements that are protective of human health and, in most cases, economically affordable. Additionally, these site-specific standards should enhance water quality.

The specific purpose of the rule changes are to satisfy state statute requirements, TWC, §26.023 and CWA, §303(d) requirements, and to more accurately assess water quality in the state; and revise requirements to protect human health and water quality. The rules would substantially advance this stated purpose by adopting water quality criteria and requirements that are supported by site-specific studies, federal and state research, and statewide monitoring and sampling data. Promulgation and enforcement of these rules will not burden private real property that is the subject of the rules because the amendments revising the state's surface water quality standards do not limit or restrict a person's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The executive director determined that this rulemaking will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and considered applicable goals and policies of the Texas Coastal Management Plan (CMP) during the rulemaking process.

The commission prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The rulemaking is consistent with the CMP goal of protecting, preserving, restoring, and enhancing the diversity, quality, quantity and functions, and values of coastal natural resources by establishing standards and criteria for instream water quality for Texas streams, rivers, lakes, estuaries, and other water bodies such as wetlands. These adopted water quality standards and criteria will provide parameters for permitted discharges that will protect, preserve, restore, and enhance the quality, functions, and value of coastal natural resources. The rulemaking also provides for clearer and more protective conditions for variances that should ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. These variance conditions allow dischargers an opportunity to examine options for upgrades while maintaining water quality that will allow for human uses of coastal waters.

The rulemaking will require wastewater discharge permit applicants to provide information and monitoring data to the commission so that the commission may make an informed decision in authorizing a discharge permit. This will ensure that the authorized activities in a wastewater discharge permit comply with all applicable requirements, thus making the rulemaking consistent with the administrative policies of the CMP. The rulemaking also provides clarity and identifies the circumstances where the commission will consider and grant variances from water quality standards.

The rulemaking considers information gathered through the biennial assessments of water quality in the commission's Water Quality Inventory to prioritize those coastal waters for studies and analysis in reviewing and revising the state's surface water quality standards. The standards are established to protect designated uses of coastal waters, including protection of uses for recreational purposes and propagation and protection of terrestrial and aquatic life. The rulemaking is consistent with the CMP's policies for discharges of municipal and industrial wastewater to coastal waters and how they relate to specific activities and coastal natural resource areas.

The adopted revisions to §§307.1 - 307.10 as they pertain to designated tidal segments within the CMP boundary, will be submitted to the Coastal Coordination Council for recertification.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the coastal management program.

PUBLIC COMMENT

A public hearing was held in Austin, Texas on March 11, 2010 to receive public comments on the proposed revisions to Chapter 307. Commission staff members were available before and after the hearing to address specific questions from those who attended the hearing. The comment period for the proposed revisions ended on March 17, 2010.

The commission received timely public comments from: Albion, Alkylphenols & Ethoxylates Research Council (APERC), Aransas County, City of Austin (Austin), Association of Electric Companies of Texas, Inc. (AECT), Barton Springs/Edwards Aquifer Conservation District (BSEACD), Travis County Judge Samuel T. Biscoe, Blackburn Carter, P.C., Texas State Representative Valinda Bolton, Bosque County Farm Bureau/Whiskey

Canyon Ranch (BCFB), Brazos River Authority (BRA), The Caddo Lake Area Chamber of Commerce (CLACC), Caddo Lake Institute (CLI), The Greater Caddo Lake Association of Texas (GCLAT), The Louisiana Greater Caddo Lake Association (LGCLA), The Friends of the Caddo Lake National Wildlife Refuge (FCLNWR), Clean Water Action (CW Action), City of Cleburne (Cleburne), Children's Environmental Health Institute (CEHI), Honorable Dickie Clary - Precinct 4 Hamilton County Commissioner, Coastal Bend Bays Foundation (CBBF), Dallas County Park Cities Municipal Utility District (DCPC MUD), Edwards Aquifer Authority, Environment Texas, The Environmental Integrity Project (EIP), City of Farmers Branch (Farmers Branch), Fox Dairy LTD, Galveston Bay Foundation (GBF), Gulf Coast Waste Disposal Authority (GCA), City of Hamilton (Hamilton), Harris County, Harris County Flood Control District (HCFCD), Harris County Public Health and Environmental Services (HCPHES), Heifer Ranch at Arroyo Seco, High Plains Dairy Counsel, Highland Lakes Group, Highland Lakes Political Action Committee (Highland Lakes PAC), Independent Cattlemen's Association of Texas (ICA), United States Section: International Boundary and Water Commission (IBWC), International Paper Company; submitted by Integral Consulting, Inc. (IPC), Lake Austin Collective (LAC), Lake Austin Snorkeling Club, City of Lakeway (Lakeway), Legacy Farms, Live Oak County Farm Bureau (LOCFB), Lone Star Chapter of the Sierra Club (Sierra Club), Lower Colorado River Authority (LCRA), Lowerre, Frederick, Perales, Allmon & Rockwell (Lowerre Frederick), City of Lubbock (Lubbock), McGinnes Industrial Maintenance Corporation; submitted by Integral Consulting, Inc. (McGinnes Corp.), Texas State Representative Sid Miller, Harrison County Judge Randy Mills, National Wildlife Federation (NWF), North Texas Municipal Water District (North Texas MWD), Nueces River Authority (NRA), Plains Cotton Growers, Inc. (PCG), Port of Corpus Christi Authority (PCCA), Port of Houston Authority (PHA), Protect Lake Travis Association (PLTA), Parkhill, Smith and Cooper, Inc. (PSC), Public Citizen, Sabine River Authority (SRA), Samsung Austin Semiconductor (Samsung), San Antonio River Authority (SARA), San Antonio Water System (SAWS), San Marcos River Foundation (SMRF), Sanderson Farms, Save Our Springs Alliance (SOSA), Sustainable Energy and Economic Development Coalition (SEED), Texas Campaign for the Environment (TCE), Texas and Southwestern Cattle Raisers Association (TSCRA), Texas Association of Clean Water Agencies (TACWA), Texas Association of Dairymen (TAD), Texas Black Bass Unlimited (TBBU), Texas Catholic Conference, Texas Cattle Feeders Association (TCFA), Texas Commission on Environmental Quality - Office of Public Interest Counsel (OPIC), Texas Chemical Counsel (TCC), Texas Comptroller of Public Accounts; Susan Combs (TCPA), Texas Conservation Alliance (TCA), Texas Department of Agriculture (TDA), Texas Department of Transportation (TXDOT), Texas Farm Bureau (TFB), Texas Industry Project; submitted by Baker Botts LLP (TIP), Texas Parks & Wildlife Department (TPWD), Texas Poultry Federation, Texas State Soil & Water Conservation Board (TSSWCB), Texas Wade Paddle and Pole (TWPP), Texas Water Conservation Association (TWCA), Texas Water Resources Institute (TWRI), Tischler/Kocurek Environmental Engineers (T/K), City of Uncertain (Uncertain), EPA, Upper Trinity Regional Water District; submitted by Lloyd Gosselink (UTRWD), Village of Volente (Volente), Water Environment Association of Texas (WEAT), Texas State Senator Kirk Watson, White River Municipal Water District, submitted by Lloyd Gosselink (White River MWD), Working Effectively for Clean Air Now (WE CAN), and over one thousand individuals.

Comments were also received from the Association of Texas Soil and Water Conservation Districts and the following Soil and Water Conservation Districts: Andrew Kent #170, Andrews #246, Atascosa County #307, Austin County #347, Bastrop County #340, Bedias Creek #428, Big Bend #227, Calhoun #345, Central Colorado #550, Coke County #219, Concho #201, Dawson County #124, Denton County #547, Fayette #341, Gaines County #166, Gillespie County #220, Gonzales County #338, Gray County #125, Hall-Childress #109, Howard #243, Hutchinson #146, Jack #549, Jackson #336, Jim Wells County #355, Johnson County #541, Karnes County #343, Kendall #216, Lamar #415, Lamb County #130, LaSalle County #354, Limestone-Falls #501, Live Oak #323, Llano County #233, Loma Blanca #328, Lubbock County #108, Lynn County #119, Marion-Cass #433, Mason County #223, McCulloch #249, McLennan County #512, Menard County #215, Middle Clear Fork #206, Middle Concho #234, Midland #244, Monte Mucho #331, Navasota #440, Nolan County #245, Nueces-Frio-Sabinal #221, Oldham County #153, Palo Pinto #518, Panola #448, Parmer #140, Piney Woods #429, Salt Fork #133, San Saba #250, Sandhills #241, San Patricio #324, Shelby #449, Sherman County #159, Starr County #332, Sulphur-Cypress #419, Tierra Blanca #143, Upper Clear Fork #165, Upper Elm-Red #524, Upper Pease #164, Upper Pecos #213, Upshur-Gregg #417, Victoria #346, Washington #348, Waters-Davis #318, Wharton County #342, Wilson County #301, Wise #548, and Wood #444.

RESPONSE TO COMMENTS

General Comments Related to the Water Quality Standards Changes

Comment: TSSWCB supports the added text throughout the standards that references TCEQ's laboratory accreditation requirements as specified in Chapter 25.

Response: The commission notes the comment in support of the references to the commission's laboratory accreditation requirements. The commission adopts the revisions as proposed.

Comment: AECT and a number of individuals filed comments supporting the overall proposed revisions to the water quality standards for Texas streams and rivers. Harris County recommends expeditious adoption of the proposed water quality standards.

Response: The commission notes the comment in support of the overall proposed revisions to the water quality standards.

Comment: Farmers Branch comments that further study is needed to determine the ecological benefit in comparison with the financial impacts to wastewater treatment plants. Farmers Branch notes that in some water bodies treated effluent discharges can make up to 90% of its base flow. Therefore, additional studies need to be performed on a case-by-case basis before requiring costly improvements to a wastewater treatment plant.

Response: The commission acknowledges that many wastewater treatment facilities in Texas have very little instream dilution, and a fiscal note analysis in accordance with rulemaking procedures was conducted in the proposal preamble and included some of these requested considerations. The commission is aware that new or more stringent effluent limitations may require expensive treatment plant upgrades and will carefully consider new or more stringent effluent limitations requirements for wastewater treatment plants.

Comment: TAD recommends TCEQ consider how the proposed water quality standards change would impact both urban and rural business, including a business continuity impact analysis. Samsung supports changes to the standards unless they will result in increased costs for dischargers.

Response: The commission appreciates the concern from the regulated community about potential increased costs for all types of business due to changes in the Texas Surface Water Quality Standards. The commission notes that a fiscal note analysis was conducted in accordance with rulemaking procedures and it included a small business analysis of the potential cost impacts of the proposed changes to the water quality standards.

Comment: One individual noted in the Public Benefits and Cost section that during the first five years the proposed rules are in effect, water quality and protection of the public and aquatic life resources would be increased. The individual notes that this statement is illogical given the proposed action to make bacteria standards attainment less stringent. A number of commenters noted that the potential cost savings to the state of approximately $1 million over a three-year period was not an adequate trade-off for lowering water quality standards. CEHI also objected to a cost-benefit analysis for making environmental decisions.

Response: The commission acknowledges the comment regarding the Public Benefits and Cost section and clarifies that this section of the preamble is in reference to all the changes in the proposed Texas Surface Water Quality Standards. A variety of the proposed revisions increase protective levels for numerous pollutants.

The primary purpose in the changes to the recreational standards is to more appropriately assign recreational uses to water bodies in Texas and to effectively apply those standards to protect the assigned uses. The costs savings identified in the fiscal note addressed a few of the immediate activities associated with the recreational revisions. However, the primary purpose of these changes were to ensure that all the resources for water quality management available in Texas are more effectively directed to water bodies that need restoration.

Comment: BSEACD reminds TCEQ of the need to honor the special hydrologic relationship between groundwater and certain surface water resources. In particular, BSEACD requests that any surface water body that is now designated by TCEQ for uses that include aquifer protection, be assured of the highest level of water quality as TCEQ applies its new standards and implementation guidance. BSEACD comments that it is appropriate to treat these designated aquifer protection segments as drinking water supplies.

Response: The commission acknowledges this comment and notes that the commission did not propose changes to the designated aquifer protection use.

§307.3 - Definitions and Abbreviations

Comment: Albion comments that a definition for "dissolved trace metals" should be included in either the standards rule or implementation guidance. Without an established or EPA deferred definition of dissolved trace metals, it is unclear what dissolved metals data complies with TCEQ standards, compliance monitoring, or monitoring programs for the purpose of assessment.

Response: While there is no specific definition for "dissolved trace metals" in either the standards rule or implementation guidance, the *Surface Water Quality Monitoring Procedures, Volume 1* (RG-415) specifically states that a 0.45 microgram filter is to be used when obtaining dissolved metals data. The commission continues to evaluate these procedures and may determine it is appropriate to add a definition to the standards rule in future revisions. No changes were made in response to this comment.

Comment: TWRI requests that the term "warm-weather" be removed from the definition of "baseflow conditions" because base flows can occur year-round and are not exclusive to warm months. TWRI suggests modifying the definition to read: "The usual, reliable, background level of a river, maintained generally by seepage from groundwater storage and through flow." TPWD comments that the new definition should be consistent with the Texas Instream Flow Program, which is that base flows "represent normal flow conditions (including variability) between precipitation events." TPWD noted that the term "baseflow" also appears as "base flow" in the rules.

Response: The commission is concerned that the use of the Texas Instream Flow definition of "base flow" might be inadvertently restrictive in terms of the normal range of conditions over which recreational surveys would be appropriate. The commission notes that the definition of "base flow conditions" was added for recreational purposes only, and this definition was renamed to "dry weather flows" in order to prevent confusion.

Comment: NWF comments that the definition of "critical low flow" is ambiguous due to the use of the word "include." NWF recommends use of the phrase "consists of" as a better fit in this definition.

Response: The commission agrees with this comment and adopts the definition as modified.

Comment: WEAT suggested modifying the definitions of "E. coli" and "Enterococci" to include the phrase "and other environmental sources" at the end of the first sentence to acknowledge there are sources other than warm-blooded animals and to make the definition consistent with the definition of "fecal coliform." TSSWCB opposes this suggested change, noting that its understanding is that there is little evidence to support it.

Response: The commission acknowledges the comment in support and opposition to adding the term "and other environmental sources." The commission responds that the current definition of *E. coli* and *Enterococci* adequately describes these bacteria indicators. The commission adopts the definitions as proposed.

Comment: TWRI suggests adding a definition of "high saline inland waters" because this term is used throughout the standards, but lacks a clear definition.

Response: For this revision, the commission's purpose is to provide clear designations water-body-by-water-body for the appropriate criteria. More evaluation is needed to develop a numerical definition that could be consistently applied to additional water bodies. The adoption of this provision on a water-body-by-water-body basis prevents confusion as to what is considered a high saline inland water body. No change was made in response to the comment.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the proposed changes to the definition of "noncontact recreation" since the proposed criteria for secondary contact recreation 1 would be set at a less protective level than the current noncontact recreation criteria. TSSWCB comments that the definition would be strengthened by clarifying that noncontact recreation is appropriate for either "activities not involving a significant risk of water ingestion" or (not "and") "where primary and secondary are considered unsafe. . ." Farmers Branch recom-

mends revising the definition to include concrete channels that do not support fish or substantial aquatic life. TPWD comments that to be consistent with other recreation definitions "noncontact recreation" should list types of activities. TPWD suggests rewording to read:

"Activities that do not involve a significant risk of water ingestion, such as those with limited body contact incidental to shoreline activity including birding, hiking, and biking. Noncontact recreation use may also be assigned where primary and secondary contact recreation should not occur because of unsafe conditions, such as ship and barge traffic."

Response: The commission acknowledges the recommended changes and the opposition of the noncontact recreation definition. It is appropriate to expand the current recreational use categories into four categories (primary contact, secondary contact 1 and 2, and noncontact recreation) with corresponding criteria in an effort to better characterize the different levels of water recreation activities that can occur in Texas.

The commission responds that a noncontact recreation designation for concrete channels may be too broad because the extent of concrete channelization can vary on a case-by-case basis. In addition, a water body, including those that are concrete lined, cannot be designated as noncontact recreation without a recreational UAA and without being publically proposed during a rule revision process.

The commission agrees that the noncontact recreation definition should be clarified to be consistent with other recreation definitions by listing the types of activities and modified the language as recommended by these comments. The commission adopts the revisions as modified.

Comment: TPWD comments that the modified definition of "nonpersistent toxic" could be less protective of aquatic life for those toxic substances that move out of the "persistent toxic" category and recommend leaving the definitions at 96 hours. One individual asks why the proposed half-life period is being increased from 96 hours to 60 days in the definitions of "nonpersistent toxic" and "persistent toxic."

Response: The revision to the definitions of "nonpersistent toxic" and "persistent toxic" are based on EPA's Persistent Bioaccumulative Toxic (PBT) Chemicals; Final Rule (64 *Federal Register* 58666; October 29, 1999). Under "Summary of Proposal" (Section IV.B1, Page 58668), EPA states that a half-life criterion of two months for water was used for the purpose of determining whether a toxic chemical is persistent in the environment. EPA further explains (Page 58381) ". . .that application of lower criteria would include so many substances as to be impractical. Further, given the uncertainties that often exist regarding physical properties and environmental behavior of chemicals, caution is especially appropriate for substances with shorter half-lives, since they are (all other things being equal) less likely to build up in the environment than more persistent substances." Therefore, the commission adopts the definitions of "nonpersistent toxic" and "persistent toxic" as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN recommend deletion of the last sentence in the definition of "nutrient criteria" consistent with their position for determining violations of nutrient numeric standards. TPWD notes that the definition includes associated screening levels for total phosphorus and secchi depth. TPWD further notes that the criteria itself in §307.4(e), references only the chlorophyll a standard.

Response: The commission concurs with this comment and adopts the stand alone chlorophyll *a* nutrient criteria for reservoirs. The last sentence in the definition of "nutrient criteria," which relates to screening levels, was deleted. The modified definition is adopted.

Comment: NWF and TIP comment that the proposed definition refers to "aquatic plants that includes phytoplankton, floating algae, floating vascular plants, attached algae, and rooted plants" and recommends using the newly defined term "aquatic vegetation" in order to assure consistency. TIP recommends for consistency with the definition of "nutrient" that the first sentence of the definition of "nutrient criteria" be revised to read: "Numeric and narrative criteria that are established to protect existing, attainable or designated uses of surface water from excessive growth of aquatic vegetation."

Response: The commission concurs with these comments and adopts the language.

Comment: NWF comments that the proposed definition of "nutrient" includes the term "nuisance aquatic vegetation" that is undefined and unclear. NWF suggests replacing with the phrase "can contribute to undesirable growth of aquatic vegetation."

Response: The commission concurs with these comments and adopts the language cited above.

Comment: TWRI asks that in the definition of "primary contact recreation" whether the term "whitewater" applies to kayaking, canoeing, and rafting or just to kayaking. TWRI also noted that the definition does not seem appropriate for intermittent streams and nontidal wetlands, which are more appropriate for secondary contact recreation 1 and 2. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN comment that the definition should also include tubing, kayaking, canoeing, and rafting (the latter three not qualified as whitewater) and that wading should not be limited to "wading by children." TSSWCB comments that canoeing, kayaking, and rafting should be included in the definition of secondary contact recreation rather than in this definition. TSSWCB indicates that this use should only apply to recreational uses that may result in prolonged and direct contact with the water.

TPWD questions the distinction between whitewater kayaking, canoeing and rafting. TPWD indicates that based on current knowledge, it is impossible to draw a meaningful distinction between risks of ingestion based on "whitewater" conditions. TPWD indicates that all canoeing, kayaking and rafting are activities that carry an elevated risk of ingestion and should receive the full protection of the primary contact recreation use category. Therefore, TPWD recommends that the word "whitewater" be removed from the definition of "primary contact recreation."

Response: The commission responds that in the primary contact recreation definition, the term "whitewater" applies to kayaking, canoeing, and rafting. The definition has been modified to clarify this.

In response to comments requesting that primary contact recreation apply to all kayaking, canoeing, and rafting, no changes were made based on this comment in the definition. The distinction of the term "whitewater" recognizes that these activities carry an elevated risk of water ingestion.

There are common types of wading by adults, such as wade fishing, that do not involve a significant risk of ingestion. Therefore, these activities would not be appropriate for primary contact recreation.

The commission responds that intermittent streams and nontidal wetlands have a presumed contact recreation use and this presumption is not changed from the existing rules. Site-specific information for each intermittent stream or nontidal wetland would be required in order to consider a presumed secondary contact recreation 1 use.

Comment: TWRI comments that the definition of "secondary contact recreation 1" should include canoeing, kayaking, and rafting under normal flow conditions. TWRI notes that the risk of ingesting water under normal flow conditions is inherently less than under "whitewater" conditions. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose adoption of this definition, but if adopted, qualifying the term "boating" by specifying "motor boating." TPWD also recommends replacing "boating" with "motor boating" or some other language to clarify that all kayaking, canoeing, and rafting activities fall under primary contact recreation.

Response: The commission responds that the term "boating" was intended to include canoeing, rafting, kayaking, and motor boating. In response, the commission changed "boating" to "canoeing, kayaking, rafting, and motor boating" and adopts the language as modified.

Comment: GBF comments that the definition of "secondary recreation 1" allows lowering use as a result of man-made degradation. GBF comments that the physical characteristics may be the result of man-made degradation, such as reduced base/stream flows and limited public access that may be remedied in the future.

Response: The commission will thoroughly evaluate water bodies to determine if recreational activities are occurring and where recreational use may be inappropriate through a Recreational UAA. A Recreational UAA involves coordination with local stakeholders and landowners, data collection, and an evaluation of water recreation activities. In addition, it includes an evaluation of the physical characteristics of the water body and historical uses. Any change to a recreational use less stringent than primary contact recreation will require public notification and the opportunity for public comment. The commission can re-evaluate, as needed, the recreation use of a water body if there are future changes in use as sometimes occurs now with UAAs for other parameters, such aquatic life uses. The commission adopts the definition as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the adoption of the definition of "secondary contact recreation 2," but if adopted, recommend eliminating the term "limited public access" from the definition.

Response: The commission acknowledges the opposition to the adoption of the secondary contact recreation 2 definition. However, there is utility in having a secondary contact recreation 2 category that takes physical characteristics of the water body and limited public access into consideration. The commission adopts the definition as proposed.

Comment: TWRI comments that the phrase "less frequently" in the definition of "secondary contact recreation 2" needs to be better described and clarified.

Response: The commission explored a more specific definition with respect to "less frequently" with the water quality advisory stakeholder group and others, but a clear consensus was not achieved. The commission may continue to work with stakeholders during the process of evaluating recreational UAAs to better apply these definitions.

Comment: TWRI comments that the definitions of "secondary recreation 1 and 2" and "non-contact recreation" should be standardized to the extent possible between freshwater and saltwater. One individual commented that there appeared to be little difference between the two secondary contact recreation standards and that only one was needed.

Response: The commission responds that the secondary contact and noncontact recreation language for freshwater and saltwater in §307.7 were standardized to the extent possible. Detailed information was provided in §307.4(j) regarding how recreational uses would be assigned; therefore, this information was not re-stated in §307.7. The additional language in the saltwater portion in §307.7 was to provide further clarification that these uses cannot apply to a coastal recreation water as defined in the Beach Act.

Comment: TACWA, TIP, TCC, and TWCA comment that the definition of "sustainable fisheries" should be revised so that very small, tidally-influenced ditches are excluded. GCA comments that the definition needs further clarification. GCA and TCC are concerned that proposed definition will be extended to tidally-influenced small ditches that discharge into a tidal water body and these ditches should not be considered sustainable fisheries. T/K, TCC, and TIP recommend the addition of the following sentence to the definition: "Tidal rivers do not include small tributaries of bays and estuaries that do not have the potential for sufficient fish production or fishing activity to create significant long-term human consumption of fish and/or shellfish."

Response: Tidal water bodies are some of the state's most productive fisheries and these water bodies generally have ample public access. For this reason, all tidal water bodies were considered to support sustainable fisheries, regardless of size. The commission notes this comment and recognizes that some tidal ditches may be so small or have such limited public access that this blanket coverage of all tidal water bodies may be unnecessary. However, at this time the commission proposes no change.

Comment: TPWD comments that an apparently arbitrary size limit has been established to define "sustainable fisheries." TPWD notes that there are many water bodies smaller than 50 surface acres that are managed as community fishing lakes. TPWD is concerned that local and subsistence users consuming fish from these waters may not be appropriately protected, since human health criteria are approximately an order of magnitude lower for these water bodies (based on 1.75 grams per day (g/day) consumption for incidental fisheries versus 17.5 g/day consumption for sustainable fisheries). TPWD recommends that the definition be changed to less than 10 acres or 30 acre-feet.

Response: At this time the commission proposes no change regarding the size of a surface water that is presumed to support a sustainable fishery. However, this definition does not prohibit smaller water bodies from being considered a sustainable fishery. Local factors, such as fish stocking practices and local fishing activities, are considered when determining if a water body should be treated as a sustainable fishery. No change to this definition was proposed or is adopted in the rules at this time.

Comment: One individual commented that in the definitions of "total dissolved solids" and "total suspended solids" the use of the phrase "filterable residue" is archaic and misleading and recommends revising this term in both definitions.

Response: The definitions of "total dissolved solids" and "total suspended solids" were modified to clarify that the phrase "filterable residue" is also equivalent to "filterable residue" as the term is used in 40 Code of Federal Regulations (CFR), Part 136.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN commented that the definition of "wetland water quality functions" should include habitat for "wildlife" and not just habitat for aquatic life.

Response: The commission acknowledges this comment. Since this recommendation could potentially affect regulatory programs, additional coordination with stakeholders is needed. After additional development, changes to these definitions may be publicly considered in the next revision of the standards.

Comment: TPWD requests that the standards include a definition of "wildlife" in §307.3. TPWD notes that common usage of the term "wildlife" conflicts with the statutory definition, in that the statutory definition excludes exotic species, while common use includes species such as feral hogs. TPWD states that this discrepancy has led to confusion and it would appreciate clarification in the standards.

Response: The commission responds that due to potential conflicts with the definition of this term in statutes and regulations, the commission adopted the term "aquatic and terrestrial life" as used in §307.1 rather than the term "wildlife." However, the commission did not change the term "wildlife" in §307.7(b)(1) because bacteria sources could be from any warm-blooded animal. The commission adopts the term as modified.

§307.4 - General Criteria

Comment: Harrison County Judge Randy Mills, Hamilton County Commissioner Dickie Clary, WEAT, SAWS, TSCRA, and one individual filed comments supporting the site-specific UAAs to determine proper water body use. SAWS comments that this approach will more appropriately classify a segments recreational use. SARA comments that not only should a UAA be used to assess current use, but public notice and public meetings should be held within the watershed prior to changing an aquatic recreation classification. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN are concerned that due to difficulties, the result of these studies will result in many streams being characterized as not used for recreation use when they actually are. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN also object to revising the presumed uses for unclassified streams solely through a UAA, without going through a revision of the water quality standards, with public notice and comment requirements. One individual commented that the proposed rules do not mention any sort of periodic review or re-evaluation of UAA results to re-assess changed stream conditions that may justify changes in designated uses. OPIC notes the conducting UAAs on all waterways that would have less stringent bacteria standards is being proposed. GBF expressed concerns that a recreational UAA cannot predict future contact recreation uses.

One individual comments that the language in §307.4(j)(2)(D) and (3)(A), suggests the need for a periodic review of designated uses. TPWD comments that the language in §307.4(j)(3)(A) - (C) appears to allow assignment of secondary contact recreation 1 use to intermittent and perennial freshwaters based on what, in TCEQ's judgment, is a "reasonable level of inquiry," provided the water body meets conditions specified in §307.4(j)(2)(B). Effectively, this language will allow a standards change in a permit, CWA, §303(d) listing, or TMDL action, without a UAA, statewide notice, or a rulemaking action. TPWD does not think this is appropriate at this time. Perhaps after the scientific adequacy of recreational UAA procedures have been demonstrated it will be justifiable to allow the suggested procedure, but there is no evidence to allow these changes without thorough review at this time. NWF opposes the proposed standards that would allow perennial stream and river segments to be presumed to support only a secondary contact recreation 1 level of use.

Response: The commission acknowledges the comments in support of UAAs. The commission notes that EPA has indicated that the recreational UAA procedures, which are not part the proposed rule, are acceptable.

The commission responds that all classified water bodies have a designated primary contact recreation (PCR) use. All unclassified water bodies have a presumed PCR use, except where site-specific information indicates that recreational activities that involve a significant risk of ingestion have little to no likelihood of occurring as described in §307.4(j). The commission will thoroughly evaluate water bodies to determine if recreational activities are occurring and where recreational use may be inappropriate through a recreational UAA. A recreational UAA involves coordination with local stakeholders and landowners, data collection, and an evaluation of water recreation activities. Any change to a recreational use less stringent than PCR will require public notification and the opportunity for public comment. The commission can re-evaluate the recreation use of a water body, as needed, if there are future developments that would justify possible recreational use changes.

Comment: One individual asks for clarification regarding what the numbers in this phrase mean: ". . .for the proposed site-specific bacteria criteria to protect recreation, one is new, none are more stringent, and 293 are less stringent." The individual notes that this language, by itself, does not lend itself to interpretation that recreation is being protected, since all changes are less stringent.

Response: The commission responds that the phrase referenced the proposed change in *E. coli* criterion for primary contact recreation from 126 colony-forming unit (cfu) per 100 ml to 206 cfu/100 ml. This proposed change was not adopted in the final rulemaking. The commission notes that the EPA has indicated that *E. coli* concentrations of up to 206 cfu per 100 ml can be considered protective of primary contact recreation.

Comment: One individual commented that in §307.4(b)(2) the use of the term "floating debris" suggests that trash may be a pollutant and recommends addressing this issue.

Response: The commission responds that the narrative specifications in §307.4(b) address a broad range of adverse conditions in water that might affect water quality uses. These specifications intentionally include a variety of effects beyond the purview of specifically defined pollutants that is typical of more quantitative standards. No change from the existing language is made at this time.

Comment: One individual commented that the use of the term "aesthetically attractive condition" in §307.4(b)(4) is not defined and notes some perceptions of this term may be environmentally harmful.

Response: The commission acknowledges that this term is open to interpretation, as is generally the case with the narrative criteria in §307.4(b). The wide variety of aquatic environments in Texas creates difficulties in establishing a uniform application of this term. The general narrative criteria were not a focus of this

revision, but changes such as these can be considered for the next triennial revision. No change from the existing language was made in response to the comment.

Comment: TPWD notes that the site-specific criteria section, §307.7(b)(4)(E), includes associated screening levels for total phosphorus and secchi depth and questions whether the criteria in §307.4(e) should include discussion of associated screening levels.

Response: The commission notes that the selected nutrient criteria for reservoirs no longer include associated screening values, so no additional discussion of them in this section is needed.

Comment: NWF comments that the term "presume" should be added to the list of the types of uses that must be protected from excessive growth of aquatic vegetation in §307.4(e).

Response: The commission concurs and adopts the language as modified.

Comment: NWF comments §307.4(f) includes a phrase "discharges of treated domestic (sanitary) effluent" that is too broad. NWF states that it is inappropriate to exempt every discharge of treated domestic effluent from compliance with the temperature standard. NWF comments that to the extent that temperature excursions resulting from discharges of treated domestic effluent are reasonably avoidable, the standards should require that the excursion be avoided.

Response: In general, the temperature exemption in §307.4(f) for domestic wastewater discharges is appropriate. The commission responds that this might be an appropriate consideration for the next revision of the standards pending additional stakeholder review.

Comment: HCFCD notes that the addition of the aquatic life subcategory of "minimal" is appropriate. TPWD notes that a new category of aquatic life use, termed "minimal," is proposed that replaces "no significant aquatic life use" in §307.4(h)(4) and §307.7(b)(3)(A)(i). No attributes are listed in either §307.7(b)(3)(A)(i), Table 3, or Table 1 of the Implementation Procedures, unlike the existing aquatic life use categories (exceptional, high, intermediate and limited). This raises the question of how to distinguish between a limited aquatic life use and a minimal aquatic life use. TPWD recommends that references to minimal aquatic life use be stricken from the standards and implementation procedures until these attributes are developed and that TCEQ continue to use the "no significant aquatic life use" designation until such attributes are developed.

Response: The commission agrees that additional evaluations of biological categories and indices to delineate a "minimal aquatic life use" may be useful, but this change and the requested deletion of references to this use are beyond the proposed scope of these revisions. The commission notes that "minimal aquatic life use" has been historically known as "no significant aquatic life use" and is only used when assigning presumed aquatic life uses to intermittent streams without perennial pools. This use is based on flow characteristics and not aquatic life attributes. The commission currently assigns "no significant aquatic life uses" as the presumed use for intermittent streams without perennial pools in permitting. The term "minimal" is also being added to §307.4(h)(4) and §307.7(b)(3)(A)(i) to be consistent with the Surface Water Quality Monitoring Program, who use the term "minimal" in their aquatic life use designation for the Integrated Report. Commission staff will continue to coordinate with TPWD staff to improve procedures to assign aquatic life use categories. The commission adopts the revision as proposed.

Comment: One individual comments that the phrase "higher uses are protected where they are attainable" in §§307.4(h)(3) and (4) is not defined and can be interpreted in multiple ways.

Response: The commission responds that the intent of this phrase is to facilitate assigning uses that are more protective than presumed, but additional clarification can be reviewed and proposed in the next revision of the standards, if appropriate.

Comment: One individual noted that §307.4(h) states that when water is present in the streambed of intermittent streams, a 24-hour dissolved oxygen mean of at least 2.0 mg/L and an absolute minimum dissolved oxygen of 1.5 mg/L must be maintained. This individual notes that the term "absolute minimum" is not defined and asks whether it means that the dissolved oxygen can never drop below 1.5 m/L even in a grab sample. If so, it would helpful if this provision also referenced §307.9(e)(6). This individual also asks whether the 1.5 mg/L is also limited to the eight-hour duration referenced in other tables and finally asks, whether a concentration just over the minimum, e.g. 1.51 mg/L, be acceptable for 16 hours as long as the average of 2.0 mg/L met.

Response: The commission responds that the term "absolute" in §307.4(h) was replaced with "24-hour" and the term "daily minima" was replaced with "24-hour minimum dissolved oxygen concentrations" in §307.7(b)(3)(A)(i), Table 3 (footnote), for consistency purposes. The eight-hour language is only applied when a dissolved oxygen concentration remains right at the 24-hour minimum criterion and this phrase is not intended to allow dissolved oxygen concentrations to go below the daily minimum at any time. The commission adopts this language as modified, but can review these provisions in the next revision of the standards.

Comment: OPIC objects to the process in §307.4(j) governing the assignment of presumed recreational uses to unclassified water bodies. OPIC notes that the process in the rule is very general, but that the specifics are included only in the guidance of the Implementation Procedures and recommends referencing the recreational UAA procedure included in the draft guidance document and require that a recreational UAA be conducted as part of an inquiry into a possible deviation from the presumed use of primary contact recreation.

Response: The procedures for the inquiry are established in the commission's recreational UAA and this document is referenced on the commission's Web site and in multiple Quality Assurance Project Plans. Therefore, the commission respectfully declines to adopt the proposed change.

Comment: TSSWCB comments that it is inappropriate to apply contact recreation use (primary or secondary) where political subdivisions have established enforceable ordinances and rules that forbid contact recreation in water bodies within their jurisdiction. For that reason, TSSWCB encourages the inclusion of a third form of the applicable application of noncontact recreation that would address this issue.

Response: The commission responds that this recommendation is outside the scope of the proposed rulemaking. However, these kinds of ordinances are major factors in assessing recreational uses with a UAA.

Comment: BRA, Fox Dairy, Hamilton County Commissioner Dickie Clary, Heifer Ranch at Arroyo Seco, High Plains Dairy

Counsel, Legacy Farms, Texas State Representative Sid Miller, Harrison County Judge Randy Mills, ICA, NRA, Sanderson Farms, 74 Soil and Water Conservation Districts, Hamilton, PCA, SAWS, TCFA, Texas Poultry Federation, TSCRA, T/K, TFB, TSSWCB, TIP, TCC, TDA, TCPA, WEAT, and a number of individuals filed comments supporting the proposed contact recreation standard changes that would allow TCEQ to apply a tiered set of water quality standards to streams depending upon their site-specific characteristics. PHA comments that all four proposed use categories include some type of recreation.

PLTA, Sierra Club, Public Citizen, TBBU, SEED, WE CAN, SOSA, TCA, SMRF, Environment Texas, and NWF oppose the revision to the recreational use categories. OPIC generally supports the new categories, but objects to the indicator bacteria levels associated with the new subcategories because they are less restrictive than current rules. GBF states that great care should be given before lowering a water body's presumed primary contact use and that care has to be taken in the recreational UAA process. GBF is also concerned that a recreational use UAA may not predict future use of a water body.

Response: The commission notes comments in support and opposition to the new recreational use categories. The commission responds that it is appropriate to expand the two current categories for recreational uses (contact and noncontact recreation) into four categories (primary contact, secondary contact 1 and 2, and noncontact recreation) in an effort to better characterize the different levels of water recreation activities that can occur in Texas. In the 1980's and 1990's, a contact recreation use was broadly presumed for all surface waters in Texas, with the exception of eight distinct water bodies, e.g. ship channels. As a result of these broad optimistic presumptions, there may be numerous water bodies with inappropriate recreational uses. The expanded recreational use categories will provide the commission the ability to better assign appropriate recreational use on water bodies. The commission notes that EPA has indicated that recreational use categories and criteria, such as secondary contact recreation with a geometric mean criterion five times the primary contact geometric mean, are acceptable.

Comment: TSSWCB comments that designated swimming areas are more adequately addressed in the recreational UAA protocols and a discussion of parks should not be included in the standards. TPWD comments that all parks with water bodies, whether federal, state, or local, with or without designated swimming areas, are likely to have wading by children. TPWD requests that language be added to §307.4(j)(3)(A) - (C) that specifically designates water bodies in parks as having primary contact recreation use and that requires a rulemaking action to change that use.

Response: The commission responds that designating all water bodies in parks as having a primary contact recreation use is not appropriate and could result in inappropriate water quality standards for numerous water bodies throughout the state. The commission responds that it will evaluate water bodies on a site-specific basis to establish the appropriate recreation use. The commission notes that it considers all parks in the evaluation of recreational UAAs.

Comment: One individual asks for an explanation of use of the phrase "substantial pools" in §307.4(j)(2)(B)(i). TPWD asks whether the phrase "or greater" should be included as it relates to the depth of one meter in this section.

Response: The commission recognizes that the term "substantial pools" is not quantitatively defined in the rule. The size and extent of pools is considered in the evaluation of recreational UAAs. In response to comments, the commission editorially revised the language to include "or greater." The commission adopts this language as modified.

Comment: One individual notes the phrase "existing recreational activities that create a significant risk of ingestion" in §307.4(j)(2)(B)(ii) and asks what the time frame is in this case. Also, the individual asks how an area that previously harbored contact recreation, but now does not, is addressed.

Response: The commission notes that the time frames for evaluating recreational uses are specified in the recreational UAA procedures. In addition, these procedures include an evaluation of historical recreation.

Comment: One individual comments that in §307.4(j)(2)(C), secondary contact recreation 2 is vague and not very different from secondary contact recreation 1.

Response: The commission responds that the differences between secondary contact recreation 1 and 2 is the frequency of occurrence of these activities due to physical characteristics of the water body or limited public access.

Comment: EPA comments that the process for assigning recreational uses to unclassified water bodies in §307.4(j)(3) does not meet the public participation requirements in 40 CFR §131.10(e), which provides the opportunity for a public hearing under 40 CFR §131.20(b). EPA notes that if public notification on a downgraded recreational use occurs through the CWA, §303(d) process there is no opportunity to request a public hearing on the proposed change; and if public notification occurs during the permitting process, only an "affected person" under Texas law may request "a public ('contested case') hearing."

Response: The commission respectfully disagrees that the proposed process for assigning presumed recreational uses does not have adequate public notification requirements. The commission notes that the commission's Integrated Report for the CWA, §303(d) List is noticed in the *Texas Register* for public comment, which accomplishes the same purpose as a public hearing because the public is able to provide comments and submit evidence for consideration by the commission. That process gives the opportunity for the public to comment on and provide evidence regarding any downgraded recreational uses. The commission then responds to the comments received when they propose the final version of the CWA, §303(d) list.

In the permitting process, the general public does have an opportunity to request a "public meeting," which is the Texas equivalent to a federal "public hearing" under 40 CFR §131.20(b). A "public meeting" is held during the permitting process for the same reason as a federal "public hearing," the taking of public comment, *(See* 30 TAC §55.154). The executive director or Office of Public Assistance will hold a public meeting if: (1) the executive director determines that there is a substantial or significant degree of public interest in an application; (2) a member of the legislature who represents the general area where the facility is located or proposed to be located requests that a public meeting be held; or (3) when a public meeting is otherwise required by law. There is no requirement that the requestors be "affected persons" under §55.203 and the executive director is required to respond in writing in the form of a Response to Public Comment "all relevant and material or significant public comments," *(See* 30 TAC §39.551(e)(3)(E)).

The "contested case hearing" process noted by EPA in their comment is not analogous to a "public hearing" under the cited federal rules. A "contested case hearing" is an evidentiary proceeding before an administrative law judge (ALJ), where all parties, e.g. the executive director, the permit applicant, TCEQ's OPIC, "affected persons," and any other party granted party status by the commission or the ALJ may offer evidence in a trial-like proceeding. A contested case hearing is limited to factual issues relating to the particular permit application at issue.

Comment: NWF also comments that TCEQ has failed to show how impacts on downstream waters with higher use would be adequately protected. Volente expressed concerns that tributaries with a higher contact recreation use will contribute to increased bacteria in downstream water bodies with a primary contact recreation use.

Response: The commission's water quality management program has a framework to address protection of downstream water quality standards that are more stringent than upstream. This is a common occurrence with other kinds of criteria, such as those for dissolved oxygen and toxic pollutants. Under this approach, in permits and TMDLs, pollutant sources are evaluated and controlled so that different standards in affected water bodies are attained.

Comment: NWF comments that TCEQ needs to improve narrative criteria for nutrient standards to provide immediate protection to those water bodies that still do not have applicable numerical criteria.

Response: The commission responds that the existing narrative criteria for nutrients provide reasonable latitude to address nutrient problems where they occur. In addition, the commission is proposing a new section in the *Procedures to Implement the Texas Surface Water Quality Standards* to evaluate and control nutrient impacts from wastewater discharges. The commission is also devoting substantial resources to develop numerical nutrient criteria for streams, rivers, and estuaries.

§307.5 - Antidegradation

Comment: Lowerre Frederick comment that the proposed rules contain an exemption from its Tier 2 protection for de minimis changes in water quality that is not supported by the CWA. Austin comments that the term de minimis needs a technically accurate, scientifically based, quantitative definition in the rules because the lack of a clear definition has created a loophole that has been exploited by permit applicants for wastewater discharges that would otherwise not be permitted. One individual comments that the phrase "important economic or social development" in §307.5(b)(2) is exceedingly vague and sets a very dangerous precedent.

Response: The commission responds that the antidegradation provisions in §307.5 are in accordance with federal regulation and guidance. The commission acknowledges that some of the considerations of the antidegradation policy have been difficult to define at both the state and federal level. An expanded section, Antidegradation, was put in the *Procedures to Implement the Texas Surface Water Quality Standards* to provide guidelines and examples on how antidegradation is addressed and defined.

§307.6 - Toxic Materials

Comment: Sierra Club, Public Citizen, TBBU, SEED, WE CAN, and EPA support narrowing the language in §307.6(a) regarding instances where the toxic criteria do not apply to instances where surface water, solely as a result of natural phenomena, exhibits characteristics beyond the limits of this section. EPA notes that EPA's policy regarding this does not apply to human health issues.

Response: This provision was intended to be analogous to the similar provision found in §307.7(a). The commission recognizes that EPA's 1997 policy regarding natural background conditions does not apply to human health numeric criteria, unless site-specific justification, such as a UAA, is provided to support a site-specific change. In response to comments, the commission adopts adding the phrase "with the exception of numeric human health criteria" at the beginning of the second sentence in §307.6(a) to clarify that the provision does not apply to human health criteria.

Comment: TPWD asks for clarification in §307.6(a) of the language when toxic criteria do not apply. For instance, TPWD asks whether toxic criteria apply to inter-basin water transfers of raw water, storm water runoff, surface discharges of groundwater, or to once-through cooling water discharges.

Response: This provision only applies to conditions and sources that are entirely due to natural phenomena.

Comment: NWF comments that "presumed" uses must be added as an additional category of uses to be protected from chronic toxicity in §307.6(b)(2).

Response: The commission notes the comment, but specifies the presumed use to be the designated use, unless a site-specific study has determined otherwise.

Comment: TPWD comments that §307.6(c)(1) and (2) was revised so that the determination of numeric criteria for the protection of aquatic life was limiting the dataset to only native species. TPWD comments that they stock and manage several species of non-native game fish in Texas water bodies. TPWD asks that these non-native fish also be protected and requests that datasets used to derive numeric criteria for protection of aquatic life include non-native stocked species.

Response: In accordance with the recalculation procedures provided by the EPA in Guidelines for Deriving Numerical Site-Specific Water Quality Criteria (EPA 600/3-84-099) and Appendix B of the draft guidance document entitled Interim Guidance on the Determination and Use of Water-Effect Ratios for Metals (EPA-823-B-94-001), states are allowed to recalculate national criteria based on native species. However, a minimum of eight families must be represented and no taxonomic grouping (including subgroups) may be completely eliminated from the national dataset. These protocols were followed when recalculating the site-specific aquatic life criteria in Table 1 of §307.6.

Comment: TIP is concerned that the language in §307.6(c)(2) may imply that the only valid basis that TCEQ can recalculate EPA nationally recommended criteria is to eliminate the effects of toxicity data for aquatic organisms that are not native to Texas. To avoid confusion regarding the scope of alternatives available to TCEQ, TIP recommends a sentence be added at the end of this section that states: "EPA guidance criteria may be used to establish numerical values as provided in 40 Code of Federal Regulations §131.1(b)."

Response: The purpose of §307.6(c)(2) is not to note all of the EPA approved methods for recalculating national criteria. Instead, §307.6(c)(2) refers to how numerical criteria contained in Table 1 of this section were recalculated. All recalculations were conducted by removing non-native fish from the dataset used to calculate the national criteria. However, in order to avoid re-

stricting the future development of criteria, the commission adds a statement to this effect at the end of §307.6(c)(2).

Comment: EPA notes a typographical error in the proposed equation for persistent toxic materials in §307.6(c)(7)(C). EPA comments that the factor should be 0.05 instead of 0.5.

Response: The commission notes and corrects this typographic error and adopts the language as modified.

Comment: T/K, TCC, and TIP supported adding the biotic ligand model (BLM) to Table 1 of §307.6 as an alternative method for calculating site-specific criteria for copper in fresh water.

Response: The commission notes this comment in support of adding the biotic ligand model for calculating site-specific criteria for copper in fresh water.

Comment: T/K and TCC recommend that TCEQ consider using the "m" designator in lieu of the "w" multiplier in the equations for all metals in Table 2 of §307.6 in anticipation of EPA's adoption of a BLM approach for one or more of these metals. T/K and TCC recommends that the definition of the multiplier in §307.6(c)(10) be expanded to use the multiplier for all metals where it is applicable.

Response: The commission notes this comment and agrees that the "m" designator will be added to additional metals when EPA approves this approach. However, in order to avoid confusion regarding when this approach may be used in lieu of a water-effect ratio study, the commission will consider adding this designation to individual metals through triennial revisions as they are approved by the EPA.

Comment: APERC and TIP support the TCEQ's proposal to adopt EPA's water quality criteria for nonylphenol. APERC notes that their review of the available studies and data support adoption of the criteria.

Response: The commission notes this comment of support for the addition of nonylphenol numeric criteria.

Comment: EPA comments that the appropriate n-nitroso-di-n-butylamine human health criterion in §307.6(d)(1) for consumption of water and fish should be 0.119 µg/L rather than 0.19 µg/L.

Response: The commission corrected this typographic error and adopts the language as modified.

Comment: AECT, T/K, TCC, and TIP support the proposed fish tissue concentration of 700 mg/L for methyl mercury.

Response: The commission notes this comment of support of the fish tissue criterion for mercury.

Comment: EPA, Sierra Club, Public Citizen, TBBU, SEED, WE CAN, OPIC, NWF, CLI, Uncertain, CLACC, EIP, Environment Texas, TCE, CW Action, GCLA, LGCLA, FCLNWR, TCA, TPWD, Environment Texas, and Texas Catholic Conference support adoption of the stricter federal mercury standard of 300 mg/L rather than the TCEQ proposed standard of 700 mg/L in §307.6(d)(1) due to the danger posed by this metal, rather than the standard in the proposed rules.

TPWD supports adopting a water quality criterion of 0.3 mg/kg in §307.6(d)(1) of the standards for implementation in regulatory actions, but using a screening level (e.g., 0.7 mg/kg) to trigger a risk assessment for determining the need for fish consumption advisories and bans.

Response: The Texas Department of State Health Services (TDSHS) uses 0.7 mg/kg for issuing fish consumption advisories to protect public health. The TDSHS has extensive experience with fish tissue contamination as it relates to human health. When developing the fish consumption advisory level, the TDSHS applied an acceptable mercury exposure level developed by the federal Agency for Toxic Substances and Disease Registry. This exposure level is based on human studies that result in safe exposure to mercury in all populations, including sensitive subgroups.

The EPA recommends a slightly lower value of 0.3 mg/kg as the national criterion for the protection of human health. This value is based on similar but different studies of mercury exposure in humans.

The TDSHS issued a fish advisory for largemouth bass and freshwater drum from Caddo Lake in 1995 due to elevated levels of mercury in fish tissue. In 2003, the TDSHS began to receive anecdotal reports that residents, possibly including subsistence fishermen, were continuing to consume these fish species from Caddo Lake. In response to these reports, the TDSHS studied residents of Caddo Lake in May of 2004 to assess low level mercury exposure. Results of this study are captured in the report *Health Consultation: Mercury Exposure Investigation Caddo Lake Area.* The Caddo Lake study showed that while participants were consuming fish with mercury concentrations of 0.7 mg/kg and greater, participants had blood level concentrations of mercury at levels below where any adverse affects would be expected. This study supports the TDSHS approach.

TCEQ toxicologists have evaluated the studies used by the Agency for Toxic Substances and Disease Registry, the EPA, and the Caddo Lake study, and the basis for the TDSHS fish tissue advisory level have been determined scientifically sound. Therefore, the commission supports the criterion of 0.7 mg/kg as being health protective and scientifically defensible. The commission adopts the criterion as proposed.

Comment: TPWD notes that TCEQ in §307.6(d)(1) chose to use an EPA-sanctioned bioconcentration factor (BCF) to convert tissue mercury to water-column mercury concentrations. TPWD concurs that the scientific community does not agree on a bioaccumulation factor (BAF), but notes with concern that use of the proposed BCF will in every instance result in a larger criterion than if any of the BAFs were used. TPWD wonders if the fish-consuming public is adequately protected by the proposed BCF and recommends use of a more conservative interim value.

Response: The numeric standard for the protection of human health is the fish tissue-based criterion of 700 µg/kg (0.7 mg/kg), not the translated water-column number, which is used for permitting purposes only.

The commission notes the concern regarding the use of a BCF instead of a BAF, but supports using a translation factor with the widest margin of acceptance among the scientific community. The commission encourages the use of BAFs for the translation between tissue-based and water-column based criteria; and these factors will be updated in future revisions as the science of developing BAFs progresses. The assumed BCF used in this translation is comparable to the BCFs used to derive the mercury criteria in the 2000 Texas Surface Water Quality Standards.

Comment: IPC and McGinnes Corp. comment that the procedures to derive the proposed tissue-based water criterion for polychlorinated dibenzo-p-dioxins and dibenzofurans in §307.6(d)(1) should be reconsidered. A 10^{-4} risk level, similar to what TDSHS uses, or the noncancer minimum risk level should be used to calculate the tissue-based criterion. Another

suggestion is to use the fish threshold developed by TDSHS as the water quality standard.

Response: The primary assumptions used to derive the proposed fish tissue concentrations were chosen for specific reasons. The excess cancer risk level of $1x10^{-5}$ is the risk level used by the commission. It is stated on page 65 of the *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194) that: "Water quality criteria for human health protection are derived as stated in §307.6(d)(8) and (9). For known or suspected carcinogens, a cancer risk of 10^{-5} (1 in 100,000) is applied to the most recent numerical criteria adopted by EPA and published in the *Federal Register."* This is also in accordance with §1.6 of EPA's guidance document *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000)* (EPA-822-B-00-004). Even though EPA uses a risk level of 10^{-6} when calculating national human health criteria, states are allowed to use a less stringent risk level of 10^{-5} when calculating human health criteria as long as states can ensure that the risk to more highly exposed subgroups, such as subsistence fishermen, is no greater than 10^{-4}. A 10^{-5} risk level can also be useful in helping prevent TDSHS fish consumption advisories that use a 10^{-4} risk level. Therefore, the commission recommends using a risk level of 10^{-5} when calculating human health criteria.

The body weight scaling factor of 3/4 is the appropriate default scaling method for carcinogens; as stated in *Methods for Identifying a Default Cross-Species Scaling Factor,* prepared by L. Rhomberg and T. Lewandowski for a 2004 EPA Risk Assessment Forum: "In the absence of chemical-specific information sufficient to do otherwise, the guidance of the EPA for carcinogen risk assessment is to apply a default animal-to-human oral dose extrapolation based on presumed toxicological equivalence of daily doses scaled by the 3/4-power of body weight (i.e., $mg/kg^{3/4}$/day doses are presumed equivalent)." Therefore, the commission uses a body weight scaling factor of 3/4 for criteria development for carcinogens.

A fish tissue consumption rate of 0.0175 kg/day, as stated in EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000)* (EPA-822-B-00-004), is recommended as a default fish intake rate to adequately protect the general population of fish consumers, based on the 1994 to 1996 data from the USDA's *Continuing Survey of Food Intake by Individuals* (CSFII). This value is the 90th percentile of the 1994-96 CSFII data and is very similar to the mean intake for all fish, which is 0.018 kg/day. Therefore, the commission uses 0.0175 kg/day as the default fish tissue consumption rate.

Carcinogens can often cause noncarcinogenic, as well as carcinogenic effects. The commission evaluates both carcinogenic and noncarcinogenic effects of chemicals and sets human health criteria based on the most conservative approach to protect against all potential effects. In the case of dioxins and furans, criteria based on the carcinogenic effects presented the most conservative approach for protection of human health. Therefore, the commission supports deriving the criterion to protect human health based on the carcinogenic potency factor of 156,000 mg/kg/day, which is the same carcinogenic potency factor used by TDSHS and is also found in EPA's *Health Effects Assessment Summary Tables* (EPA 540-R-97-036), as opposed to the noncancer minimum risk level of 1 pg/kg/day. The commission adopts the criterion as proposed.

Comment: IPC and McGinnes Corp. comment that the use of a BCF for establishing water quality criteria for mixtures of polychlorinated dibenzo-p-dioxins and dibenzofurans is inappropriate. IPC and McGinnes Corp. comment that there is currently no reliable way to translate polychlorinated dibenzo-p-dioxins and dibenzofurans from a fish tissue concentration to a water column concentration.

Response: The commission acknowledges there can be high variability in BCFs. However, the use of a fish tissue criterion is one way to improve applicability of a water quality criterion. The commission encourages the development of site-specific BAF. However, even in light of variability, there must be an assumed BCF in order to conduct water quality management programs. The commission proposed using the BCF found in the EPA's *Ambient Water Quality Criteria for Polychlorinated Biphenyls* (EPA 440/5-80-068); and the commission will continue to update this BCF in future rule revisions as additional BCF/BAF development continues. The commission adopts the language as proposed.

Comment: T/K supports the proposed fish tissue-based human health water quality criteria for various compounds in Table 2 of §307.6 and would like to see that approach be extended to all constituents that have bioconcentration or bioaccumulation factors greater than 1,000. TIP and AECT also support the fish tissue-based human health water quality criteria for specified highly bioaccumulative pollutants. TWCA and TCC support the proposed changes to adopt fish tissue-based criteria for highly bioaccumulative pollutants such as mercury, dioxins, furans, PCBs, and DDT.

Response: The commission notes this comment in support of fish tissue-based criteria and the comment regarding the development of similar criteria for other highly bioaccumulative constituents. This recommendation may be considered for the next triennial revision.

Comment: TCC and TIP comment that the proposed criteria of benzo(a)anthracene in Table 2 of §307.6 of 0.007 mg/L (fish and water) and 0.03 mg/L fish are incorrect. TCC's review of available data shows that the water quality criteria for benzo(a)anthracene should be identical to those of benzo(a)pyrene because the benzo(a)pyrene ql applies to both chemicals. Therefore, TCC, and TIP stated that the proposed limits should be 0.068 mg/L (fish and water) and 0.33 mg/L (fish).*

Response: The commission acknowledges the error in calculation. The necessary correction was made to Table 2 in §307.6 and adopts the criterion as modified.

*Comment: TIP comments that footnote "**" in Table 2 of §307.6 states that PCB criteria apply to the sum of all congeners or all isomers or homologs or Arochlor analysis. TIP contends that this footnote is not yet supported by analytical methods necessary for its application. TIP recommends the footnote be revised to read: "Until Method 1668 or an equivalent method to measure PCB congeners is approved at 40 CFR Part 136, compliance with the PCB criteria shall be determined using Arochlor data." TCC comments that the proposed fish tissue criterion for PCBs in the proposed rules is unworkable and recommends determining compliance with water quality criteria for PCBs with Arochlor data, until EPA promulgates Method 1668.*

Response: The commission edited and adopted the footnote as follows: "Until Method 1668 or equivalent method to measure PCB congeners is approved in 40 CFR Part 136, compliance with PCB criteria is determined using Arochlor data or any alternate method listed in a TCEQ approved Quality Assurance Plan."

Comment: In Table 2 of §307.6, TPWD recommends changing "Polychlorinated Biphenyls PCBs)" to "Polychlorinated Biphenyls (PCBs)."

Response: The commission agrees with this comment and the recommended change was made.

Comment: TIP recommends that TCEQ review the numeric notation format for BCF factors that it uses in its footnotes to Table 2. In some footnotes, TIP notes that TCEQ uses two different forms of scientific notation. For consistency, TIP recommends selecting one format and using it throughout.

Response: The commission agrees with the comment and revised the form of scientific notation for consistency in the adopted rules.

Comment: TPWD comments that in certain instances in §307.6(d)(1), default criteria or calculations are based on United States Food and Drug Administration (USFDA) action levels for contaminants in fish tissue. USFDA action levels are not based only on risk assessment, but also on risk management (i.e., economic impacts) and are set to protect the general public from contaminants in fish shipped in interstate commerce. These action levels are not designed to protect sport or subsistence anglers from eating contaminated fish from local waters. Therefore, TPWD suggests it would be more appropriate to use action levels that are based on local consumer consumption, rather than interstate commerce.

Response: USFDA action levels were used in previous water quality standards revisions for the calculation of human health mercury criteria. However, USFDA action levels were not utilized in this revision to calculate human health criteria listed in Table 2 of this section. Criteria, including fish tissue-based criteria, were calculated in accordance with the procedures described in §307.6(d)(3).

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN support the consideration of childhood exposure in the setting of human health criteria for noncarcinogens in §307.6(d)(2).

Response: The commission notes this comment in support of childhood exposure in the setting of human health criteria for noncarcinogens and adopts the language as proposed.

Comment: TPWD notes that in §307.6(d)(7) and §307.9(e)(4) the reference to an average life span of 70 years was deleted. TPWD supported of this change, since the average longevity of Americans exceeds 70 years. However, TPWD comments that a new value for average lifespan was not included and recommends that a new value be included, along with the appropriate references.

Response: The Center for Disease Control (CDC) currently lists the average life expectancy of 77.7 years. However, the CDC also notes that the average life expectancy varies widely between gender and race. Since the average life expectancy continues to increase as medical technologies and treatments advance, no specific number was included in this revision of the standards.

Comment: TPWD supports requirements in §307.6(e) to address sublethal effects in toxicity testing requirements, particularly in light of recent findings regarding the effects of pharmaceuticals and personal care products on aquatic biota.

Response: The commission notes this comment in support of sublethal effects in toxicity testing requirements.

Comment: NWF notes that the third sentence in §307.6(c)(1) is a confusing circular statement that basically states, "Chronic total toxicity. . .must be. . .controlled to preclude chronic toxicity." NWF recommends deleting the term "chronic" the first time it appears in the third sentence.

Response: The word "chronic" is included in the first portion of the sentence because it refers to a specific type (category) of toxicity testing. The purpose of the statement is to clarify that this type of test is used to protect all waters in the state with a designated aquatic life use of limited or greater from chronic toxicity. The commission adopts the language as proposed.

Comment: In regards to §307.6(d)(5), NWF notes that the proposed reference to "stream flow conditions as specified in §§307.8" could be read as making human health concentration criteria inapplicable when any one of those stream flow conditions are not satisfied. NWF recommends a more narrow reference be included.

Response: The commission proposed this change in §307.6(d)(5) in order to indicate that although harmonic mean flows are used as the assumed instream flow when calculating permit limits for human health toxic criteria, the criteria are still applicable, as a long-term average, at flows below the harmonic mean flow. The commission added a sentence to this effect in §307.8(4).

Comment: NWF comments that the proposed revisions to §307.6(e)(2)(D) appear to create an unacceptable situation, such that demonstrated toxic impacts may not be addressed. The proposed language makes the requirement of a toxicity reduction evaluation (TRE) discretionary and then goes on to state that permit amendments are dependent on the results of a TRE. The section does not appear to have any language describing what happens when acute or chronic toxicity is not precluded, but a toxicity reduction evaluation is not required.

Response: The commission agrees clarification of §307.6(e)(2)(D) is needed and adopts the modified language as follows: "If toxicity biomonitoring results indicate that a discharge is not sufficiently controlled to preclude acute or chronic toxicity as described in this subsection, then the permittee will be required to eliminate sources of toxicity and may be required to conduct a toxicity reduction evaluation (TRE) in accordance with the permitting procedures of the commission. In accordance with the implementation procedures, permits are amended to include appropriate provisions to eliminate toxicity."

Comment: TIP is concerned that language in §307.6(e)(2)(D) that refers only to a chemical-specific limit is confusing and recommends the second to last sentence in the section be revised as follows: "Where sufficient to attain and maintain applicable numeric and narrative state water quality standards, a chemical-specific limit, best management practices, or other actions designed to reduce or eliminate toxicity, rather than a total toxicity limit, may be established in the permit."

Response: The commission agrees with this clarification and changed the language as recommended.

Comment: One individual comments that the variance included in §307.6(e)(2)(E)(i) is not clear whether it refers to natural conditions or human impacts. The individual notes that issuing variances based on the latter is in opposition to the antidegradation policy.

Response: The purpose of this section is intended to describe some of the justifications that might be appropriate in the devel-

opment of site-specific standards for toxicity and toxic pollutants. This type of site-specific standard requires a revision to the standards rule for it to be fully incorporated into water quality management programs.

§307.7 - Site-Specific Uses and Criteria

Comment: BRA supports changing the indicator bacteria for certain high saline inland waters from E. coli to Enterococci.

Response: The commission acknowledges this comment in support of changing the indicator bacteria for certain high saline inland waters.

Comment: LCRA questions the use of Enterococci as an indicator of pathogenic bacteria in tidally-influenced surface water because their review of the data indicates that Enterococci may not always be the appropriate indicator of pathogenic contamination in tidal streams. LCRA suggests analyzing bacteria samples in tidal streams for both Enterococci and E.coli.

Response: The commission acknowledges that during certain times tidal water bodies may exhibit levels below the thresholds where *E. coli* could be used. However, for consistency with monitoring and assessment purposes, Enterococcus will continue to be applied as the indicator for recreational suitability in tidal waters.

Comment: Austin, Uncertain, CLACC, EIP, Environment Texas, TCE, CW Action, GCLA, LGCLA, FCLNWR, CLI, DCPC MUD, Highland Lakes Group, Highland Lakes PAC, PLTA, Lakeway, State Senator Kirk Watson, Texas State Representative Valinda Bolton, SMRF, TCA, CEHI, Environment Texas, NWF, and Volente oppose relaxing the bacteria standard from 126 cfu/100 ml to 206 cfu/100 ml. Travis County Judge Samuel T. Biscoe comments that it is inappropriate to make this change statewide and recommends retaining the current standard on each classified and unclassified segment in Travis County. Volente is concerned that the proposed rules will allow for increased bacteria levels in some tributaries to the Highland Lakes. Senator Watson recommended that the rules be written to allow for consideration of potential impact of setting even less stringent requirements for tributaries of the Highland Lakes that risk being classified as secondary contact recreation under the proposed rules. OPIC suggests the current bacteria limits for both fresh and saltwater be maintained. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose raising the standard to EPA's standard at this time because EPA is working under a consent order to revise their recreational water quality criteria by October, 2012. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN recommend that TCEQ wait until those standards are published prior to making changes at this time to weaken the state's current standards. Sierra Club, Public Citizen, TBBU, SEED, WE CAN, and NWP also oppose the proposed higher allowable bacteria levels in the proposed secondary contact recreation 1 of 630 cfu/100 ml and noncontact recreation of 2,060 cfu/100 ml. HCPHES asks for additional information regarding relaxing the bacteria standards for contact recreation. CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, Uncertain, TCE, and CLI generally do not support any changes to the bacteria criteria. DCPC MUD asked why there is an across the board relaxation of bacteria criteria from 126 cfu/100 ml to 206 cfu/100 ml.

Numerous individuals objected to the redefinition of the contact recreation standards and setting weaker clean water standards by increasing the allowed levels of bacteria in water bodies used for recreation.

BRA, Fox Dairy, Hamilton County Commissioner Dickie Clary, Heifer Ranch at Arroyo Seco, HCFCD, High Plains Dairy Counsel, IBWC, ICA, Legacy Farms, Sanderson Farms, Texas State Representative Sid Miller, 74 Soil and Water Conservation Districts, the Texas Poultry Federation, Hamilton, TCFA, PCG, TSCRA, T/K, TFA, TSSWCB, TCC, TCPA, and numerous individuals filed comments in support of changing the bacteria standard from 126 cfu/100 ml to 206 cfu/100 ml. SARA comments that all reservoirs, perennial streams, and intermittent streams with pools should be classified as primary contact recreation with a standard E. coli of 206 cfu/100 ml. Other individuals filed comments supporting the proposed change because it was consistent with EPA guidance for fresh water and would not adversely affect water quality in Texas streams and rivers. HCFCD agrees with the proposed revisions to §307.7(b)(3).

Sierra Club and 9 individuals commented that a major factor in the proposed changes is a reduction in TCEQ workload. TSSWCB does not agree that these changes are being made to address workload, but to determine the appropriate use and criteria.

Response: The intention of the revisions is to better assign appropriate recreational uses and criteria to water bodies in Texas. Currently, recreational waters can have two types of recreational uses - contact and noncontact recreation. In the 1980's and 1990's, a contact recreation use was broadly presumed for all surface waters in Texas, with the exception of eight specific water bodies, e.g. ship channels. As a result of these broad optimistic presumptions, there may be numerous water bodies with inappropriate recreational uses.

The commission will thoroughly evaluate water bodies to determine if recreational activities are occurring and where recreational use may be inappropriate through a recreational UAA. A recreational UAA involves coordination with local stakeholders and landowners, data collection, and an evaluation of water recreation activities.

In response to comments, the commission adopts modified §307.7(b)(1)(A) and Appendix A that retains the freshwater primary contact recreation geometric mean criterion of 126 *E. coli* per 100 ml and modifies the freshwater primary contact recreation geometric mean criterion from 54 to 33 Enterococci per 100 ml for high saline inland water bodies.

The commission notes that the EPA has indicated that states may adopt a secondary contact recreation use and less stringent criterion (such as five times the primary contact criterion).

Comment: TSSWCB suggests minor alterations in the factors to calculate the limits for inland fresh E. coli, inland salt Enterococci, inland salt (alternative) fecal coliform, and coastal salt Enterococci. Based on their calculations, it suggests the following criteria for various uses and parameters. TSSWCB also suggests establishing bacteria criteria for secondary contact recreation 2 for Enterococci in coastal marine waters in §307.7. TSSWCB's recommendations are as follows:

Figure: 30 TAC Chapter 307 - Preamble

Response: The commission acknowledges these suggestions. The secondary contact recreation criteria for freshwater is based on EPA's November 2003 draft guidance document entitled *Implementation Guidance for Ambient Water Quality Criteria for Bacteria,* which indicates that states may adopt a secondary contact recreation use and less stringent criterion (such as five

times the primary contact criterion). Different fecal coliform criteria for secondary contact recreation 1 and 2 were not proposed because fecal coliform, as an alternative indicator, is only applicable to high saline inland freshwaters for a period of two years after the adoption of the rule. The commission did not propose a secondary contact recreation 2 use for saltwater due to compliance concerns regarding the Beach Act. The commission adopts the language as proposed.

Comment: TSSWCB strongly supports the elimination of fecal coliform as an alternative instream indicator for E. coli in fresh inland waters and for Enterococcus in coastal waters. Additionally, TSSWCB strongly supports the elimination of the use of fecal coliform as an indicator for wastewater effluent discharges.

Response: The commission acknowledges these comments of support.

Comment: TSSWCB comments that certain water bodies in the Panhandle and West Texas have a natural high salt content that makes E. coli detection unreliable. Therefore, TSSWCB supports the use of Enterococcus as the applicable indicator bacteria for high saline waters. TSSWCB supports the use of fecal coliform as a temporary alternative indicator, for a two-year time frame, only until sufficient Enterococcus data are collected.

Response: The commission acknowledges the support for the use of Enterococcus as an applicable indicator bacteria for high saline inland freshwaters.

Comment: GBF comments that the relationship between E. coli and human pathogens has not been established in Houston area bayous and streams and recommends TCEQ immediately undertake research to clarify this relationship. In the future, in order to further refine the standards, WEAT suggests that TCEQ conduct studies to improve the quantitative measures of risk that should inform the criteria for specific uses. For future revisions, Harris County suggests TCEQ could consider adjusting the criteria for bacteria to better correlate with human health risk.

Response: The commission acknowledges these comments and notes that the EPA is in the process of developing new or revising bacteria criteria by October 15, 2012, that are to be based on recent epidemiological studies. The commission will re-evaluate the recreation criteria in subsequent standards revisions when the EPA's new or revised bacteria criteria become available.

Comment: TSSWCB comments that there are conflicting numbers regarding what constitutes high saline inland waters and requests TCEQ explain the disparity between the numbers.

Response: The commission will evaluate provisions in guidance documents where this discrepancy might occur.

Comment: TSSWCB comments that they do not support the unsubstantiated statement that designates Enterococcus as the recreational indicator bacteria for unclassified segments in high saline inland water bodies. TSSWCB suggests adding the following language to §307.7: ". . .unless specific conductance data indicate that a particular unclassified water body is not high saline."

Response: The commission revised the language as recommended.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN object to the language in §307.7(b)(1) that would allow a classified segment to be designated for less than contact recreation on the basis that "wildlife sources of bacteria are unavoidably high." TPWD appreciates that in §307.7(b)(1) TCEQ has made a provision in the contact recreation standards for wildlife management areas, coastal birding trail sites, and similar venues by including language, " . . .unless . . .wildlife sources of bacteria are unavoidably high and there is limited aquatic recreation potential. . . ."

Response: The commission acknowledges the comments of support and opposition to the term "wildlife sources of bacteria" in §307.7(b)(1). The commission responds that there is utility in having this language in the standards that takes wildlife sources into account. The commission adopts the language as proposed.

Comment: One individual asks for an explanation of the phrase in §307.7(b)(1) regarding sources of pollution that cannot be controlled by existing regulations.

Response: The commission responds that the language in §307.7(b)(1) is not intended to relax bacteria criteria for regulatory purposes. There may be instances where there are elevated concentrations of indicator bacteria in state or international border waters from sources that are outside the jurisdiction of existing regulations in Texas.

Comment: One individual notes that the reference to the single sample criterion of E. coli in §307.7(b)(1)(A)(i) is inconsistent with the statements on page 16 of the proposal preamble that discusses attainment based on samples taken over a two-year period.

Response: The commission responds that the single sample criterion in §307.7 is provided for non-assessment purposes such as swimmer safety notification and wastewater permit compliance.

Comment: One individual asks what the interpretation of §307.7(b)(1)(A)(v) is where the unclassified segments are not characteristically high saline, but freshwater. The individual also comments that Enterococci levels for high saline inland waters and saltwater in §307.7(b)(1)(B)(i) - (iii) are not consistent and the reason for the discrepancies are not apparent. In addition, the individual asks why there is no secondary contact recreation 2 listing for saltwater.

Response: The commission responds that the intent was for Enterococcus to be applied as an indicator uniformly to unclassified water bodies that are within the watershed of certain high saline inland classified segments. This was done to prevent potential confusion from having two indicators within the watershed of a segment, particularly when determining when one indicator is used instead of the other for monitoring and assessment purposes. The proposed language was modified and adopted as changed to allow *E. coli* to be used on certain unclassified water bodies when it is demonstrated that they are not highly saline.

The commission responds that the freshwater and saltwater Enterococci criteria are based on EPA's recommended 1986 bacteria criteria. EPA's criteria were derived using *E. coli* and Enterococci concentrations from epidemiological studies that are roughly correlated to the estimated illness rate associated with EPA's previously recommended fecal coliform criteria. EPA estimated these illness rates to be approximately 1% of swimmers exposed in freshwater and 1.9% of swimmers exposed in marine water. EPA's recommended risk level and geometric mean for Enterococci to protect for primary contact recreation in saltwater is 1.9% and 35 cfu/100 ml, respectively. Their recommended risk level and geometric mean for enterococci to protect for pri-

mary contact recreation in freshwater are 1% and 54 cfu/100 ml, respectively. The commission did not propose a secondary contact recreation 2 use for saltwater due to compliance concerns regarding the Beach Act.

Comment: One individual notes that §307.7(b)(1)(C)(ii) indicates that the fecal coliform criterion for both secondary contact recreation uses is 1,000 cfu/100 ml, but the E. coli criterion between these uses are 630 cfu/100 ml and 1,030 cfu/100 ml and states that this does not follow.

Response: The commission responds that different fecal coliform criteria for secondary contact recreation 1 and 2 were not proposed since fecal coliform, as an alternative indicator, is only applicable to high saline inland freshwaters for a period of two years after the adoption of the rules.

Comment: One individual noted that §307.7(b)(3) refers to "minimum" in the column heading, but "daily minima" in the footnotes, and asks if these terms are synonymous. This individual also asks if "daily minima" is the same as the "absolute minimum" mentioned in other provisions (see §307.4(h)(4)). The individual asks whether it means that the dissolved oxygen can never drop below 1.5 m/L even in a grab sample. If so, it would be helpful if this provision also referenced §307.9(e)(6). This individual also asks whether a concentration just over the minimum (e.g. 1.51 mg/L) would be acceptable for 16 hours, as long as the 24-hour mean dissolved oxygen was met.

Response: The commission responds that the term "absolute" in §307.4(h) was replaced with "24-hour" and the term "daily minima" was replaced with "24-hour minimum dissolved oxygen concentrations" in §307.7, Table 3, (footnote) for consistency purposes. The eight-hour language is only applied when a dissolved oxygen concentration remains right at the 24-hour minimum criterion. This phrase is not intended to allow dissolved oxygen concentrations to go below the daily minimum at any time. The commission adopts this language as modified from the existing rule. The commission may review these provisions at the next revision of the standards.

NOTE: There were comments that directly addressed nutrients in §307.7. However, most of the comments are in reference to §307.10, Appendix F. These comments will be included in that discussion.

Comment: Aransas County, Blackburn Carter, CBBF, NWF, TPWD, TWPP, and a number of individuals commented that the standards do not enhance the protection of seagrasses. Aransas County notes that the county contains all or part of six inland bay systems that are major tourism attractions and that the seagrass habitat must be maintained to protect the environmental integrity of the bays. Blackburn Carter noted that a version of the water quality standards that circulated in January, 2009 included language for the protection of seagrasses. Blackburn Carter notes that these provisions were removed in the proposed standards and recommends reinserting the 2009 language into the standards. Sierra Club, Public Citizen, TBBU, SEED, WE CAN, and NWF also support the previously proposed seagrass standards.

TXDOT and TSSWCB support future setting of seagrass water quality standards, but at this time, all basic uses associated with seagrass propagation have not been clarified. Therefore, TXDOT and TSSWCB support the decision to eliminate any significant revisions at this time. PCCA supports not proposing changes for seagrass at this time, but are strongly committed to addressing issues related to seagrass in the future.

Response: The commission acknowledges the interest in designating individual segments for seagrass use, and because of that interest, draft designations were presented to the Water Quality Standards Advisory Workgroup. The commission was unable to resolve substantial stakeholder concerns about unintended negative regulatory impacts of these designations on navigation in coastal waterways. Provisions that were added in the previous standards revisions, such as the specification of seagrass as a protected use in §307.7(b)(5), remain in place so that an important tier of protection is still provided. The commission will continue to coordinate with stakeholders to better monitor, assess, and protect seagrasses along the Texas coast.

Comment: TWRI recommends providing a definition of the term "natural phenomena" used in §307.7(a) because it is a general term that can be interpreted in many different ways. TWRI recommends providing a definition of the term.

Response: The commission acknowledges that a definition of the term "natural phenomena" might be useful. However, more investigation and expert opinion are needed to develop a definition of that term that is broadly applicable. At this time, the commission does not incorporate this suggestion into the adopted rules.

Comment: TACWA notes that reuse of treated effluent is increasing and that may make the use of historical data, which has worked in the past, problematic. TWCA comments that the procedure for setting chemical parameters is different from all other parameters and is inconsistent with the CWA. TACWA and TWCA recommend inserting the following language at the end of §307.7(b)(4)(a): "It is recognized that criteria developed with the objective of maintaining historical water quality may be different than criteria developed with the objective of maintaining the quality needed to support designated, attainable, and presumed uses. To facilitate that process, the TCEQ encourages the regulated community to develop use-based, site-specific criteria where appropriate."

Response: The commission acknowledges that the use of historical data to establish criteria for parameters such as TDS, chlorides, and sulfates can be problematic at specific sites. For this reason, the commission has actively developed adjustments of these site-specific criteria at individual sites, including in the proposed changes for this standards revision. The language that TWCA and TACWA suggest may be a useful consideration for these adjustments, but it should be more carefully developed over time to evaluate for future changes in the water quality standards or related procedures.

§307.8 - Application of Standards

Comment: One individual asks in §307.8(a)(1)(F) whether the aquatic recreation criteria for unclassified waters apply to classified waters above 7Q2.

Response: The aquatic recreation language was removed from §307.8(a)(1)(F) so that aquatic recreation geometric mean criterion for unclassified and classified water bodies will apply not only above critical low flows, but also below critical low flows.

Comment: T/K and TCC comment that the provision in §307.8(a)(2)(A) relating to critical low flows in spring flow dominated streams with federally listed endangered species is stated to be "0.1% probability value" of a lognormal distribution of flows for the period of record used in the calculation. T/K and TCC comment that this terminology is inconsistent with the typical interpretation of probability, which is normally

expressed as a decimal fraction, rather than a percentile. T/K and TCC state that this section should be changed to express probability consistent with §307.8(a)(2)(B), which uses the 5th percentile value of the flow data. TPWD, Sierra Club, Public Citizen, TBBU, SEED, and WE CAN recommend that the critical low-flow for streams or rivers dominated by streamflows should be determined using a 0.1% probability value.

Response: The commission agrees that the terminology in §307.8(a)(2)(A) would be clearer as "0.1% percentile value" rather than "0.1% probability value," and this change is adopted as suggested. In §307.8(a)(2)(B), the commission responds that the use of a 5th percentile provides a significant degree of additional protection to springflow dominated streams and rivers that's supported by currently available information and evaluations. For some springflow dominated streams, the feasibility of establishing critical low flows below 5th percentile flows has not been demonstrated.

Comment: TPWD recommends removing the "new clause" in §307.8(a)(4) that relates to calculation of human health, TDS, chlorides, and sulfates permit limits. TPWD comments that the language appears out of place in the application of standards section, which otherwise focuses on flows below which standards do not apply. The information is already in the Implementation Procedures.

Response: The commission responds that the added language in §307.8(a)(4) is a part of several changes, including §307.6(d)(5), and are being made to clarify the applicability of human health criteria with respect to streamflow. In response to this and other comments, the language in §307.8(a)(4) was adopted as proposed to clarify the applicability of human health criteria at streamflows below the harmonic mean flow. For additional clarity and in response to the comment, the commission adds a sentence to §307.8(a)(4) to indicate that these criteria are still applicable as a long term average at flows below the harmonic mean flow.

Comment: One individual asks whether the reference to periodically recalculating flows in §307.8(a)(8) applies to increased flows due to permitted discharges.

Response: The commission responds that in practice; the flows at gauging sites are recalculated based on measured flows, including those from wastewater discharges. There are no practical means of partitioning permitted discharge flows in a complex watershed.

§307.9 - Determination of Standards Attainment

Comment: TIP supports changes made regarding representative samples in §307.9(b).

Response: The commission notes the comment and the proposed provision that addresses representative samples is adopted.

Comment: TPWD comments that a more appropriate means of chlorophyll a sampling than what is proposed in §307.9(b)(2), would be to take samples from throughout the euphotic zone or solely from the water layer with the highest dissolved oxygen concentration (during daylight hours). However, if the criteria for chlorophyll a developed for lentic water bodies were based upon near-surface water samples, then near-surface samples should be used.

Response: The commission responds that there are some advantages to obtaining a vertical composite sample of chlorophyll *a* within the euphotic zone. However, using this approach creates complications since varying depths would be used as individual samples and it would be difficult to implement in the field. Routine sampling would need to be conducted on vertical profiles and based on taking discrete interval measurements from top to bottom so that the integration over a prescribed layer can occur "after the fact" during data analysis. However, historical data are based on near-surface single-grab samples. Therefore, criteria based on historical data, and to a large extent assessment of those criteria in the future, are constrained to near-surface samples.

Comment: EPA comments that the use of §307.9(c)(2) confines measurement of dissolved oxygen in all water body types to a single sample taken near the surface. EPA recommends that the rule maintain some measure of specificity on the applicability of measurements taken at depth in deep water systems.

Response: The commission appreciates these comments and concurs that additional specificity may be needed for dissolved oxygen sampling depths, and additional guidance may be developed as appropriate in the *Surface Water Quality Monitoring Procedures.* In terms of data collection, the commission intends to continue measuring vertical profiles of dissolved oxygen in addition to measuring dissolved oxygen over 24-hour periods at a single depth.

Comment: TSCRA supports the clarification of depth and temperature requirements for collection of bacteria and chlorophyll a samples in §307.9(c)(2).

Response: The commission acknowledges this comment in support of the clarification of depth and temperature requirements for collection of bacteria and chlorophyll *a* samples.

Comment: A number of comments were received concerning proposed revisions in §307.9(e)(1) - (7) to define the minimum sample number minimum time period for applying data to assess standards attainment. T/K, TIP, TCC, and AECT support the proposal in §307.9(e)(1) to determine attainment for chlorides, sulfates, and TDS using sample measurements collected over a period of at least two years. TWRI comments that the inclusion of samples "collected over at least a two-year period" in §307.9(e)(3) directly contradicts TCEQ's Assessment Guidance, which states that assessments should be based on samples collected over a seven-year period. EPA commented that flexibility has to be allowed to consider shorter time frames in certain circumstances, as in the current assessment guidance. TWRI states that the provision should be changed from a two-year to a seven-year monitoring period. BRA comments that two years of data is not enough, and that due to changing stream conditions over time, a minimum of five years of data should be required for water quality assessments. OPIC asks for additional information regarding the intended purpose and anticipated effects of the two-year time frame. TCA opposes increasing the amount of sampling prior to determining a segment as impaired. One individual notes the revised specification of a minimum sampling period in §307.9(e)(3) - (5), but expresses concern that there is not a discussion on the number of samples in these paragraphs. In §307.9(e)(3), TSSWCB requests that a minimum dataset be codified in the rules regarding how many bacteria samples are necessary to assess use attainment. TSSWCB and TDA both expressed concern that the minimum number of samples for bacteria that are needed to assess for impairment are insufficient. TDA suggests a minimum of 50-75 bacteria samples over five - seven years to evaluate whether a water body is impaired. Numerous individuals also recommended that the

number of samples required to classify a water body as impaired not be increased. TCC and T/K also support the proposals in §307.9(e)(3) and (4) to determine attainment for bacteria and toxic materials. Sierra Club, SOSA, Environment Texas, Public Citizen, TBBU, SEED, and WE CAN oppose the proposal in §307.9(e)(3) to require two years of water quality sampling data to demonstrate that the geometric mean for bacteria levels violates the water quality standards. One individual comments that there are no minimum number of samples indicated for §307.9(e)(4), (5), or (7)(A). WEAT, TIP, TCC, and T/K support the proposed use of at least ten samples in determining attainment in §307.9(e)(7)(B) related to nutrient criteria. With respect to nutrient criteria in §307.9(e)(7)(B), GBF asks how the standards will be enforced if determining a violation takes five years and states that there should be a way to have immediate enforcement when obvious violations are present.

Response: The commission responds that the intent of these proposed revisions was to provide a consistent framework for minimum sample numbers and sampling period. The proposal was also intended to be compatible with current assessment procedures. In the assessment procedures, the overall period of assessment is seven years when data are available for that period, but the minimum time frame that is considered usable for assessment is two years except in prescribed, unusual circumstances. In addition, the assessment procedures specify that a minimum of ten data points is generally required, unless a statistically significant result is clearly available from fewer data. However, because there were a large variety of comments expressing concern with these proposed revisions and additions, and because there were also concerns with clarity, the commission adopts modified proposed and existing language that removes all references to minimum sample numbers and sampling period. The requirements for numbers of samples and sampling period for assessment purposes will be addressed in the Surface Water Quality Monitoring Program's *Guidance for Assessing and Reporting Surface Water Quality in Texas.*

Comment: TPWD questions the decision in §307.9(e)(1) to base standards attainment determinations for chloride, sulfate, and TDS on median values. TCC favors the proposed approach. T/K, TIP, TCC, and AECT support the proposal in §307.9(e)(1) to determine attainment for chlorides, sulfates, and TDS using the median of sample measurements. TPWD notes that §307.10, Appendix A still appropriately refers to TDS, chloride, and sulfate values as "maximum annual averages" for the segments.

Response: The commission acknowledges that the criteria for dissolved solids were derived as the upper prediction interval around the historical mean of sampling data. Therefore, using the mean for assessing compliance is the more statistically rigorous procedure. However, there are practical advantages for assessing compliance using a median as the measure of a central value of sampling data, in order to minimize the effects of outliers, errors, and non-detect values when the available dataset for assessment is small. In the case of dissolved solids, the variability over time at a single sampling station is generally not extremely high; and the measured concentrations are well above detection limits and minimum quantification levels. Therefore, the practical advantages for assessing compliance using a median are not as substantial as with some of the other kinds of long-term criteria. The commission concurs that additional review is needed before making this proposed change, and in §307.9(e)(1) the mean will remain as the measure of standards attainment for dissolved solids criteria.

Comment: The Sierra Club, Public Citizen, TBBU, SEED, WE CAN, Environment Texas, and NWF oppose the proposal in §307.9(e)(3) to eliminate the consideration of a single maximum water sample showing high bacteria levels in determining whether the water quality standard for the stream has been violated. TSSWCB comments that the reasoning used by those opposed to eliminate the single sample is flawed. EPA recommends more flexibility to allow for more limited datasets to be used and recommend addressing sampling period requirements or options in the assessment procedures, rather than in the water quality standards.

Response: The commission responds that a geometric mean is more appropriate to determine water quality attainment for assessment purposes rather than single sample numbers. The commission notes that the EPA has indicated that the geometric mean is the more relevant value for ensuring that appropriate actions are taken to protect and improve water quality. Single sample numbers for primary contact recreation in freshwater and saltwater will be retained for the purposes of swimming advisory programs and wastewater permit compliance.

Comment: BRA, Fox Dairy, Hamilton County Commissioner Dickie Clary, Heifer Ranch at Arroyo Seco, High Plains Dairy Counsel, Legacy Farms, Texas State Representative Sid Miller, Hamilton, Harrison County Judge Randy Mills, ICA, Sanderson Farms, 74 Soil and Conservation Water Districts, TCFA, Texas Poultry Federation, PCG, TSCRA, TSSWCB, TFA, WEAT, and a number of individuals filed comments in favor of a high-flow exemption since it was highly unlikely that recreational activities would be occurring during high-flow conditions and that samples taken during these events should not be used for assessment purposes. WEAT suggests that TCEQ develop specific procedures to implement the high flow exclusion in §307.9.

NWF comments that the high-flow exemption, as drafted, is too broad. NWF comments that if this exemption is going to be included, what constitutes a "high-flow" needs to be defined and described in a very clear manner. TPWD recognizes the basis for a high-flow exemption, but thinks it is not well-defined. TPWD recommends that the language be revised to read: " . . .estimated flow severity index of 'flood.'" TSSWCB suggests that when using the estimated flow severity index, for consistency purposes, TCEQ should define this high-flow exclusion at the severity index of "flood."

CLACC, EIP, Environment Texas, Uncertain, TCE, CW Action, GCLA, LGCLA, FCLNWR, CLI, Sierra Club, Public Citizen, TBBU, SEED, WE CAN, EPA, Environment Texas, SOSA, and TCA oppose the high-flow exemption for samples because high-flow conditions are representative of the variable condition of Texas streams and rivers; and to exclude those samples render the attainment determination unrepresentative of the true conditions. EPA disagrees with the automatic exclusion of sample results. OPIC asks for additional information regarding the intended purpose and anticipated effects of the high-flow exemption. One individual commented that low-flow situations in segments whose only source is treated wastewater also needs attention.

Response: The commission notes the comments in support and opposition to the high-flow exemption for bacteria. The commission responds that there is utility in having a high-flow exemption for bacteria at times when contact recreation activities are not practical or safe. The commission also notes that while a high-flow exemption is added, the commission also revised language in §307.8 that results in recreation criteria applying below

critical low-flows when contact recreational activities are more likely to occur. The commission agrees with the recommendations to better define the estimated flow severity index. In response to the comments, the term "indicates that swimming is not practical or safe" in §307.9(e)(3)(B) was removed and the term "flood or an equivalent category" was substituted for adoption.

The adopted standards establish a reasonable and defined framework for the bacteria high-flow exemption, and further details on recommended procedures for assessing standards attainment will be provided in the Surface Water Quality Monitoring Program's *Guidance for Assessing and Reporting Surface Water Quality in Texas.*

Comment: TSSWCB comments that for consistency, instead of characterizing the high-flow exclusion as "data exclusion" under assessing attainment, it should be addressed like the low-flow exclusion (7Q2) by stating that the use/criteria do not apply under these conditions.

Response: The commission notes that uses apply under all conditions. The proposed high-flow exemption of above the 90th percentile is roughly equivalent to a 7Q2 frequency and it is more straight-forward to apply. The commission adopts the language as proposed.

Comment: TSSWCB asks for clarification in the standards or implementation procedures on how the high flow exclusion would apply to lentic systems and coastal waterbodies.

Response: The commission revised the proposed high-flow exemption language to clarify that §307.9(e)(3)(A) applies to freshwater streams and rivers only and that §307.9(e)(3)(B) applies to tidal and freshwater stream and rivers. The commission adopts the revisions as modified.

Comment: TSSWCB cautions against uniformly applying high flow values across the state. TSSWCB suggests TCEQ establish a public process to examine the statistical validity of a uniform value versus regional values based on an isopluvial map.

Response: The commission is evaluating instream flows in several programs, including water uses, and will continue to coordinate improving evaluations of both high- and low-flow levels that determine standards applicability. The language is adopted as proposed.

Comment: In regards to §307.9(e)(4), EPA recommends the use of the mean or an upper percentile value of a dataset when assessing human health criteria. TPWD questions the decision to base standards attainment determinations for human health criteria in §307.9(e)(4) on median values. TPWD comments that the proposed new method of determining standards attainment does seem not to be statistically accurate or as protective as the current procedure. TPWD asks for an explanation regarding why this change was made. CLACC, EIP, Environment Texas, TCE, CW Action, GCLA, LGCLA, FCLNWR, CLI, Sierra Club, Uncertain, SOSA, Public Citizen, TBBU, SEED, and WE CAN also oppose the requirement in §307.9(e)(4) that standards attainment for human health criteria for toxics be based on the median rather than the average of samples.

Response: The commission concurs that means rather than medians may be more appropriate for some parameters that are assessed over a long time period. For human health criteria, there is some advantage in using a median in order to dampen the effect of non-detect measurements. However, assessing with a mean ensures that unusually high concentrations of a toxic pollutant are afforded substantial weight in the long-term calculations. For human health criteria, the long-term weighted exposure is important in assessing potential health risk. For this reason, in §307.9(e)(4) the commission deletes the proposed change to median values for assessment of human health criteria, and the assessment will continue to be based on mean values.

Comment: Sierra Club, Public Citizen, TBBU, SEED, WE CAN, PLTA, TPWD, Austin, Volente, SOSA, and NWF oppose the use of the median rather than the mean to determine impairment of nutrient criteria in §307.9(e)(7). They are concerned that the use of a median when the statistic was calculated using the mean, is not statistically valid; and the median will tend to minimize the impact of algal blooms in the assessment process. WEAT, TIP, T/K, TCC, and SRA are in general support of the use of median values to assess nutrient criteria.

Response: The commission concurs that the proposed use of the median is not strictly rigorous in terms of statistical applicability of a mean and a median, since the criteria were initially derived based on the upper prediction interval around the mean. However, assessment of chlorophyll *a* is complicated by: (1) measurements that are below detection limits or quantification levels, (2) the effect of single high value outliers in an assessment dataset, and (3) the relatively small datasets that are often available for assessment purposes. For these reasons, the procedures to assess attainment of chlorophyll *a* criteria will be based on the median of assessment samples, as proposed. The commission will continue to explore ways to improve the development and assessment of nutrient criteria in the future.

Comment: EPA, Sierra Club, Public Citizen, TBBU, SEED, and WE CAN comment that they understand the rationale for using the main pool of a reservoir for sampling, but that TCEQ needs to develop a process for addressing nutrient concerns in the arms and coves of reservoirs. NWF comments that the numerical standards applicable to the main pool must be considered in context with other parts of the reservoir, such as the arms and coves that are likely to experience higher levels of nutrient loading. CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, Volente, Uncertain, and CLI are also concerned how the criteria will or will not be applied to coves. TWPD comments that reservoir nutrient criteria is applicable only to the main pool stations, which react relatively slower than coves and riverine areas in showing effects of increasing nutrient concentrations. Because of this weakness in the suggested approach, very large increases in the nutrients will occur before a reservoir would be declared impaired. To protect reservoirs from eutrophication, TPWD believes a more sensitive process should be developed.

Response: The commission agrees that nutrient concerns need to be addressed in the arms and coves of reservoirs. At this time the commission has developed nutrient criteria only for main pool stations, these criteria are only applicable at the main pool due to the way in which they were derived. The commission will be addressing nutrient criteria for coves and arms of reservoirs in the future.

Comment: T/K and TCC support the proposal in §307.9(e)(8) that clarifies TCEQ policy with respect to streams that have low or no flow during significant periods of most years. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the proposed language that would exempt use of site-specific criteria under certain conditions.

Response: The commission responds that this change, concerning the assessment of criteria that are applied as long term averages (TDS, chlorides, sulfates, indicator bacteria, and human health toxic criteria), is intended to limit the applicability of these criteria when streamflow in perennial streams becomes negligible or when residual pools in intermittent streams shrink during very dry periods. During these periods, water quality tends to become degraded even under natural conditions. The commission notes that these provisions apply only to sampling data to assess standards attainment, and not to regulatory actions such as permitting calculations. Previously, §307.8(a)(1)(A) indicated that site-specific criteria for dissolved solids (TDS, chlorides, sulfates) did not apply at flows less than the seven-day, two-year low-flows; and §307.6(d)(5) exempted human health toxic criteria below harmonic mean stream flows. These exemptions were considered to be inadvertently applicable to streamflows that could be inappropriately high; and the commission adopts the language as proposed. Therefore, the proposed additions in §307.9(e)(8) are needed to provide clear, limited exemptions of long-term criteria during very dry conditions; and these provisions are adopted as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the deferment in §307.9(f) of listing a stream as impaired for a presumed high aquatic life use until a UAA is conducted. EPA comments that the proposed language for deferment of listing for presumed aquatic life use is unacceptable. EPA expects the same standards to apply to both unclassified and classified waters. EPA comments that category 5B of the state's existing Integrated Report provides adequate flexibility to address standards issues prior to development of a TMDL for a given water body.

NWF comments that the failure to assess impairments based on presumed uses is not justified and is not consistent with the CWA. At minimum, NWF states that this must be limited to situations when there is significant evidence to suggest that the presumed use may not be appropriate. NWF comments that this could be accomplished by revising language in the sentence that starts: "Instead, the listing can be deferred. . ." and making the sentence read: "Instead, if there is credible evidence indicating that the presumed use may not be appropriate, the listing can be deferred. . . ."

OPIC comments that in order to prevent potential degradation of water quality during UAA preparation, the provision clarify that individual permitting decisions and permit limits will continue to be based on presumed high aquatic life use while the UAA is being conducted. TPWD comments that they do not understand the need to defer CWA, §303(d) listing of water bodies that do not attain a presumed high aquatic life use, but appreciate that this deferral was limited to a maximum of two listing cycles.

Response: The commission acknowledges the concerns that were expressed regarding the proposed temporary deferral of potential listings based on presumed high aquatic life uses (as assessed by indices of biotic integrity) and dissolved oxygen criteria. The purpose of this proposed revision is to preclude inappropriate listings of water bodies as impaired and to avoid associated regulatory actions that may be unnecessary. The intent of the commission is not to change the presumption of high aquatic life use for unclassified perennial streams. The commission will continue to conduct studies and assess site-specific aquatic life uses for unclassified water bodies whenever needed by water quality management programs. The proposed revision explicitly expresses that commitment for purposes of assessing standards attainment, and any deferral under this provision must be evaluated within four years of the initial deferral. This provision in §307.9(f) is adopted as proposed, and the commission will continue to coordinate with stakeholders to explore ways to streamline and improve assessment of aquatic life uses in Texas.

§307.10 - Appendices A - G

General Comments

Comment: OPIC comments that based on the information in the proposal, it is unable to fully evaluate each proposed site-specific change.

Response: The commission responds that detailed documentation on site-specific standards revisions have been provided upon request throughout the rulemaking process.

Appendix A - Site-specific Uses and Criteria for Classified Segments

General Comments

Comment: EPA comments that they have received UAAs or other documentation on the following segments and will initiate review in the near future: Segments 0306, 0307, 0401, 0402, 0406, 0407, 0409, 0410, 0608, 0812, 1245, 1305, 1603, 1811, 1814, and 2308. EPA notes that UAAs for the following segments are still to be submitted to EPA for review: Segments 0305, 2485, and 2491.

Response: The commission acknowledges this comment.

Comment: OPIC recommends TCEQ proceed with full TMDL studies in impaired waters under current limits, rather than relying on UAAs to determine the naturally occurring levels of dissolved oxygen and the water bodies potential to achieve a particular use.

Response: UAAs are essential to establish water quality goals for specific water bodies. In addition, some water bodies are listed based on presumed uses. A UAA indicates that the water body is not actually impaired and can be used to determine whether the actual use is due to natural conditions and not due to human induced factors. In other cases, the presumption is confirmed and the UAA serves a function of establishing an appropriate goal for a TMDL.

Comment: TSSWCB supports designating different aquatic life use categories for fish versus benthic communities on the same water body, as long as data analysis indicates those different designations are appropriate. However, TSSWCB believes that attainment should not be based on only one of these two metrics.

Response: The commission acknowledges the support of the proposed revision.

Comment: TSSWCB comments that if water bodies are included on the CWA, §303(d) list at the sub-segment level, then the water quality standards should allow for establishment of uses and criteria at the sub-segment level. TSSWCB suggests adding text that would allow for designation of site-specific uses and criteria at the assessment unit (AU) level.

Response: The commission responds that the AUs used by the Surface Water Quality Monitoring team are described in the 2008 Surface Water Quality Monitoring Program's *Guidance for Assessing and Reporting Surface Water Quality in Texas* and exist for the purpose of assessing water bodies. AUs are used to describe individual or groups of monitoring stations within a segment. Also, AUs need to be flexible in order to change when

monitoring stations are no longer active or new stations are created. Some criteria (TDS, chlorides, and sulfates) are not assessed by AU, but are assessed on a segment wide basis. If water quality standards were set at the AU level, a rule revision would be necessary every time a monitoring station was discontinued or added.

Comment: TPWD notes that TCEQ uses a regionalized index of biotic integrity for the fish community, while a statewide index is used for the benthic macroinvertebrate community. TPWD questions whether the disparity between the observed aquatic life uses arises from the use of a statewide index of biotic integrity for the benthic macroinvertebrate community. TPWD urges TCEQ to prioritize development of regionalized indices of biotic integrity for benthic macroinvertebrates because doing so could help resolve apparent differences between fish and benthic macroinvertebrate community assessments.

Response: The commission responds that a statewide index of biotic integrity continues to be used by the commission for benthic macroinvertebrates because regionalized indices have not been developed to date. The commission acknowledges this comment and notes that the commission has established this as a priority and will continue to work on developing regionalized indices of biotic integrity for benthic macroinvertebrates in coordination with TPWD.

Comment: TPWD comments that the second paragraph of the introduction to Appendix A states that critical low-flows apply at or downstream of the springs providing the flows, but that "critical low-flows upstream of these springs may be considerably smaller." TPWD states that this calls into question why the area upstream would not be defined as a separate segment given a substantial hydrologic change to the system.

Response: In most of these situations, spring flow is usually associated with the upper reach of a stream. Typically the application of the spring flow systems would be overprotective of the upper reaches above the springs. In the future, the commission can consider adjusting low-flow criteria or segment boundaries on a case-by-case basis. The commission adopts the language as proposed.

Comment: PSC asks whether the standard changes would remove Segment 2311 - Upper Pecos River from the CWA, §303(d) list. If so, will the City of Pecos be able to discharge treated effluent into this segment provided they meet the discharge requirements.

Response: The proposed revisions by the commission will not change the CWA, §303(d) listing status of Segment 2311 - Upper Pecos River.

Comment: CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, Uncertain, and CLI comment that they support the creation of Segment 0410 - Black Cypress Bayou if it is done for the purposes of protecting water quality; and does not cause degradation of Black Cypress or Big Cypress Bayous, but suggest that the new segment be given an exceptional aquatic life use.

Response: The commission acknowledges the support of the creation of Segment 0410 - Black Cypress Bayou. The commission concurs that Segment 0410 is an "Ecologically Unique Stream Segment." However, this designation does not automatically warrant the assumption that the water body can support an exceptional aquatic life use. A UAA was performed on Segment 0410 and the results of this UAA indicate that this segment is a perennial water body that supports a high aquatic life use. In quantitative terms, the fish index of biotic integrity scores for this segment was on the high end of high. However, when considering the benthic index of biotic integrity scores the appropriate overall use was a high.

Bacteria

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the downgrading of water quality in 293 stream segments proposed as "primary contact recreation" that would set a less stringent bacteria requirement of 206 cfu/100 ml. LCRA supports the proposal that designates all classified segments as primary contact use and recommends retaining the current contact standard for bacteria of 126 cfu/100 in classified reservoirs because reservoirs typically have lower ambient concentrations of bacteria than flowing water. Volente is concerned about the increase in acceptable level of indicator bacteria (126 cfu/100 ml to 206 cfu/100 ml) especially in classified segments, like the Highland Lakes. Lakeway recommends the criterion of 126 cfu/100 ml be maintained for the Highland Lakes. Senator Watson requested that the commission keep the current criterion (126 cfu/100 ml) for primary contact recreation in Lake Austin and Lake Travis.

Response: In response to comments, the commission adopts modified Appendix A that retains the freshwater primary contact recreation geometric mean criterion of 126 *E. coli* per 100 ml and modifies the freshwater primary contact recreation geometric mean criterion from 54 to 33 Enterococci per 100 ml for high saline inland water bodies.

Comment: BRA supports the change in indicator bacteria to Enterococci for Segment 1208 - Brazos River above Possum Kingdom Lake, Segment 1238 - Salt Fork Brazos River, and Segment 1241 - Double Mountain Fork Brazos River.

Response: The commission acknowledges the support of the proposed revisions.

Comment: IBWC agrees with the primary contact recreation designation and the proposed change of the bacteria indicator to 206 cfu/100 ml for Segments 2301-07, 2309-10, and 2313-14; in the Rio Grande Basin, the sole-source drinking water designation for Segments 2302-04, the primary contact recreation designation and the proposed change of the bacteria indicator to Enterococci and alternative indicator to fecal coliform for Segments 2310-11; and the removal of the public water supply designation from Segment 2308.

Response: The commission acknowledges the support of the proposed revisions.

Comment: IBWC comments that Segment 2301 - Rio Grande Tidal should be added to footnote 1.

Response: The commission responds that the appropriate indicator bacteria is identified in both §307.7(b)(1)(B) as well as in footnote 1 in Appendix A. While other water bodies are specifically written into these footnotes, these are water bodies that have been identified as high saline inland water bodies where fecal coliform can be used as an alternative indicator for two years after the adoption of these rules. No other marine or fresh water bodies are listed in these footnotes, because fecal coliform is no longer used as an alternate indicator for recreational purposes. The commission adopts the language as proposed.

Comment: IBWC comments that the indicator bacteria for Segment 2308 - Rio Grande below International Dam should be changed from the proposed 605 cfu/100 ml to 2,060 cfu/100 ml to

reflect changes in standards for noncontact recreation proposed in the rules.

Response: The commission acknowledges that the newly adopted geometric mean criterion for noncontact criterion is 2060 cfu/100 ml. However, the definition of noncontact recreation and the way the criteria are applied have changed since the existing use and criteria were evaluated. Therefore, additional UAAs would be needed in order to support a major criterion change for this segment.

Comment: IBWC comments that the alternative indicator bacteria of fecal coliform for Segment 2310 - Lower Pecos River and Segment 2311 - Upper Pecos River should be listed beside the primary indicator bacteria (54/200).

Response: The commission responds that the criterion for the alternate fecal coliform indicator was removed from Appendix A because the commission transitioned to new indicators, *E. coli* and Enterococci, in 2000. Since fecal coliform can only be used in high saline inland water bodies for two years after the adoption of this title in order to allow time to collect sufficient data for Enterococcus, the commission did not include fecal coliform criterion in Appendix A.

Dissolved Oxygen

Comment: One individual notes that Appendix A has a dissolved oxygen criteria of 2.0 mg/L and are allowed a daily variation down to 1.5 mg/L for no more than eight hours per 24-hour period and that a dissolved oxygen criteria of 1.0 mg/L will be considered the minimum value at any time. This individual notes that this minimum appears to be in conflict with the allowable daily variation in a previous sentence in the appendix as well as the "daily minima" listed in Table 3 in §307.7(b)(3(A)(i). This individual notes the use of the words "down to" seems to be slightly different than used elsewhere. In Appendix A, it appears to mean that a concentration of less than 2.0 mg/L lasting longer than eight hours would be a violation and asks whether that interpretation is correct.

Response: The commission responds that the term "absolute" in §307.4(h) was replaced with "24-hour" and the term "daily minima" was replaced with "24-hour minimum dissolved oxygen concentrations" in §307.7, Table 3, (footnote) for consistency purposes. The eight-hour language is only applied when a dissolved oxygen concentration remains right at the 24-hour minimum criterion and this phrase is not intended to allow dissolved oxygen concentrations to go below the daily minimum at any time. The commission adopts this language as modified from the proposed language.

Comment: NRA, TACWA, and TWCA recommend the use of the current increments for dissolved oxygen, i.e. 5.0 mg/L, 4.0 mg/L, 3.0 mg/L, etc. and do not support the proposed use of fractional increments. TSSWCB support the proposed fractional dissolved oxygen criteria.

Response: The commission agrees that it is generally appropriate to apply dissolved oxygen criteria in 1.0 mg/L increments. However, in cases where there is sufficient information, it can be reasonable to adjust criteria in half mg increments. The commission has utilized this approach in prior Texas Surface Water Quality Standards for dissolved oxygen criteria in Segment 0805 - Upper Trinity River and the Segment 0841 - Lower West Fork Trinity River. The commission adopts the language as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the weakening of the dissolved oxygen criteria from 5.0 mg/L to 3.0 mg/L in Segment 0211 - Little Wichita River and lowering the water quality standards for dissolved oxygen, and lowering the aquatic life designation in Segment 0833 - Clear Fork Trinity River above Lake Weatherford.

Response: The commission responds that UAAs were performed on Segment 0211 - Little Wichita River and Segment 0833 - Clear Fork Trinity River Above Lake Weatherford. The results of these UAAs indicate that Segment 0211 is a perennial water body that supports a high aquatic life use. However, the mean and minimum dissolved oxygen concentrations were extremely low during several sampling events; and did not meet the presumed corresponding dissolved oxygen criteria associated with a high aquaticlife use. A recommendation of an average dissolved oxygen criterion of 3.0 mg/L and a minimum dissolved oxygen criterion of 2.0 mg/L are made in the UAA. These criteria best describe the observed data in this segment. Segment 0833 is an intermittent water body with perennial pools that supports an intermediate aquatic life use. However, the UAA demonstrates that during periods of low flow, the presumed corresponding dissolved oxygen concentration of 4.0 mg/L cannot be achieved. A recommendation for a mean dissolved oxygen value of 2.0 mg/L and an minimum of 1.0 mg/L when flow values are below 1 cubic feet per second are made in the UAA. The UAA better describes the current conditions in Segment 0833. EPA has indicated that the findings of both UAAs are appropriate and the commission adopts the changes as proposed.

Comment: NRA recommends a dissolved oxygen standard of 4.0 mg/L in Segment 2485 - Oso Bay and Segment 2491 - Laguna Madre rather than the proposed 4.5 mg/L or current standard of 5.0 mg/L. NRA notes that one of the justifications for proposing a 4.5 mg/L standard for dissolved oxygen was due to the large date set for Segment 2491. However, NRA notes that this large data set is the result of a large data collection program over a two-year period and that the time frame may not necessarily representative of a wide range of conditions.

Response: The commission acknowledges that a large dataset was used in the evaluation of Segment 2485 - Oso Bay and Segment 2491 - Laguna Madre; and that the majority of the data used to establish the proposed criteria was collected over a two-year period. The commission notes that data collected over a two-year period is typically used to determine site-specific conditions of waterbodies through the UAA process in accordance to *Surface Water Quality Monitoring Procedures Volume 2* (Appendix E). The minimum requirements for a UAA are five dissolved oxygen samples over a two-year period. However, this UAA uses many more data points than the minimum and an evaluation of historical data was considered as well. This UAA far exceeds the minimum requirements necessary to develop site-specific criteria. The commission adopts the language as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, WE CAN, TPWD, and NWF oppose lowering the current dissolved oxygen in Segment 2485 - Oso Bay and Segment 2491 - Laguna Madre and urges the adoption of a 24-hour minimum dissolved oxygen criterion of 2.0 mg/L instead of 1.5 mg/L. TPWD recommends that no changes to the dissolved oxygen criteria for either Oso Bay or the Laguna Madre until: 1) it is demonstrated that low dissolved oxygen levels are not due to pollutants, 2) it is demonstrated that the change will not have a deleterious impact on aquatic life, and 3) appropriate reference and AUs have been established.

Response: The commission acknowledges the concern that a dissolved oxygen concentration of 1.5 mg/L in Segment 2485 - Oso Bay and Segment 2495 - Laguna Madre may have adverse effects to the aquatic biota. During the course of the studies used in the determination of dissolved oxygen criteria, multiple sampling events occurred when dissolved oxygen levels were low under least impacted conditions. The commission initiated further review of the dissolved oxygen criteria for these segments. The commission concluded that, while no effects were seen in either segment during the course of the studies, the available biological data were limited. Therefore, a 2.0 mg/L minimum dissolved oxygen criteria may be more appropriate at this time.

The commission further responds that although the Laguna Madre is a fairly unique system, it shares chemical and physical parameters with Oso Bay. Both of the water bodies are very shallow, hyper saline, and support communities of seagrasses. The commission also recognizes that portions of Oso Bay are potentially impacted by anthropogenic effects. This is not generally the case for the Laguna Madre. While the Laguna Madre receives fresh water inflows from the Arroyo Colorado, which has point and nonpoint sources of pollution, over 80% of the coastline is sparsely populated, if it is populated at all. It is because of this that the Laguna Madre is one of the least impacted marine water bodies in Texas. The commission asserts that Laguna Madre is sufficiently similar to Oso Bay to be used as a reference site.

The large amount of data provided in these studies demonstrated that 98% of the 24-hour average dissolved oxygen data sets for the Laguna Madre are above 4.5 mg/L and 89% of the Oso Bay data are above 4.5 mg/L. The commission concluded that a 4.5 mg/L average 24-hour dissolved oxygen criterion and a 2.0 mg/L minimum 24-hour dissolved oxygen criterion are appropriate for both Oso Bay and Laguna Madre. The commission adopts the criteria as modified from the proposed language.

TDS, chlorides, sulfate

Comment: TPWD comments that TCEQ has proposed significant changes in the TDS, chlorides and sulfate criteria for Segment 1206, 1238-41, 1411, 1421, 1426, and 2106. TPWD is concerned that the proposed changes are to accommodate increases of TDS, chlorides, and sulfate whether from natural or human activities. If current data indicate increasing TDS, chlorides, and sulfates, TPWD would like TCEQ to identify whether the increases are anthropogenic or natural in origin because their understanding is that the purpose of these criteria is to maintain ambient conditions, and requests that TCEQ provide a rationale for these changes. TPWD does not support changing TDS, chloride, and sulfate criteria in response to anthropogenic influences. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose lowering the water quality standards for TDS in Segment 0833 - Clear Fork Trinity River above Lake Weatherford.

Response: The commission recognizes the possibility for increased TDS, chloride, and sulfate in waterbodies due to anthropogenic effects as well as a need to maintain ambient conditions. The determination for changes in the above mentioned criteria was based on the full history of data available to the commission at the time of calculation. The secondary constituent levels are: chloride (300 mg/L); sulfate (300 mg/L); and TDS (1000 mg/L). Current federal guidance contained in the EPA document entitled *Ambient Water Quality Criteria for Chloride-1988* recommends 230 mg/L of chloride for chronic protection of freshwater aquatic life. A concentration of 230 mg/L of chloride is protective of most aquatic invertebrate and vertebrate communities. Of the 19 segments with a proposed change to at least one of the dissolved mineral criteria, 13 are designated as a public water supply. Of these, only four segments (1411, 1421, 1426, and 1433) were proposed with one or more of the dissolved mineral criteria higher than the secondary constituent levels or chloride criteria higher than 230 mg/L. Segments 1411, 1421, and 1426 currently have dissolved minerals criteria higher than the commission's secondary constituent levels. The new dissolved minerals criteria for Segment 1433 exceed secondary drinking water quality standards and the federal chronic chloride criterion. Our evaluation indicates that there are no anthropogenic trends in the dissolved minerals criteria for Segment 1433. This reservoir receives water from Segment 1421 and Segment 1426 that are both high saline inland water bodies with criteria greater than secondary constituent levels and the federal chronic chloride criterion. The current dissolved minerals criteria for Segments 1421 and 1426 are also higher than the proposed criteria for Segment 1433. The recommended criteria changes for Segments 1413 and 1426 are based on data that incorporates a wider range of lake level and stream flow conditions, respectively. The chloride criterion for Segment 1426 currently exceeds the federal chronic chloride criterion. The commission's evaluation indicates there are no anthropogenic induced trends in the data used to calculate the criteria in these two water bodies.

Comment: Sierra Club, Public Citizen, TBBU, SEED, WE CAN, TPWD, and NWF object to the proposed lowering of water quality standards for TDS in Segments 0507, 0812, 0821, and 1227 in order to accommodate a water reuse project. OPIC asks for additional information on the effects on water quality and aquatic life from the proposed change. TPWD specifically asks that TCEQ prepare a UAA prior to approving these standards changes. TPWD asks that TCEQ provide a rationale for why certain entities must meet existing standards and bear the cost of doing so while others may achieve lower operating costs by meeting a lesser water quality standard. TPWD further requests that TCEQ initiate policy discussions involving water quality and regional water planning stakeholders, prior to approving these standards changes.

Response: The commission recognizes the need to maintain ambient conditions for TDS, chloride, and sulfate in water bodies. However, the commission also recognizes the importance of water reuse as a viable approach for managing the state's water resources. EPA does not require a UAA to be performed when a change in criteria, such as TDS, chloride, sulfate, and pH is requested.

The proposed increases in dissolved minerals criteria for Segment 0507, Segment 0821, and Segment 1227 are due to water reuse projects. The proposed criteria change in Segment 1227 is in response to Cleburne's request that the Segment 1227's dissolved minerals criteria reflect Cleburne's projected future conditions, which includes adding water sources that have higher dissolved minerals concentrations than the current criteria for the Segment 1227. These sources include Segment 1203, which has TDS, chloride, and sulfate criterion of 1500 mg/L, 670 mg/L, and 320 mg/L, respectively. The re-evaluation of dissolved minerals criteria development for Segment 1227 is based on the assumptions that: (1) the effects of increased flow from future projected sources would be additive (rather than proportional or multiplicative); (2) that Cleburne's effluent will be virtually the entire dry-weather flow of the Nolan River at projected future conditions; and (3) a confidence level of 0.99 was used because effluent variability was very low and because the effluent samples

were collected over a short time frame and was likely to underestimate the long-term variability. The criteria are the projected instream concentrations using a simple mass balance calculation to determine a prediction interval around the mean. If the calculated criterion was higher than the Segment 1203 criterion downstream, then the criterion for Segment 1203 was substituted as the criterion for that parameter. Data obtained by the BRA on Segment 1227 was also reviewed to determine if differences in fish communities exist between Segments 1227 and 1203. The data demonstrated that similar communities exist and increases in dissolved solids in Segment 1227 would not cause a negative impact.

The proposed criteria change in Segment 0821 is in response to a request from the North Texas MWD and are to account for the high saline inland water it receives from the Red River Basin as a result of a North Texas MWD permitted inter-basin transfer. The recommended criteria for Segment 0821 were established to be equivalent to dissolved minerals criteria in downstream Segments 0820 and 0819. The proposed criteria are well below the secondary constituent levels of 300 mg/L for chloride and sulfate and 1000 mg/L for TDS.

The proposed criteria changes to Segment 0507 are in response to a request from the SRA that the dissolved minerals criteria be increased in anticipation of a water reuse project in Segment 0507's watershed. The Lake Tawakoni Recycled Water Study, which was initiated by SRA and the City of Dallas, evaluated the feasibility of increasing the overall raw water supply in the Upper Sabine Basin by delivery of highly treated water. The proposed criteria are based on data provided by SRA in a February 22, 2008, Alan Plummer and Associates, Inc. technical memorandum with subject "Request to increase Segment 0507 Texas Surface Water Quality Standards criteria for Total Dissolved Solids, Chloride and Sulfate."

The proposed criteria change in Segment 0812 was not in response to a reuse project. The criteria were based on the full history of data available to the commission at the time of calculation and the evaluation indicates there are no anthropogenic induced trends in the criteria in this water body. These changes were discussed during the January 2009 Standards Workgroup Meeting, but the commission may look into further avenues for public participation in future dissolved minerals changes. No other entities have requested further examination of site-specific dissolved solids criteria, but considerations to those requests would be evaluated on a case-by-case basis.

Comment: North Texas MWD supports the proposed changes to the criteria for chlorides, sulfates, and TDS for Segment 0821 - Lavon Lake. Cleburne supports the proposed changes to the criteria for chlorides, sulfates, and TDS for Segment 1227 - Nolan River. BRA supports the proposed changes to the criteria for chlorides, sulfates, and TDS for Segment 1238 - Salt Fork Brazos River, Segment 1240 - White River Lake, and Segment 1241 - Double Mountain Fork Brazos River.

Response: The commission acknowledges the support of the proposed revisions.

Comment: White River MWD comments that the proposed TDS standard of 780 mg/L in Segment 1239 - White River does not reflect actual conditions based on the data they have reviewed. White River MWD comments that the natural hydrology of the watershed has changed significantly over the last decade, and as such, the adopted standards need to reflect those changed conditions.

Response: The commission developed this criterion using available data, primarily from the upstream reservoir, which is an approach that is sometimes used to develop TDS criteria and is a reasonable approach. However, this additional information indicates that this approach may be incorrect in this instance. Therefore, the commission withdraws this proposal at this time and the existing language in the current rules will remain in place.

Comment: NRA would like to see consideration of site specific conversion factors for specific conductance of TDS in Segment 2106. NRA notes that analysis has shown that the overall ratio of TDS for Segment 2106 is 0.58, rather than the state-wide conversion factor of 0.65.

Response: The commission clarified in the footnote that a site specific conversion factor for TDS of 0.58 was used in the calculation of the proposed standards change for Segment 2106 - Nueces/Lower Frio River. The commission adopts the footnote as modified.

Uses

Comment: LCRA comments that Segment 1431, Mid Pecan Bayou, is the only classified water body in the state without an aquatic life use. LCRA recommends that TCEQ conduct the appropriate studies to designate the aquatic life use for this segment.

Response: The commission plans to begin a UAA on Segment 1431 - Mid Pecan Bayou the summer of 2010. The results are anticipated to be completed for consideration in the next triennial revision of the Texas Surface Water Quality Standards.

Comment: UTRWD suggests a Limited Aquatic Life Use for Segment 0305 - North Sulphur River is more appropriate than the proposed Intermediate Aquatic Life Use. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the reclassification of Segment 0305 - North Sulphur River from "high" aquatic life use to "intermediate" aquatic life use for the fish community and "limited aquatic life use" for the benthic community. TPWD questions the UAA conclusion on this segment that it is not feasible to restore the river's habitat to a point where it will support a high aquatic life use for fish and benthic communities, thus warranting a revision of the aquatic life use. TPWD requests that prior to lowering the aquatic life use, TCEQ conduct an analysis of the feasibility of restoring the river.

Response: The commission responds that the data available supported intermediate and limited aquatic life uses for the fish and benthic communities, respectively. A separate feasibility analysis of restoring the North Sulphur River is outside the requirements of a UAA. The commission considered the following factors from EPA's regulation 40 Code of Federal Regulations §131.10 (g)(4), relevant: "Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use." Specifically, the North Sulphur River was channelized to alleviate flooding in the watershed and the widths and depths of the river before and after channelization became severely enlarged after channelization. The commission adopts the language as proposed.

Comment: TPWD supports the proposed high aquatic life designation for Segment 0406 - James' Bayou, Segment 0407 - Black Bayou, and Segment 0410 - Black Cypress Bayou.

Response: The commission acknowledges the support of the proposed revisions.

Comment: TPWD, Uncertain, CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, and CLI oppose the use of a regression equation in Segment 0406 - James' Bayou, Segment 0407 - Black Bayou, Segment 0410 - Black Cypress Bayou, and Segment 0409 - Little Cypress Bayou. They specifically oppose the possibility of dissolved oxygen levels set at 1.5 mg/L during certain conditions, as well as several particular comments on the regression equation itself.

TPWD has concerns about implementation of the proposed dissolved oxygen criteria for streams in the Cypress Creek basin. Based on their review of the UAA for the Cypress Creek Basin, TPWD recommends, at a minimum, revising mean dissolved oxygen criteria in Appendices A and D to a value that reflects realistic flow frequencies in the water bodies, rather than providing the impression that 5.0 mg/L is the criterion most of the time. Secondly, TPWD recommends reassessing the minimum dissolved oxygen criterion and consider whether a fixed interval tied to the mean dissolved oxygen equation is appropriate. TPWD is concerned that extremely low minimum dissolved oxygen levels may not be protective of aquatic life and requests that TCEQ provide additional analysis of the frequency of minimum dissolved oxygen patterns. Thirdly, TPWD recommends conducting further statistical analysis to evaluate whether it is appropriate to aggregate data from all the water bodies together for constructing the dissolved oxygen equation, particularly when several are classified segments with somewhat different dissolved oxygen and watershed dynamics. Finally, it recommends explaining the discrepancy between the equations listed in the implementation procedures and Appendix A of the standards. The first term is variously listed as 12.11 or 12.61.

Response: The commission acknowledges that current values listed in Appendices A and D for the Cypress Creek Basin streams that use the Black Cypress Bayou regression equation may be misleading. However, the commission also contends that listing a value that reflects realistic flow frequencies can also be misleading. The commission changed the values in Appendices A and D to read ó5.0 mg/L. This will avoid confusion as well as more accurately depict what the range of values could be, rather than list a single value that may only occur doing certain periods of time. Due to the multiple comments received regarding the minimum dissolved oxygen set by this equation, further review of the minimum dissolved oxygen criteria was conducted. As a result of this analysis, the commission determined that a minimum of 1.0 mg/L dissolved oxygen would be more appropriate than the possible 0.5 mg/L dissolved oxygen value that would result during low flow conditions. The commission also incorporates a 0.5 mg/L factor to determine the minimum dissolved oxygen when the average dissolved oxygen criterion is set at or below 2.0 mg/L. The data used to develop the Black Cypress Bayou regression equation utilized only data from the Black Cypress Bayou. Data from the other streams listed in the *Use-Attainability Analysis (UAA) for Selected Streams in the Cypress Creek Basin* were used to validate that the Black Cypress Bayou regression equation could accurately describe the conditions found in these other water bodies. The language is adopted as modified from the proposed language.

The commission notes the discrepancy between the equations listed in *Procedures to Implement the Texas Surface Water Quality Standards* and Appendix A; however, the equation in the *Procedures to Implement the Texas Surface Water Quality Standards* is based on the WQS and is adjusted to provide additional protection when applied in models at steady state flow conditions. The language is adopted as proposed.

The Black Cypress Bayou UAA describes Black Cypress Bayou as a least-impacted watershed within the South Central Plains Ecoregion of Texas. Because of this conclusion, the primary cause of low dissolved oxygen levels was determined to be natural variations. Data were collected in accordance with the Surface Water Quality Monitoring Procedures that specify that data be collected between March and October to capture the low-flow conditions of streams. Although the data were collected over two years of varying flow conditions, this system experiences wide fluctuations and flow regimes. The inclusion of watershed size as a variable in the equation was preferred over bed slope due to the fact that it was less subjective and it helps describe the flow regime of the streams that the equation is being applied to. The equation does not directly take tree canopy into consideration in the equation because it is also a subjective variable. Flow data were collected using United States Geological Survey gauge stations, which is an acceptable practice in UAA studies. Black Cypress Bayou was determined in the UAA to support a high aquatic life use and 5.0 mg/L dissolved oxygen is protective of a high aquatic life use. The inclusion of lower dissolved oxygen levels was also determined to be protective of a high aquatic life use in this study because multiple sampling events occurred when dissolved oxygen levels were low with no observed effects on the fish and benthic communities. The regression equation proposed in the standards was based on an equation that was approved by EPA for use in East Texas. Currently, all dissolved oxygen criteria that are developed by a UAA use 24-hour dissolved oxygen data and can be assessed using grab sample data. These changes were discussed during the January 2009 Standards Workgroup Meeting, but the commission may look into further avenues for public participation in future dissolved oxygen and aquatic life use changes. The commission adopts language as modified from the proposed language.

Comment: PHA requests that Segment 2436 - Barbours Cut Channel be changed to the Navigational/Industrial Water Source category. PHA notes that this segment is part of the Houston Ship Channel and that public access is restricted and is regulated by the Department of Homeland Security and the United States Coast Guard under 33 CFR Part 165. PHA is concerned that listing Segment 2436 as a primary contact recreation water body may inappropriately reflect the allowed uses of these waters.

Response: The commission responds that to remove the contact recreational use of Segment 2436 - Barbours Cut Channel would require a UAA. The commission may evaluate the designated recreational use for Segment 2436 for the next triennial revision.

pH

Comment: CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, Uncertain, and CLI oppose the pH changes to Segments 0401-02, 0406-07, and 0410. OPIC requests TCEQ provide the scientific basis for its recommended pH changes to these segments.

Response: The commission proposed changes to pH criteria for five segments in the Cypress Creek Basin based on the full history of data available to the commission at the time of calculation. The evaluation indicates there are no obvious trends in the data used in the determination of these criteria. From the available data, the proposed criteria better describe the natural conditions observed in these water bodies. The commission adopts the language as proposed.

Temperature

Comment: The Edwards Aquifer Authority commented that they had collected and analyzed data on temperature in Segment 1811 - Comal River and Segment 1814 - Upper San Marcos River and they support the proposed change of the temperature criteria to 78 degrees Fahrenheit in certain portions of those steams. They concur that the change will provide additional protection to federally listed endangered species within those segments. SAWS is concerned about the focus on temperature criteria in Segment 1811 - Comal River and Segment 1814 - Upper San Marcos River. In SAWS opinion, this focus distracts from other water quality threats in these segments and their aquatic life. SAWS comments that time, effort, and financial resources would be better directed towards addressing these other water quality threats, rather than towards addressing a possible lower temperature standard that is based on a single study in a controlled laboratory setting. SMRF comments that they appreciate the improvement in the temperature standard proposed for the San Marcos River, but note that 72 degrees Fahrenheit is normal water temperature and habitat condition for this segment of the river.

Response: The commission acknowledges SAWS concerns and responds that the proposed maximum temperature criteria in Segments 1811 and 1814 are intended to be protective of federally endangered or threatened aquatic or aquatic dependent species. The temperature changes are based on available literature and data collected on these two water bodies by different entities, including BIOWEST, Inc., TPWD, and TCEQ. The commission notes that the data available indicate that the upper portions of Segments 1811 and 1814, due to direct spring influence, have temperatures lower than the existing maximum temperature criteria of 90 degrees Fahrenheit and 80 degrees Fahrenheit, respectively, and that the proposed revision is appropriate at this time. The commission adopts the maximum temperature criteria as proposed.

Appendix B - Sole-source Surface Drinking Water Supplies

Comment: IBWC concurs with the designations of Segments 2302, 2303, and 2304 and the removal of Segment 2308 in the Rio Grande Basin as sole-source drinking water supplies.

Response: The commission notes this comment in support of the designations of Segments 2302, 2303, and 2304 as sole-source drinking water supplies and the removal of the public water supply use for Segment 2308 in the Rio Grande Basin.

Comment: EPA supports the designation of sole-source drinking water supplies to specific water bodies. However, EPA asks what the process is for making revisions and notes if TCEQ does not plan to conduct interim standards revisions to incorporate changes, it may be appropriate to revise the language in Appendix B to state: "Where a water body has been identified as a sole-source drinking water supply, but is not included in Appendix B yet, the same level of protection may be applied."

Response: The commission notes this comment in support of the designation of sole-source surface drinking water supplies to specific water bodies. The commission edited the first paragraph by removing the sentence: "However, it is subject to amendment at any time." and replacing it with: "Where a water body has been identified as a sole-source surface drinking water supply, but is not included in this appendix yet, the same level of protection may be applied." The commission adopts the language as modified.

Comment: EPA asks whether the change to Segment 1801 - Guadalupe River Tidal in Appendix B refers to the Guadalupe-Blanco River Authority's diversion near Tivoli for municipal drinking water to the City of Port Lavaca and other cities. If so, EPA asks whether a public water supply use for this segment be designated in Appendix A of this section. EPA also notes that 1801 is in parentheses, indicating only an unclassified segment is being designated. However, EPA states that the segment descriptions in Appendix C of this section do not appear to include any unclassified portions of segments in this area.

Response: The commission responds that the sole-source surface drinking water supply is a terminal reservoir in close proximity to Segments 1801 and 1802. The commission corrected this entry in Appendix B by replacing "Guadalupe River" with "Terminal Reservoir" and replacing Segment "(1801)" with "(1802)," since water is obtained from Segment 1802, which is a designated public water supply use. The commission adopts the language as modified.

Appendix C - Segment Descriptions

Comment: EPA comments that the upper boundary for Segment 1305 - Caney Creek above Tidal is proposed to be changed to the confluence with Water Hole Creek. EPA believes this location is in Matagorda County, rather than Wharton County where the current upper boundary is found.

Response: The commission concurs that the county name for the upper boundary is incorrect and changed it to Matagorda County. The commission adopts the language as modified.

Appendix D - Site-specific Uses and Criteria for Unclassified Water Bodies

Comment: EPA comments that they will provide separate reviews of UAAs for the following water bodies: Dixon Creek (0101), Harrison Bayou (0401), Flag Lake Drainage Canal (1111), North Fork Rocky Creek (1217), Lavaca River (1602), and Camp Meeting Creek (1806).

Response: The commission notes this comment.

Comment: TPWD comments that TCEQ has proposed downgrading the aquatic life use from high to intermediate (dissolved oxygen 4.0 mg/L) in White Oak Creek (0303). Based on their review of the available biological data, TPWD does not support the proposed change. TPWD requests that the aquatic life use remain high with average and minimum dissolved oxygen criteria of 5.0 mg/L and 3.0 mg/L, respectively, until it is demonstrated that low dissolved oxygen levels are not due to pollutants.

Response: A UAA was conducted on White Oak Creek, an unclassified water body within the watershed of Segment 0303, in 2001 and 2002. While the commission recognizes the importance of the use of unimpacted water bodies to establish water quality standards, very few water bodies in Texas are unimpacted by point and nonpoint sources. Three routine monitoring stations were used in the study in an effort to evaluate variability in the stream as a whole. The data collected at all three stations were uniform in nature, which indicates that while both point and nonpoint sources exist, no significant impacts appear to be adversely affecting one portion of the stream over another. EPA has reviewed the UAA and agreed with the study findings in a letter dated November 2, 2009.

The coefficient of variation (CV) is not applied to index of biotic integrity results in order to set standards. Instead, the CV is utilized during the §305(b) assessment. If the CV were applied while setting the standard and during the assessment process, the index of biotic integrity would be skewed to only the upper

range of variation one would expect to see in aquatic biological systems. The CV should only be applied once, and it has been the policy of the commission to apply the CV during the §305(b) assessment.

Comment: Uncertain, CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, and CLI oppose lowering the water quality standards for Harrison Bayou (0401). TPWD supports the proposed high aquatic life designation for Harrison Bayou.

Response: The commission responds that the due to multiple comments received regarding the minimum dissolved oxygen set by this equation, further review of the minimum dissolved oxygen criteria was conducted. As a result of this analysis, the commission determined that a minimum of 1.0 mg/L dissolved oxygen would be more appropriate than the possible 0.5 mg/L dissolved oxygen value that would result during low-flow conditions; and modified the footnote to use a 0.5 mg/L factor to determine the minimum dissolved oxygen when the average dissolved oxygen criteria is set at or below 2.0 mg/L.

The Black Cypress Bayou UAA describes Black Cypress Bayou as a least-impacted watershed within the South Central Plains Ecoregion of Texas. Because of this conclusion, the primary cause of low dissolved oxygen levels was determined to be natural variations. Data were collected in accordance with the Surface Water Quality Monitoring Procedures, which specifies that data be collected between March and October to capture the low-flow conditions of streams. Although the data were collected over two years of varying flow conditions, this system experiences wide fluctuations and flow regimes. The inclusion of watershed size as a variable in the equation was preferred over bed slope due to the fact that it was less subjective and it helps describe the flow regime of the streams that the equation is being applied to. The equation does not directly take tree canopy into consideration in the equation because it is also a subjective variable. Flow data were collected using United States Geological Survey gauge stations, which is an acceptable practice in UAA studies. Black Cypress Bayou was determined in the UAA to support a high aquatic life use and 5.0 mg/L dissolved oxygen is protective of a high aquatic life use. The inclusion of lower dissolved oxygen levels was also determined to be protective of a high aquatic life use in this study because multiple sampling events occurred when dissolved oxygen levels were low with no observed effects on the fish and benthic communities. The regression equation proposed in the standards was based on an equation that was approved by EPA for use in East Texas. Currently, all dissolved oxygen criteria that are developed by a UAA use 24-hour dissolved oxygen data and can be assessed using grab sample data. These changes to the dissolved oxygen criteria for Segment 0401 were discussed during the January 2009 Standards Workgroup Meeting, but the commission may look into further avenues for public participation in future dissolved minerals changes. The commission adopts language as modified from the proposed language.

Comment: Uncertain, CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, and CLI oppose lowering the water quality standards for Meddlin Creek (0403).

Response: A receiving water assessment was conducted on Meddlin Creek in 2002 and found the stream to be perennial and supporting a high aquatic life use. Therefore, Meddlin Creek is listed in Appendix D as perennial, supporting a high aquatic life use, and having an average dissolved oxygen concentration of 5.0 mg/L. No criteria for the stream have been lowered from the presumed aquatic life uses for a perennial stream as described in §307.4(h)(3). No additional data was provided to demonstrate that this water body supports an exceptional aquatic life use, but this use can be revisited during a future revision if the commission receives additional information.

Comment: EPA comments that a high aquatic life use is proposed for Spring Branch (0801). EPA notes that a UAA completed in 1999 recommended an intermediate aquatic life use and described it as a shorter stream and suggests TCEQ may want to verify the boundaries.

Response: According to findings during a 2008 receiving water assessment for Spring Branch, the water body is better described as supporting a high aquatic life use with corresponding 5.0 mg/L average dissolved oxygen concentration. The boundaries were verified, and the commission does not recommend any changes to the reach description. The commission adopts the language as proposed.

Comment: Based on their review of data, TPWD is concerned about the current criteria for Pilot Grove Creek (0821) of low aquatic life use and 3.0 mg/L average dissolved oxygen. TPWD recommends that TCEQ conduct a re-evaluation of the aquatic life use and dissolved oxygen criteria.

Response: Revisions to the Appendix D entry for Pilot Grove were needed in order to clarify the description of the reach. The commission agrees that sampling methodology for biological communities has improved over recent years. However, at this time no other evaluation of this stream in the form of a receiving water assessment or UAA has been performed. The comment requesting the stream's re-evaluation is noted and may be considered by the Water Quality Standards Group of the Water Quality Planning Division and the Standards Implementation Team of the Water Quality Division for the next triennial revision.

Comment: HCFCD notes that some of the channelized ditches and streams in Harris County have perennial flow only because of effluent discharges. HCFCD believes the dissolved oxygen criterion in these channels should not be expected to support the same aquatic life use as natural streams. HCFCD comments that the more appropriate aquatic life use category for these manmade segments is "minimal" and not "intermediate" or "limited."

Response: Aquatic life use designations were assigned to HCFCD ditches based on a UAA conducted in 1999. Five streams with existing receiving water assessments were chosen to represent perennial, channelized streams and two concreted bayous were chosen to represent concrete-lined channels. These sites were also compared to least disturbed reference sites in the West Gulf Plain Ecoregion.

Many of the perennial ditches in Harris County are classified as such due to combined effluent flow from multiple upstream dischargers. These streams are presumed to support a high aquatic life use even though they are artificially perennial. Due to alteration of the stream bed and removal of habitat, these ditches do not support the same type of aquatic life use (intolerant species, diversity, and evenness) as the least disturbed reference sites. A comparison of Harris County ditch sites both upstream and downstream of impacted sites shows that aquatic life uses are similar.

Not all flood control ditches in Harris County can be allowed to re-establish stream-side vegetation due to the increased chance of flooding. However, those that were left unmaintained do attain a higher aquatic life use. The finding of the UAA recommended

assigning aquatic life use categories based on the degree of ditch modifications. Channelized and concrete-lined ditches and channelized and maintained (no riparian or instream cover) ditches were determined to support a limited aquatic life use. Ditches that were channelized, but not maintained (riparian vegetation recovered to early successional trees) were determined to support an intermediate aquatic life use. Therefore, the commission adopts the language as proposed.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN are concerned about whether the designation of limited aquatic life use and corresponding dissolved oxygen criteria of 4.0 mg/L for various concrete lined ditches and streams in Harris County will negatively impact intermediate aquatic life ditches and streams that receive flow from limited aquatic life ditches and streams.

Response: The commission's water quality management program has a framework to address protection of downstream water quality standards that are more stringent than upstream. This is a common occurrence with other kinds of criteria, such as those for toxic pollutants. Under this approach, in permits and TMDLs, pollutant sources are evaluated and controlled so that different standards in affected water bodies are attained.

Comment: GBF notes that Appendix D has 50 additions of HCFCD concrete-lined ditches and streams for aquatic life uses and dissolved oxygen. GBF notes that this could cause review of these ditches and streams for nutrients if standard attainment for dissolved oxygen is not met.

Response: The commission acknowledges the concern that the addition of these ditches could cause the review of these water bodies for nutrients if dissolved oxygen is not met. In one recent study, the commission recognized the relationship between dissolved oxygen impairment and nutrient enrichment; and addressed it in a TMDL. The language is adopted as proposed.

Comment: EPA comments that TCEQ may wish to review the previously completed UAA for Dry Creek (1009) in Harris County. The upper boundary for the portion assigned a limited aquatic life use is proposed to change to HCFCD ditch K-145-05-00, 0.29 km upstream of Spring Cypress Road. In the UAA, this ditch appears to be several kilometers upstream from that stream.

Response: The location of Harris County Flood Control District ditch K-145-05-00 was verified by the Standards Implementation Team of the Water Quality Division. The commission adopts language as proposed.

Comment: BRA comments that they have collected information on a number of unclassified segments that are not included in Appendix D. Based on their review of the data, BRA recommends the following unclassified streams be included in Appendix D: Cedar Creek (1209), Middle Yegua Creek upstream and downstream of the confluence of Cross Creek (1212), Trimmier Creek (1216), Reese Creek (1217), South Rocky Creek (1217), and Deadman Creek downstream from the City of Abilene Waste Water Treatment Plant discharge point (1232).

Response: The commission has not had time to evaluate this recent data; and will evaluate it and gather more information, as needed. The commission notes this comment and may consider the inclusion of these streams in future triennial revisions.

Comment: BRA contends that according to data they have collected, Wickson Creek (1209) is an intermittent stream with perennial pools rather than a perennial stream.

Response: The commission is proposing no change to the Appendix D entry for Wickson Creek. At this time, no other evaluation of this stream in the form of a receiving water assessment or UAA has been performed. The commission has not had time to evaluate this recent data; and will evaluate it and gather more information, as needed. The comment requesting the stream's re-evaluation is noted and may be considered by the Water Quality Standards Group of the Water Quality Planning Division and the Standards Implementation Team of the Water Quality Division for the next triennial revision.

Comment: BRA contends that according to available data, Pecan Creek (1221) is an intermittent stream with perennial pools rather than a perennial stream. Because it is proposed as a perennial stream, BRA comments that the aquatic life use and dissolved oxygen criteria assigned are too high and the stream should be assigned a limited aquatic life use with a dissolved oxygen criteria of 3.0 mg/L.

Response: The commission is proposing no change to the Appendix D entry for Pecan Creek. At this time, no other evaluation of this stream in the form of a receiving water assessment or UAA has been performed. The commission has not had time to evaluate this recent data; and will evaluate it and gather more information, as needed. The comment requesting the stream's re-evaluation is noted and may be considered by the Water Quality Standards Group of the Water Quality Planning Division and the Standards Implementation Team of the Water Quality Division for the next triennial revision.

Comment: BRA contends that according to available data, Berry Creek (1248) is an intermittent stream with perennial pools rather than a perennial stream. Because it is proposed as a perennial stream, BRA comments that the aquatic life use and dissolved oxygen criteria assigned are too high and the stream should be assigned a limited aquatic life use with a dissolved oxygen criteria of 3.0 mg/L.

Response: At this time, no other evaluation of this stream in the form of a receiving water assessment or UAA has been performed. The commission has not had time to evaluate this more recent data; and will evaluate it and gather more information, as needed. The comment requesting the stream's re-evaluation is noted and may be considered by the Water Quality Standards Group of the Water Quality Planning Division and the Standards Implementation Team of the Water Quality Division for the next triennial revision.

Comment: Travis County Judge Samuel T. Biscoe files comment in support of the exceptional aquatic life use proposed for tributaries of Colorado River (1428) which include Dry Creek, Gilleland Creek, and Harris Branch.

Response: The commission notes this comment in support of site-specific criteria for unclassified tributaries of Segment 1428.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN support the designation of exceptional aquatic life use and corresponding dissolved oxygen criteria of 6.0 mg/L for the portion of Dry Creek (1428). Austin comments that the exceptional aquatic life designation should include some form of documentation or technical support.

Response: Flow status is based on field observations and geology. Two receiving water assessment reaches were chosen to characterize this stream because: (1) the stream is braided, (2) it crosses the level 4 Ecoregion, and (3) it crosses several members of Pleistocene era terrace deposits of the Colorado

River. The receiving water assessment locations chosen were the Pearce Lane and Wolf Road crossings.

Flow in Dry Creek was observed by staff at several locations on August 5, 2005 after an extended dry hot period. Backpack electrofishing and seine sampling from the Pearce Lane receiving water assessment resulted in 21 different species and 255 individuals despite difficult sampling conditions for both techniques. The region 32 index of biotic integrity score resulting from the data was 49, which correspond to an exceptional aquaticlife use for this location.

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the proposed change for the Lavaca River (1602) in Lavaca County that would decrease the dissolved oxygen criteria from 4.0 mg/L to 2.0 mg/L as a 24-hour average and 1.0 mg/L as a minimum from March 15th through October 15th. TPWD comments that in the Lavaca River, TCEQ took the unusual step of assigning a high aquatic life use, while setting seasonal dissolved oxygen criteria (2.0 mg/L average and 1.0 mg/L minimum) for the period March 15th through October 15th. TPWD concurs that the upper Lavaca River warrants a high aquatic life use and does not object to seasonal dissolved oxygen criteria. However, their review of data in the UAA suggests that the existing dissolved oxygen criteria can be met during the spring and fall. Therefore, the lower dissolved oxygen criteria should only apply for the period July through September, rather than through the entire index period. TPWD recommends that the seasonal dissolved oxygen criteria, 2.0 mg/L average and 1.0 mg/L minimum, be revised to apply from July 1st through September 30th.

Response: Dissolved oxygen concentrations are often influenced by the amount of flow present in the water body. A UAA conducted on the Lavaca River (Segment 1602) in 2005 and 2006 shows a positive relationship between flow and dissolved oxygen concentrations. Table 7 in the final use-attainability report demonstrates that when flows dropped in the early spring the dissolved oxygen also drops, and flows during the study did not begin to increase until early fall. Therefore, the commission adopts the proposed seasonal dissolved oxygen criteria of 2.0 mg/L as a 24-hour average and 1.0 mg/L as a 24-hour minimum apply from March 15th to October 15th.

Comment: SARA comments that the data collected seems to indicate that the dissolved oxygen content with limited aquatic life use for Salado Creek (1910) should be 3.0 mg/L rather than 4.0 mg/L.

Response: A UAA was conducted on Salado Creek (Segment 1910) in 2001-2002. All stations used in this study, including Station 12877, were considered to be representative of each flow regime type of Salado Creek. Data collected demonstrated that an intermediate aquatic life use with corresponding 24-hour average dissolved oxygen criteria of 4.0 mg/L is appropriate for this portion of Salado Creek. The commission would need additional biological, physical, and chemical data in order to alter the commission's current recommended aquatic life use and dissolved oxygen criteria as they are currently listed in Appendix D. The commission adopts the language as proposed.

Appendix E - Site-specific Toxic Criteria

Comment: TPWD comments that they have long had concerns about the site-specific standards for selenium under consideration for Dixon Creek (101) in Hutchison County. Therefore, TPWD supports TCEQ's decision to revoke these site-specific standards.

Response: The commission notes this comment related to the removal of the site-specific selenium standard for Dixon Creek.

Comment: EPA comments that the site-specific criteria for lead in Big Cypress Creek (0404) may not represent the dissolved fraction of the metal. EPA believes that these criteria have not been revised since its original adoption in 1995 and additional review may be needed as some of the newer toxicity tests may have measured the dissolved lead portion.

Response: The commission has not proposed changes to this portion of Appendix E. The comment is noted and may be re-evaluated during the next triennial revision.

Comment: EPA comments that the description of Buck Creek (0604) seems to represent a considerably longer reach than would be implemented as a mixing zone. EPA believes the confluence of Buck Creek and Segment 0604 is over ten miles from the point of discharge and recommend revising the site description.

Response: The Angelina and Neches River Authority describes Buck Creek as intermittent with pools above the unnamed tributary that receives the discharge from Lufkin Industries. Therefore, no mixing zone is allowed in Buck Creek, and during normal low-flow conditions the effluent from the discharger makes up all of the flow in Buck Creek downstream of Lufkin Industries' discharge point. In similar situations, the EPA has allowed the water-effect ratio study results to apply from the point of discharge downstream to the first perennial water body. However, the commission recognizes that this leads to an unusually long reach. The commission modified and adopted the language placing the lower boundary of the reach at the confluence of Buck Creek with Clayton Creek in Angelina County.

Appendix F - Site-specific Nutrient Criteria for Selected Reservoirs

NOTE: There were comments that directly addressed nutrients in §307.7. However, most of the comments are in reference to §307.10 Appendix F and are addressed in this section.

Comment: Sierra Club, Public Citizen, TBBU, SEED, WE CAN, PLTA, NWF, TPWD, and TCA support the adoption of numerical nutrient standards; however, they are concerned about the methodology used to set the numerical standards. TCA is also concerned about the water bodies in the state that will still have no numerical nutrient standards. Sierra Club, Public Citizen, TBBU, SEED, WE CAN, and PLTA urge the TCEQ to move forward with numeric nutrient criteria for rivers and streams in the next triennial revision. OPIC recommends TCEQ take note of a recent proposal by EPA to regulate nutrients in Florida and consider it a model for Texas.

WEAT and Harris County comment that the proposed revisions mark the completion of an important step. In the future revisions to the standards, Harris County suggests the TCEQ consider establishing more sensitive measures of nutrient impairment in lakes and impoundments. TACWA, TDA, and PHA appreciate the extensive work by TCEQ to develop the proposed revisions.

Sierra Club, Public Citizen, TBBU, SEED, and WE CAN note that adoption of nutrient standards for bodies of water, other than reservoirs, is required by federal law; and urges TCEQ to move expeditiously during the next revision of water quality standards to develop and adopt protective nutrient standards for those other bodies of water. OPIC strongly supports the beginning of the process of establishing numerical nutrient requirements for Texas waterways.

Response: The commission appreciates the support of the public and stakeholders in the efforts toward numeric nutrient criteria development for the State of Texas. Nutrient criteria are complex in such a large and diverse state. The methodologies presented in the rules for reservoir nutrient criteria are the culmination of years of work by the commission staff and stakeholders. The commission and interested parties held many workgroups examining methodologies and concerns. The commission will work toward further development of nutrient criteria for water bodies of the state and further refine the numeric nutrient reservoir criteria presented in the rules. This will include an evaluation of methods to develop nutrient criteria that have been used in other states.

Comment: BRA, SRA, SARA, Fox Dairy, Heifer Ranch at Arroyo Seco, High Plains Dairy Counsel, Legacy Farms, Texas State Representative Sid Miller, HCFCD, T/K, PCG, Hamilton, Farmers Branch, TSSWCB, TSCRA, TFB, TIP, GBF, BCFB, LOCFB, the Association of Texas Soil and Water Conservation Districts, and 74 Soil and Water Conservation Districts filed comments in general support of using chlorophyll a criteria as proposed in §307.9(e)(7) and Appendix F as long as total phosphorus and transparency verify that there is an actually water body impairment. SARA also supports the secondary screening criteria, because there currently is no accreditation program for chlorophyll a and current analytical methods for that constituent are not particularly robust. SRA suggests a better approach would be to utilize both secchi disk transparency and total phosphorus for confirming non-support, and the best approach would be with secchi disk transparency that can be shown to be directly correlated with elevated chlorophyll a values. WEAT and SRA suggest retaining the present structure of Appendix F, but use the chlorophyll a values in the alternative proposal. A second alternative suggested by WEAT is to use chlorophyll a as they are proposed in Appendix F, but require confirmation based on both total phosphorus and transparency.

Sierra Club, Public Citizen, TBBU, SEED, WE CAN, Texas State Representative Valinda Bolton, Uncertain, CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, Austin, SOSA, PLTA, Volente, and CLI support the development of numerical nutrient criteria, but comment that total phosphorus and transparency should not be used as an additional test to determine water body impairment. TPWD, NWF, and LCRA have general concerns about the current total phosphorous reporting limit of 0.06 mg/L, which they comment is too high to be effective.

TPWD has compared the likelihood of flagging reservoirs with significant changes to the likelihood of identifying reservoirs as impaired using the TCEQ's proposed chlorophyll a criteria and total phosphorus screening levels. TPWD commented that their analysis of the data provided compelling evidence that the TCEQ procedure requiring both total phosphorus and chlorophyll a lack sufficient power to detect obvious change in the reservoirs. TPWD would prefer an approach where high levels of total phosphorus or high levels of chlorophyll a, or low transparency or moderate levels of any two parameters, would flag a reservoir.

TCC notes that the term "supplemental screening levels" is used in §307.7(b)(4)(E) without a description of how they are to be used. TCC recommends adding a definition of this term in §307.3 and cite §307.9(e)(7) to describe how the levels will be used in assessing the nutrient quality of reservoirs and lakes listed in Appendix F. WEAT recommends that the role of the secondary screening parameters in the event of a CWA, §303(d) listing for nutrients be more fully defined. WEAT comments that there should not be a requirement to achieve compliance with secondary screening parameters to fulfill TMDL requirements because they may be due to natural geologic conditions.

EPA states that "based on the federal regulation at 40 CFR §130.7(b), states must identify water quality limited segments where other pollution control requirements are not stringent enough to implement any water quality standards, inclusive of all numeric criteria; given that chlorophyll a criteria are 'applicable' as water quality standards under these regulations." EPA expects that use attainment decisions be based on the assessment of these criteria, irrespective of associated indicator screening levels. EPA comments that the use of supplemental screening may not be as protective as a single criterion, preferably a causal criterion such as total phosphorus or total nitrogen. Harris County also suggests future refinements to the standards should focus on causal variables such as phosphorus.

Response: The commission appreciates comments on the proposed nutrient criteria and other alternative criteria (stand alone chlorophyll *a* criteria) that were presented. The commission recognizes that some stakeholders prefer stand alone nutrient criteria for chlorophyll *a,* while other stakeholders prefer the use of total phosphorus and transparency as supplemental screening parameters.

The commission recognizes that data to assess eutrophication are highly variable and tend to exhibit cycles over multiple years that complicate the assessment. In addition, key parameters such as chlorophyll *a* and total phosphorus are often at levels that are near or below detection and limits; or minimum quantification levels. These difficulties are potentially lessened by the use of multiple parameters for assessment. However, there were also many comments and substantial concerns in opposition to the use of supplemental screening parameters to confirm nutrient impairment. The commission also recognizes that the statistical level of significance is difficult to determine when using parameters that are likely to be correlated.

In view of these concerns regarding secondary screening parameters, the commission deletes the proposed nutrient criteria based on secondary screening parameters and adopts the "stand alone" chlorophyll *a* nutrient criteria at the confidence level of 0.01 for reservoirs in Appendix F. The use of stand alone chlorophyll *a* criteria is also incorporated into the adopted versions §§307.3(a)(40), 307.7(b)(4)(E), and 307.9(e)(7). Other options to incorporate additional parameters for nutrient criteria will be considered by the commission for future nutrient criteria revisions.

Comment: Austin, Sierra Club, Public Citizen, TBBU, SEED, WE CAN, LCRA, Highland Lakes Group, Highland Lakes PAC, Lakeway, Texas State Representative Valinda Bolton, TPWD, and NWF oppose the language in Appendix F that would apply a 5.0 µg/L criterion for chlorophyll a to reservoirs with a calculated criterion of less than 5.0 µg/L. Travis County Judge Samuel T. Biscoe comments that this proposal is unacceptable and recommends that Appendix F reflect the necessity for special laboratory techniques for analysis of chlorophyll a and total phosphorus when a criterion is less than the general quantification level.

LCRA comments that TCEQ may want to use the model results they developed in evaluating the proposed chlorophyll a standard for Segment 1404 - Lake Travis and its watershed to test nutrient criteria. LCRA comments that the calculated criterion for Lake Travis is 3.31 µg/L and assessing it at the proposed 5.0 µg/L significantly decreases the level of protection in the reser-

voir. Accordingly, LCRA recommends that the high quality, low detection data from the Clean Rivers Program be used to assess the calculated criteria for Lake Travis.

PLTA comments that the proposed criteria for chlorophyll a are higher than ambient levels in Lake Travis and would result in degradation. PLTA supports LCRA's recommendation. PLTA comments that TCEQ needs to address the nutrient loading of the arms and coves of Lake Travis as well. Highland Lake PAC opposes any lowering of water quality standards in the Highland Lakes, Lake Travis in particular. Several individuals also filed comments opposing any weakening of water quality standards in Lake Travis. State Senator Kirk Watson also opposes raising the chlorophyll a standard in Lake Travis. Volente commented that the proposed numerical standard for chlorophyll a was not adequate to protect water quality in the Highland Lakes. Travis County Judge Samuel T. Biscoe files comments in support of the adoption of the numerical nutrient criteria, but opposed to the proposed nutrient criteria for Lady Bird Lake, Lake Austin, and Lake Travis.

BRA is concerned about the language regarding screening levels in the third paragraph of Appendix F, and suggests the paragraph creates confusion and could lead to misinterpretation. The low total phosphorus level of 0.04 mg/L could result in healthy low nutrient lakes being listed as impaired. BRA requests the screening values should be reflected in the table and removed from the text. Therefore, BRA recommends that Appendix F reflect the actual assessment values.

EPA, Austin, Sierra Club, Public Citizen, TBBU, SEED, WE CAN, TPWD, Texas State Representative Valinda Bolton, and NWF comment that the standard should be set at the calculated value. EPA suggests language on current detection limits could be omitted. Furthermore, they suggest screening level language should be moved to the Surface Water Quality Monitoring Program's Procedures Guidance for Assessing and Reporting Surface Water Quality in Texas, and detection limits for compliance purposes could be addressed in the Implementation Procedures, where there are already provisions for similar parameters.

Response: The commission is aware of the concerns regarding language presented in Appendix F with regard to screening level values for chlorophyll *a* and total phosphorus. The adopted language in Appendix F reflects the stand alone chlorophyll *a* criteria. The note on minimum chlorophyll *a* level has been slightly revised to indicate the minimum default value is based on historical quantification levels. For the table in Appendix F, the commission incorporates a chlorophyll *a* level of 5 µg/L for the minimum default criteria.

Historical data that were used for the calculation often had minimum quantification levels and reporting levels above current chlorophyll *a* reporting values. The default to 5 µg/L is necessary in order to address this higher reporting level in much of the data used in nutrient criteria development. Even with these limitations, the default criteria of 5 µg/L chlorophyll *a* provides a general level of protection for clearer reservoirs. The commission notes that this concentration is lower than the minimum concentration of chlorophyll *a* criteria for those that have been developed for other states, such as for Florida lakes. The commission acknowledges that this approach is of concern to some commenters and the commission will evaluate ways to improve criteria for clear reservoirs, such as non-parametric statistical techniques and additional evaluation of chlorophyll *a* minimum quantification levels. This evaluation will be facilitated where reservoirs, such as the Highland Lakes, have substantial historical data.

To avoid confusion, the default chlorophyll *a* criteria are listed in the table in Appendix F for assessment purposes. For those reservoirs with default criteria, the calculated values are shown in parenthesis.

Comment: IBWC opposes the site-specific nutrient criteria and screening levels for reservoirs in the Rio Grande Basin. Based on review of the available data, IBWC believes that the criteria and screening should be less stringent for Segment 2303 - International Falcon Reservoir, 2305 - International Amistad Reservoir, and 2312 - Red Bluff Reservoir. IBWC requests a thorough review of the chlorophyll a criteria and total phosphorus screening levels for these segments to ensure the appropriateness of the proposed nutrient criteria.

Response: The commission recognizes IBWC's role in water quality management of the Rio Grande. Therefore, in response to their comments, the proposed adoption of nutrient criteria for International Falcon Reservoir (Segment 2303) and International Amistad Reservoir (Segment 2305) were deleted, pending future coordination and consideration. The commission appreciates that these large reservoirs are international boundary waters directly on the Rio Grande River. The commission is adopting a chlorophyll *a* criteria for Red Bluff Reservoir (Segment 2312) since this reservoir is a long distance (>300 stream miles) from the Rio Grande.

Comment: TPWD supports the TCEQ's efforts in §307.7(b)(4)(E) to establish nutrient criteria for reservoirs. However, TPWD does not support the statistical methodology used for setting the criteria and suggest the TCEQ use the methodology proposed by TPWD. TPWD's methodology is based on non-parametric control charts that evaluate the 90th percentile of chlorophyll a. TPWD suggests that their methodology is less sensitive to non-detect measurements and better reflects the effects of algal blooms. TPWD also notes that unlike TCEQ's proposed methods, their approach does not require the assumption of a normal distribution.

Overall, TPWD states that the TCEQ's approach is too cautious and will fail to identify and address problematic situations before they are extreme. TPWD is concerned that the proposed approach fails to address the antidegradation intent of the CWA, as it is likely to allow the trophic state of reservoirs to change. TPWD suggests that TCEQ look for a new approach that is statistically defensible and has more power to detect changes.

OPIC questions the methodology used to determine the numeric nutrient criteria and recommends using the TPWD methodology. LCRA does not agree with the stand alone approach and supports the TPWD proposed non-parametric method for developing standards for Texas reservoirs. Harris County also supports use of the TPWD method presented above, but suggests these refinements should be addressed after adoption of currently proposed nutrient criteria.

Response: The commission appreciates TPWD's unusual efforts in evaluating nutrient criteria options for Texas reservoirs. There would be some advantages to non-parametric statistical techniques to define criteria from historical data sets, particularly the lack of reliance on a statistical distribution as well as the reduced effect of measurements below quantification levels. Commission staff reviewed TPWD's control chart approaches as well as other non-parametric statistical approaches to derive nutrient criteria from historical data. At this time, the commission's

reviews and evaluations indicate that the relatively straight-forward proposed approach that incorporates variability around a mean is an appropriate starting point for initiating nutrient criteria for Texas reservoirs. The use of a 90th percentile for a control chart analysis is less intuitive to those that will be using these criteria, and the commission is unaware of a control chart analysis or similar approach that is being used for criteria development in other states or by EPA. The procedures to evaluate standards attainment using a control chart are not particularly difficult, but these procedures are relatively specialized and unfamiliar to most stakeholders in the water quality arena. In addition, preliminary analyses and literature reviews suggest that statistical uncertainty can be substantial when estimating the scalar value of the 90th percentile of modest datasets with high variability. This uncertainty would need to be further evaluated and addressed. A criterion based on a 90th percentile can also be more difficult to evaluate when reviewing regulatory actions that affect nutrient loads. The commission will continue to coordinate with TPWD, other stakeholders, and experts in eutrophication analysis in order to develop nutrient criteria for other types of water bodies and to expand and improve nutrient criteria for reservoirs. However, the commission does not adopt the methodology suggested by TPWD as part of this rulemaking.

Comment: If TCEQ chooses to retain the method currently proposed, TPWD recommends TCEQ consider having tiered false positive rates to allow for screening; increase sample sizes used in the assessment; switch from using a two-tailed interval to a one-tailed interval; and/or ascertain if there is structure in the data that can be exploited to reduce the variability.

Response: The commission appreciates TPWD's efforts in evaluating the proposed nutrient criteria. Some of these suggestions are beyond the scope of the current rulemaking. However, commission staff will consider them in future development and re-evaluation of nutrient criteria. The commission also concurs that larger sample sizes are statistically beneficial for assessment purposes and will continue to maximize data collection efforts within the constraints of available resources. At this time, the commission does not incorporate these suggestions into the adopted nutrient criteria. However, the procedures for assessing attainment of nutrient criteria will continue to be reviewed by the commission.

Comment: BRA and SRA have expressed concerns regarding the elimination of values as "outliers" when they may actually be representative data. SRA does not agree with methodology that excludes values by statistical analysis alone.

Response: The commission acknowledges that this is a reasonable concern. However, the approach to identify outliers using Tukey Box Plot is a common statistical practice. Outlier exclusion was needed to avoid excessive outlier effects on smaller datasets, where one error can heavily bias the ultimate result. In general, the effect on the calculated criteria of removing a relative small number of outliers is minimal.

Comment: Overall, TPWD and BRA are supportive of the use of other causative factors, such as nitrate and orthophosphate. BRA recommends that the TCEQ consider using orthophosphate instead of total phosphorus for the phosphorus screening level since orthophosphate phosphorus is the most biologically available phosphorus compound and readily utilized by algal communities. BRA comments that since the goal is to protect lakes showing signs of advance eutrophication from further degradation; and since algal communities may be nutrient limited for phosphorus and nitrogen, they recommend including a screening level for nitrate or total Kjeldahl nitrogen.

Response: The commission agrees that the use of readily available forms of nutrients, such as orthophosphate and nitrate, may have some advantages in assessing eutrophication, such as assessing short-term growth potential at a particular point in time. The available forms can also be important components of some eutrophication models. However, both nitrate and orthophosphate are relatively transitory and variable in comparison to total forms of nutrients. Sometimes a high proportion of phosphorus can be bound up in phytoplankton algae and rapidly recycled, so that the overall algal density might be substantial even though the orthophosphate remains relatively low. The use of total phosphorus or total nitrogen facilitates assessing long-term trophic status and establishing controls on nutrient loads where needed. In addition, for many reservoirs concentrations of phosphorus are often below quantification levels and this problem is exacerbated when measuring orthophosphates. The commission also agrees that measurements of total nitrogen (including Kjeldahl nitrogen) or nitrate are also potentially useful for screening purposes. At the present time, there are insufficient nitrogen data to historically evaluate screening values for many reservoirs in Texas, and the commission is exploring ways to expand the available nitrogen data for future monitoring efforts. The commission also notes that EPA recommends that nutrient criteria for phosphorus be expressed as total phosphorus, and this has generally been the approach that's been employed for criteria development in other states. As explained in other responses, the initial set of nutrient criteria are adopted for chlorophyll *a,* and supplemental screening of phosphorus values is not included. However, in the future, the commission and stakeholders will have an opportunity to further evaluate appropriate ways to apply phosphorus and nitrogen to nutrient criteria.

Comment: EPA requests that the TCEQ provide further explanation whether all existing uses for the selected reservoirs can be maintained with the proposed numeric criteria. EPA requests an explanation from TCEQ regarding why the available data approach was chosen over the more commonly used approaches to criteria development, such as reference water bodies. EPA questions whether the criteria that would apply to the following reservoirs would be protective of their designated uses: Lake Tanglewood, Lake Tawakoni, Lake Murvaul, Lake Palestine, Lake Livingston, Lake Worth, Eagle Mountain Reservoir, Bardwell Reservoir, Cedar Creek Reservoir, White Rock Lake, Lake Arlington, Benbrook Lake, Lake Conroe, Lake Granbury, Sommerville Lake, Proctor Lake, Lake Waco, Buffalo Springs Lake, Brady Creek Reservoir, O.C. Fisher Reservoir, and Red Bluff Reservoir.

In general, the EPA does not support chlorophyll a criteria above 20 µg/L, unless there is demonstration that these values are protective of designated uses. EPA comments that reliance on historical data does not necessarily improve water quality in reservoirs. EPA states that if declining water quality trends were captured in a data set, it could be argued that the proposed criteria was not protective, but only reflect water bodies in the process of eutrophication. EPA believes the intent should be protection and improvement in water quality, not maintaining the status of declining water quality. NWF also comments that the numerical standards are not sufficiently protective, particularly for those reservoirs already experiencing relatively high levels of chlorophyll a (over 20 µg/L). Lubbock asks TCEQ to review the proposed chlorophyll a criterion for Segment (1241) - Buffalo Springs Lake. Lubbock comments that the pre-1990 data is

not reliable and should not be used to calculate the chlorophyll a criterion.

Response: The commission responds that it is not extraordinary for even the mean chlorophyll *a* concentrations of Texas reservoirs to exceed 20 µg/L. When statistical variability is accounted for, many of the applicable criteria are above 20 µg/L, as noted by EPA and NWF. The commission's advisory workgroup on nutrient criteria generally recommended that criteria be developed for as many reservoirs as reasonably possible using historical data. The commission also notes that EPA's national guidance criteria for nutrients were not based on concentrations that were known to be related to water quality uses, but rather were selected as arbitrary percentiles of historical data from large aggregate ecoregions. The commission intends to continue exploring improved methods to categorize reservoirs into groups so that "least impacted" reference reservoirs can be identified and compared to other reservoirs in their group; and identify and address any reservoirs that might demonstrate an increase in eutrophication due to anthropogenic sources of nutrients. In response to this comment and in response to a concern expressed by the City of Lubbock, the commission is deleting the proposed nutrient criteria for Buffalo Springs Lake, since this small, unclassified reservoir exhibits particularly high chlorophyll *a* concentrations. For reservoirs with adopted criteria above 20 µg/L, the commission will coordinate with EPA during the federal review of the revisions to provide additional information and analyses concerning historical data patterns, sources of nutrient loadings, and other relevant information.

Comment: BRA asks the TCEQ to consider more leniencies in nutrient levels for lakes not currently exhibiting signs of eutrophication in setting minimum values to allow for natural lake development.

Response: Texas reservoirs in general show slow rates of natural eutrophication and trends are not generally apparent. There was no clear method to consider the small effects of natural aging. However, to partly address this concern relatively recent historical data were used to calculate nutrient criteria when sufficient data were available.

Comment: After reviewing available data, TPWD requests that TCEQ explain the methodology that was used in deriving criteria and screening levels; and demonstrate that both methods are protective. TPWD also requests that TCEQ conduct simulations to test the ability of any proposed methodology to discriminate between ambient and altered environments, as TPWD did using the original data set for chlorophyll a.

TPWD comments that examination of the new TCEQ dataset suggests that significant changes in chlorophyll a concentrations have occurred since 2004 at most reservoirs and they are concerned that the TCEQ analysis has not dealt with this appropriately.

BRA, Lubbock, SRA and WEAT are concerned about some of the data used to develop the proposed nutrient standards. BRA states that some of the historical data collected in the 1970's and 1980's is unreliable because they date before the development and implementation of laboratory and program quality control standards. Furthermore, SRA suggest data from 2004-2008 only should be used in developing reservoir criteria for the Sabine Basin. BRA and SRA recommends using only the recent data with verifiable methodologies and quality control in calculating the nutrient standards. WEAT suggests changes to Appendix F to minimize the unintended effects of using data not analyzed with improved current analytical methods.

Response: In response to concerns about using screening parameters, the commission deleted the proposed screening levels as previously discussed in earlier responses. The methodology for deriving criteria is explained in Appendix F.

The commission notes that the nutrient advisory workgroup recommended that criteria be developed and applied to as many reservoirs as reasonably possible. When insufficient data were available for this period for a particular reservoir, the commission added data for the entire period of record. This approach was taken because stakeholders expressed serious concerns about including only historical data, due to changes in chlorophyll *a* collection and analysis. However, in response to the comments concerned about trends over time in reservoirs, the commission re-evaluated the data used for criteria calculations. This re-evaluation indicated trends over time that appear to be anomalous and potentially artificial for the following 15 reservoirs: Lake Meredith (Segment 0102), Farmers Creek Reservoir (Segment 0210), Diversion Lake (Segment 0215), Lake Mackenzie (Segment 0228), Lake O' the Pines (Segment 0403), Lake Arlington (Segment 0828), Lake Weatherford (Segment 0832), Lake Amon G. Carter (Segment 0834), Lake Houston (Segment 1002), Leon Reservoir (Segment 1224), Lake Palo Pinto (Segment 1230), Fort Phantom Hill Reservoir (Segment 1236), Inks Lake (Segment 1407), E. V. Spence Reservoir (Segment 1411), and Lake Brownwood (Segment 1418). Therefore, the proposed nutrient criteria for these 15 reservoirs were deleted from the adopted standards. The commission may continue criteria development for these reservoirs in the future.

Comment: One individual noted that EPA's Algal Assay Bottle test might be helpful in resolving the nutrient/chlorophyll/algae dilemma.

Response: The commission notes that data from nutrient enrichment tests are available for some reservoirs. These results can be useful in assessing nutrient sensitivity and defining the limiting nutrients. At this stage, the available enrichment information on Texas reservoirs is insufficient to use in adjusting nutrient criteria.

Comment: CLACC, GCLAT, LGCLA, FCLNWR, EIP, CW Action, TCE, Uncertain, and CLI question why different lakes in the same watershed have different chlorophyll a criteria and why the criteria cannot be applied basin wide.

Response: The commission worked in conjunction with stakeholder workgroups and examined independent studies of reservoirs to develop classification based nutrient criteria. Texas reservoirs are highly variable systems, even within the same watershed or ecoregion, and this has complicated the development of criteria across groups of reservoirs. The initial set of reservoir nutrient criteria is therefore established for individual reservoirs. The commission will continue to explore approaches to effectively categorize reservoirs into groups.

Appendix G - Site-specific Recreational Uses and Criteria for Unclassified Water Bodies

Comment: Sierra Club, Public Citizen, TBBU, SEED, and WE CAN oppose the designation of Brickhouse Gully/Bayou and the two unnamed tributaries of Whiteoak Bayou as "secondary contact recreation 1" and believes these water bodies should continue to be presumed for contact recreation at this time. Sierra Club, Public Citizen, TBBU, SEED, and WE CAN also ques-

tion the adequacy of the UAAs conducted to make the proposed changes. EPA also comments that they have received UAAs on these unclassified water bodies and will initiate review in the near future.

Response: Site-specific recreational uses and criteria for these three water bodies are appropriate since the recreational UAA followed the recreational UAA procedures and was submitted to EPA for review and preliminary approval. The commission notes that EPA received the UAA for these three water bodies and will initiate review in the near future. EPA has indicated to the commission that the proposed recreational uses and associated criteria and the recreational UAA procedures are acceptable. The commission notes that designating site-specific recreational uses for certain water bodies is appropriate due to contact recreation being broadly presumed for all Texas surface waters, with the exception of eight water bodies, such as ship channels, in the 1980's and 1990's. The commission adopts Appendix G as proposed.

STATUTORY AUTHORITY

These amendments are adopted under the Texas Water Code, §26.023, that provides the Texas Commission on Environmental Quality with the authority to make rules setting Texas Surface Water Quality Standards (TSWQS) for all waters in the state. These amendments are also being adopted under Texas Water Code, §5.103, that authorizes the commission to adopt any rules necessary to carry out its powers and duties under the Texas Water Code and other laws of this state. The adopted amendments will satisfy the provision in Federal Clean Water Act, §303(c) that requires states to adopt water quality standards and to review and revise standards from time to time, but at least once each three year period. The revisions to the TSWQS are adopted to incorporate new information and studies on the appropriate uses and criteria of individual water bodies, to incorporate new scientific data on the effects of specific chemicals and pollutants, and to address new provisions in the Texas Water Code, federal regulations, and guidance of the EPA.

These amendments implement the Texas Water Code, §§5.103, 26.003, 26.023, and 26.026 in addition to Federal Clean Water Act, §303(c). No other codes or statutes will be affected by this adoption.

§307.2. Description of Standards.

(a) Contents of the Texas Surface Water Quality Standards.

(1) Section 307.1 of this title (relating to General Policy Statement) contains the general standards policy of the commission.

(2) This section lists the major sections of the standards, defines basin classification categories, describes justifications for standards modifications, and provides the effective dates of the rules.

(3) Section 307.3 of this title (relating to Definitions and Abbreviations) defines terms and abbreviations used in the standards.

(4) Section 307.4 of this title (relating to General Criteria) lists the general criteria that are applicable to all surface waters of the state unless specifically excepted in §307.8 of this title (relating to Application of Standards) or §307.9 of this title (relating to Determination of Standards Attainment).

(5) Section 307.5 of this title (relating to Antidegradation) describes the antidegradation policy and implementation procedures.

(6) Section 307.6 of this title (relating to Toxic Materials) establishes criteria and control procedures for specific toxic substances and total toxicity.

(7) Section 307.7 of this title (relating to Site-Specific Uses and Criteria) defines appropriate water uses and supporting criteria for site-specific standards.

(8) Section 307.8 of this title (relating to the Application of Standards) sets forth conditions when portions of the standards do not apply - such as in mixing zones or below critical low-flows.

(9) Section 307.9 of this title describes sampling and analytical procedures to determine standards attainment.

(10) Section 307.10 of this title (relating to Appendices A - G) lists site-specific standards and supporting information for classified segments (Appendices A and C), water bodies that are sole-source surface drinking water supplies (Appendix B), site-specific uses and criteria for unclassified water bodies (Appendix D), site-specific toxic criteria that may be derived for any water in the state (Appendix E), chlorophyll *a* criteria for selected reservoirs (Appendix F), and site-specific recreational uses and criteria for unclassified water bodies (Appendix G). Specific appendices are as follows:

(A) Appendix A - Site-specific Uses and Criteria for Classified Segments;

(B) Appendix B - Sole-source Surface Drinking Water Supplies;

(C) Appendix C - Segment Descriptions;

(D) Appendix D - Site-specific Uses and Criteria for Unclassified Water Bodies;

(E) Appendix E - Site-specific Toxic Criteria;

(F) Appendix F - Site-specific Nutrient Criteria for Selected Reservoirs; and

(G) Appendix G - Site-specific Recreational Uses and Criteria for Unclassified Water Bodies.

(b) Applicability. The Texas Surface Water Quality Standards apply to surface waters in the state - including wetlands.

(c) Classification of surface waters. The major surface waters of the state are classified as segments for purposes of water quality management and designation of site-specific standards. Classified segments are aggregated by basin, and basins are categorized as follows:

(1) River basin waters. Surface inland waters comprising the major rivers and their tributaries, including listed impounded waters and the tidal portion of rivers to the extent that they are confined in channels.

(2) Coastal basin waters. Surface inland waters, including listed impounded waters but exclusive of paragraph (1) of this subsection, discharging, flowing, or otherwise communicating with bays or the gulf, including the tidal portion of streams to the extent that they are confined in channels.

(3) Bay waters. All tidal waters, exclusive of those included in river basin waters, coastal basin waters, and gulf waters.

(4) Gulf waters. Waters that are not included in or do not form a part of any bay or estuary but that are a part of the open waters of the Gulf of Mexico to the limit of the state's jurisdiction.

(d) Modification of standards.

(1) The commission reserves the right to amend these standards following the completion of special studies.

(2) Any errors in water quality standards resulting from clerical errors or errors in data may be corrected by the commission through amendment of the affected standards. Water quality standards

not affected by such clerical errors or errors in data remain valid until changed by the commission.

(3) The narrative provisions, presumed uses, designated uses, and numerical criteria of the Texas Surface Water Quality Standards may be amended for a specific water body to account for local conditions. A site-specific standard is an explicit amendment to this title, Chapter 307 (Texas Surface Water Quality Standards), and adoption of a site-specific standard requires the procedures for public notice and hearing established under the Texas Water Code, §26.024 and §26.025. An amendment that establishes a site-specific standard requires a use-attainability analysis that demonstrates that reasonably attainable water-quality related uses are protected. Upon adoption, site-specific amendments to the standards will be listed in §307.10 of this title.

(4) Factors that may justify the development of site-specific standards are described in §§307.4, 307.6, 307.7, and 307.8 of this title.

(5) Temporary variance. When scientific information indicates that a site-specific standards amendment is justified, the commission may allow a corresponding temporary variance to the water quality standards in a permit for a discharge of wastewater or storm water.

(A) A temporary variance is only applicable to an existing permitted discharge.

(B) A permittee may apply for a temporary variance prior to or during the permit application process. The temporary variance request must be included in a public notice during the permit application process. An opportunity for public comment is provided, and the request may be considered in any public hearing on the permit application.

(C) A temporary variance for a Texas Pollutant Discharge Elimination System permit also requires review and approval by the United States Environmental Protection Agency (EPA) during the permitting process.

(D) The permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality, and the term of the permit must not exceed three years. Effluent limitations that are needed to meet the existing standards are listed in the permit and are effective immediately as final permit effluent limitations in the succeeding permit, unless the permittee fulfills the requirements of the conditions for the variance in the permit.

(E) When the permittee has complied with the terms of the conditions in the temporary variance, then the succeeding permit may include a permit schedule to meet standards in accordance with subsection (f) of this section. The succeeding permit may also extend the temporary variance in accordance with subsection (f) of this section in order to allow additional time for a site-specific standard to be adopted in this title. This extension can be approved by the commission only after a site-specific study that supports a standards change is completed and the commission agrees the completed study supports a change in the applicable standard(s).

(F) Site-specific standards that are developed under a temporary variance must be expeditiously proposed and publicly considered for adoption at the earliest opportunity.

(e) Standards implementation procedures. Provisions for implementing the water quality standards are described in a document entitled *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194) as amended and approved by the Texas Commission on Environmental Quality and EPA.

(f) Permit schedules to meet standards. Upon permit amendment or permit renewal, the commission may establish interim effluent limitations to allow a permittee time to modify effluent quality in order to attain final effluent limitations. The duration of any interim effluent limitations may not be longer than three years from the effective date of the permit issuance, except in accordance with a temporary variance as described in subsection (d)(5) of this section.

(g) Temporary standards. Where a criterion is not attained and cannot be attained for one or more of the reasons listed in 40 Code of Federal Regulations (CFR) §131.10(g), then a temporary standard for specific water bodies may be adopted in §307.10 of this title as an alternative to changing uses. A criterion that is established as a temporary standard must be adopted in accordance with the provisions of subsection (d)(3) of this section. Specific reasons and additional procedures for justifying a temporary standard are provided in the standards implementation procedures. A temporary standard must identify the water body or water bodies where the criterion applies. A temporary standard identifies the numerical criteria that apply during the existence of the temporary standard. A temporary standard does not exempt any discharge from compliance with applicable technology-based effluent limits. A temporary standard expires no later than the completion of the next triennial revision of the Texas Surface Water Quality Standards. When a temporary standard expires, subsequent discharge permits are issued to meet the applicable existing water quality standards. If a temporary standard is sufficiently justified in accordance with the provisions of subsection (d)(3) of this section, it can be renewed during revisions of the Texas Surface Water Quality Standards. A temporary standard cannot be established that would impair an existing use.

(h) Effective date of standards. Except as provided in 40 CFR §131.21 (EPA review and approval of water quality standards), these rules become effective 20 days after the date they are filed in the office of the secretary of state. As to actions covered by 40 CFR §131.21, the rules become effective upon approval by EPA.

(i) Effect of conflict or invalidity of rule.

(1) If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the provisions contained in this chapter that can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

(2) To the extent of any irreconcilable conflict between provisions of this chapter and other rules of the commission, the provisions of this chapter supersede.

§307.3. Definitions and Abbreviations.

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

(1) Acute toxicity--Toxicity that exerts a stimulus severe enough to rapidly induce an effect. The duration of exposure applicable to acute toxicity is typically 96 hours or less. Tests of total toxicity normally use lethality as the measure of acute impacts. (Direct thermal impacts are excluded from definitions of toxicity.)

(2) Ambient--Refers to the existing water quality in a particular water body.

(3) Aquatic vegetation--Refers to aquatic organisms, i.e., plant life, found in the water and includes phytoplankton; algae, both attached and floating; and vascular and nonvascular plants, both rooted and floating.

(4) Attainable use--A use that can be reasonably achieved by a water body in accordance with its physical, biological, and

chemical characteristics whether it is currently meeting that use or not. Guidelines for the determination and review of attainable uses are provided in the standards implementation procedures. The designated use, existing use, or presumed use of a water body may not necessarily be the attainable use.

(5) Background--Refers to the water quality in a particular water body that would occur if that water body were relatively unaffected by human activities.

(6) Bedslope--Stream gradient, or the extent of the drop in elevation encountered as the stream flows downhill. One measure of bedslope is the elevation decline in meters over the stream distance in kilometers.

(7) Best management practices--Schedules of activities, maintenance procedures, and other management practices to prevent or reduce the pollution of water in the state from point and nonpoint sources, to the maximum extent practicable. Best management practices also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

(8) Bioaccumulative--Describes a chemical that is taken up by aquatic organisms from water directly or through the consumption of food containing the chemical.

(9) Bioconcentration factor--A unitless value describing the degree to which a chemical can be concentrated in the tissues of an organism in the aquatic environment and that is absorbed directly from the water. The bioconcentration factor is the ratio of a chemical's concentration in the tissue of an organism compared to that chemical's average concentration in the surrounding water.

(10) Biological integrity--The species composition, diversity, and functional organization of a community of organisms in an environment relatively unaffected by pollution.

(11) Chronic toxicity--Toxicity that continues for a long-term period after exposure to toxic substances. Chronic exposure produces sub-lethal effects, such as growth impairment and reduced reproductive success, but it may also produce lethality. The duration of exposure applicable to the most common chronic toxicity test is seven days or more.

(12) Classified--Refers to a water body that is listed and described in Appendix A and Appendix C in §307.10 of this title (relating to Appendices A - G). Site-specific uses and criteria for classified water bodies are listed in Appendix A.

(13) Commission--Texas Commission on Environmental Quality.

(14) Criteria--Water quality conditions that are to be met in order to support and protect desired uses, i.e., existing, designated, attainable, and presumed uses.

(15) Critical low-flow--Low-flow condition that consists of the seven-day, two-year low-flow (7Q2 flow) or the alternative low-flows for spring-fed streams as discussed in §307.8(a)(2) of this title (relating to Application of Standards) and below which some standards do not apply.

(16) Designated use--A use that is assigned to specific water bodies in Appendix A, Appendix D, or Appendix G in §307.10 of this title. Typical uses that may be designated for specific water bodies include domestic water supply, categories of aquatic life use, recreation categories, and aquifer protection.

(17) Discharge permit--A permit issued by the state or a federal agency to discharge treated effluent or cooling water into waters of the state.

(18) Dry weather flows--Sustained or typical dry, warm-weather flows between rainfall events, excluding unusual antecedent conditions of drought or wet weather.

(19) EC_{50}--The concentration of a toxicant that produces an adverse effect on 50% of the organisms tested in a specified time period.

(20) *E. coli--Escherichia coli,* a subgroup of fecal coliform bacteria that is present in the intestinal tracts and feces of warm-blooded animals. It is used as an indicator of the potential presence of pathogens.

(21) Effluent--Wastewater discharged from any point source prior to entering a water body.

(22) Enterococci--A subgroup of fecal streptococci bacteria (mainly *Streptococcus faecalis* and *Streptococcus faecium)* that is present in the intestinal tracts and feces of warm-blooded animals. It is used as an indicator of the potential presence of pathogens.

(23) Epilimnion--The upper mixed layer of a lake (including impoundments, ponds, and reservoirs).

(24) Existing use--A use that is currently being supported by a specific water body or that was attained on or after November 28, 1975.

(25) Fecal coliform--A portion of the coliform bacteria group that is present in the intestinal tracts and feces of warm-blooded animals; heat tolerant bacteria from other sources can sometimes be included. It is used as an indicator of the potential presence of pathogens.

(26) Freshwaters--Inland waters that exhibit no measurable elevation changes due to normal tides.

(27) Halocline--A vertical gradient in salinity under conditions of density stratification that is usually recognized as the point where salinity exhibits the greatest difference in the vertical direction.

(28) Harmonic mean flow--A measure of mean flow in a water course that is calculated by summing the reciprocals of the individual flow measurements, dividing this sum by the number of measurements, and then calculating the reciprocal of the resulting number.

(29) Incidental fishery--A level of fishery that applies to water bodies that are not considered to have a sustainable fishery but that have an aquatic life use of limited, intermediate, high, or exceptional.

(30) Industrial cooling impoundment--An impoundment that is owned or operated by, or in conjunction with, the water rights permittee, and that is designed and constructed for the primary purpose of reducing the temperature and removing heat from an industrial effluent.

(31) Intermittent stream--A stream that has a period of zero flow for at least one week during most years. Where flow records are available, a stream with a 7Q2 flow of less than 0.1 cubic feet per second is considered intermittent.

(32) Intermittent stream with perennial pools--An intermittent stream that maintains persistent pools even when flow in the stream is less than 0.1 cubic feet per second.

(33) LC_{50}--The concentration of a toxicant that is lethal (fatal) to 50% of the organisms tested in a specified time period.

(34) Main pool station--A monitoring station that is located in the main body of a reservoir near the dam and not located in a cove or in the riverine portion or transition zone of a reservoir.

(35) Method detection limit--The minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte. The method detection limit (MDL) is estimated in accordance with 40 Code of Federal Regulations Part 136, Appendix B.

(36) Minimum analytical level--The lowest concentration that a particular substance can be quantitatively measured with a defined accuracy and precision level using approved analytical methods. The minimum analytical level is not the published MDL for a United States Environmental Protection Agency (EPA)-approved analytical method that is based on laboratory analysis of the substance in reagent (distilled) water. The minimum analytical level is based on analyses of the analyte in the matrix of concern (e.g., wastewater effluents). The commission establishes general minimum analytical levels that are applicable when information on matrix-specific minimum analytical levels is unavailable.

(37) Mixing zone--The area contiguous to a permitted discharge where mixing with receiving waters takes place and where specified criteria, as listed in §307.8(b)(1) of this title, can be exceeded. Acute toxicity to aquatic organisms is not allowed in a mixing zone, and chronic toxicity to aquatic organisms is not allowed beyond a mixing zone.

(38) Noncontact recreation--Activities that do not involve a significant risk of water ingestion, such as those with limited body contact incidental to shoreline activity, including birding, hiking, and biking. Noncontact recreation use may also be assigned where primary and secondary contact recreation activities should not occur because of unsafe conditions, such as ship and barge traffic.

(39) Nonpersistent--Describes a toxic substance that readily degrades in the aquatic environment, exhibits a half-life of less than 60 days, and does not have a tendency to accumulate in organisms.

(40) Nutrient criteria--Numeric and narrative criteria that are established to protect surface waters from excessive growth of aquatic vegetation. Nutrient numeric criteria for reservoirs are expressed in terms of chlorophyll *a* concentration per unit volume as a measure of phytoplankton density.

(41) Nutrient--A chemical constituent, most commonly a form of nitrogen or phosphorus, that in excess can contribute to the undesirable growth of aquatic vegetation and impact uses as defined in this title.

(42) Oyster waters--Waters producing edible species of clams, oysters, or mussels.

(43) Persistent--Describes a toxic substance that is not readily degraded and exhibits a half-life of 60 days or more in an aquatic environment.

(44) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(45) Point source--Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants or wastes are or may be discharged into or adjacent to any water in the state.

(46) Presumed use--A use that is assigned to generic categories of water bodies (such as perennial streams). Presumed uses are superseded by designated uses for individual water bodies in Appendix A, Appendix D, or Appendix G of §307.10 of this title.

(47) Primary contact recreation--Activities that are presumed to involve a significant risk of ingestion of water (e.g. wading by children, swimming, water skiing, diving, tubing, surfing, and the following whitewater activities: kayaking, canoeing, and rafting).

(48) Protection zone--Any area within the watershed of a sole-source surface drinking water supply that is:

(A) within two miles of the normal pool elevation of a body of surface water that is a sole-source surface drinking water supply;

(B) within two miles of that part of a perennial stream that is:

(i) a tributary of a sole-source surface drinking water supply; and

(ii) within three linear miles upstream of the normal pool elevation of a sole-source surface drinking water supply; or

(C) within two miles of that part of a stream that is a sole-source surface drinking water supply, extending three linear miles upstream from the water supply intake (Texas Water Code, §26.0286).

(49) Public drinking water supply--A water body designated to provide water to a public water system as defined in Chapter 290 of this title (relating to Public Drinking Water).

(50) Saltwater--A coastal water that has a measurable elevation change due to normal tides. In the absence of tidal information, saltwater is generally considered to be a coastal water that typically has a salinity of two parts per thousand or greater in a significant portion of the water column.

(51) Salinity--The total dissolved solids in water after all carbonates have been converted to oxides, all bromide and iodide have been replaced by chloride, and all organic matter has been oxidized. For most purposes, salinity is considered equivalent to total dissolved salt content. Salinity is usually expressed in parts per thousand.

(52) Seagrass propagation--A water-quality-related existing use that applies to saltwater with significant stands of submerged seagrass.

(53) Secondary contact recreation 1--Activities that commonly occur but have limited body contact incidental to shoreline activity (e.g. fishing, canoeing, kayaking, rafting and motor boating). These activities are presumed to pose a less significant risk of water ingestion than primary contact recreation but more than secondary contact recreation 2.

(54) Secondary contact recreation 2--Activities with limited body contact incidental to shoreline activity (e.g. fishing, canoeing, kayaking, rafting and motor boating) that are presumed to pose a less significant risk of water ingestion than secondary contact recreation 1. These activities occur less frequently than secondary contact recreation 1 due to physical characteristics of the water body or limited public access.

(55) Segment--A water body or portion of a water body that is individually defined and classified in Appendices A and C of §307.10 of this title in the Texas Surface Water Quality Standards. A segment is intended to have relatively homogeneous chemical, physical, and hy-

drological characteristics. A segment provides a basic unit for assigning site-specific standards and for applying water quality management programs of the agency. Classified segments may include streams, rivers, bays, estuaries, wetlands, lakes, or reservoirs.

(56) Settleable solids--The volume or weight of material that settles out of a water sample in a specified period of time.

(57) Seven-day, two-year low-flow (7Q2)--The lowest average stream flow for seven consecutive days with a recurrence interval of two years, as statistically determined from historical data. As specified in §307.8 of this title, some water quality standards do not apply at stream flows that are less than the 7Q2 flow.

(58) Shellfish--Clams, oysters, mussels, crabs, crayfish, lobsters, and shrimp.

(59) Sole-source surface drinking water supply--A body of surface water that is identified as a public water supply in rules adopted by the commission under Texas Water Code, §26.023 and is the sole source of supply of a public water supply system, exclusive of emergency water connections (Texas Water Code, §26.0286).

(60) Standard Methods for the Examination of Water and Wastewater--A document describing sampling and analytical procedures that is published by the American Public Health Association, American Water Works Association, and Water Environment Federation. The most recent edition of this document is to be followed whenever its use is specified by these rules.

(61) Standards--Desirable uses (i.e., existing, attainable, designated, or presumed uses as defined in this title) and the narrative and numerical criteria deemed necessary to protect those uses in surface waters.

(62) Standards implementation procedures--Methods and protocols in the guidance document *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194), as amended and approved by the commission and EPA.

(63) Storm water--Rainfall runoff, snow melt runoff, surface runoff, and drainage.

(64) Storm water discharge--A point source discharge that is composed entirely of storm water associated with an industrial activity, a construction activity, a discharge from a municipal separate storm sewer system, or other discharge designated by the agency.

(65) Stream order--A classification of stream size, where the smallest, unbranched tributaries of a drainage basin are designated first order streams. Where two first order streams join, a second order stream is formed; and where two second order streams join, a third order stream is formed, etc. For purposes of water quality standards application, stream order is determined from United States Geological Survey topographic maps with a scale of 1:24,000.

(66) Surface water in the state--Lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state as defined in the Texas Water Code, §26.001, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all water-courses and bodies of surface water, that are wholly or partially inside or bordering the state or subject to the jurisdiction of the state; except that waters in treatment systems that are authorized by state or federal law, regulation, or permit, and that are created for the purpose of waste treatment are not considered to be water in the state.

(67) Sustainable Fisheries--Descriptive of water bodies that potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish. Sustainable fisheries include perennial streams and rivers with a stream order of three or greater; lakes and reservoirs greater than or equal to 150 acre-feet or 50 surface acres; all bays, estuaries, and tidal rivers. Water bodies that are presumed to have sustainable fisheries include all designated segments listed in Appendix A unless specifically exempted.

(68) Thalweg--The deepest portion of a stream or river channel cross-section.

(69) Tidal--Descriptive of coastal waters that are subject to the ebb and flow of tides. For purposes of standards applicability, tidal waters are considered to be saltwater. Classified tidal waters include all bays and estuaries with a segment number that begins with 24xx, all streams with the word tidal in the segment name, and the Gulf of Mexico.

(70) To discharge--Includes to deposit, conduct, drain, emit, throw, run, allow to seep, or otherwise release or dispose of, or to allow, permit, or suffer any of these acts or omissions.

(71) Total Maximum Daily Load (TMDL)--The total amount of a substance that a water body can assimilate and still meet the Texas Surface Water Quality Standards.

(72) Total dissolved solids--The amount of material (inorganic salts and small amounts of organic material) dissolved in water and commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to the term filterable residue, as used in 40 Code of Federal Regulations Part 136 and in previous editions of the publication entitled, *Standard Methods for the Examination of Water and Wastewater.*

(73) Total suspended solids--Total suspended matter in water, which is commonly expressed as a concentration in terms of milligrams per liter. The term is equivalent to nonfilterable residue, as used in 40 Code of Federal Regulations Part 136 and in previous editions of the publication entitled, *Standard Methods for the Examination of Water and Wastewater.*

(74) Total toxicity--Toxicity as determined by exposing aquatic organisms to samples or dilutions of instream water or treated effluent. Also referred to as whole effluent toxicity or biomonitoring.

(75) Toxic equivalency factor (TEF)--A factor to describe an order-of-magnitude consensus estimate of the toxicity of a compound relative to the toxicity of 2,3,7,8-tetraclorodibenzo-*p*-dioxin (2,3,7,8-TCDD). The factor is applied to transform various concentrations of dioxins and furans or dioxin-like polychlorinated biphenyls (PCBs) into equivalent concentrations of 2,3,7,8-TCDD, expressed as a toxic equivalency (TEQ).

(76) Toxic equivalency (TEQ)--The sum of the products from the concentration of each dioxin and furan, or dioxin-like PCB congener, multiplied by its respective TEF to give a single 2,3,7,8-TCDD equivalent.

(77) Toxicity--The occurrence of adverse effects to living organisms due to exposure to toxic materials. Adverse effects caused by conditions of temperature and dissolved oxygen are excluded from the definition of toxicity. With respect to the provisions of §307.6(e) of this title (relating to Toxic Materials), which concerns total toxicity and biomonitoring requirements, adverse effects caused by concentrations of dissolved salts (such as sodium, potassium, calcium, chloride, carbonate) in source waters are excluded from the definition of toxicity. Source water is defined as surface water or groundwater that is used as a public water supply or industrial water supply (including a cooling-water supply). Source water does not include brine water that is produced during the extraction of oil and gas, or other sources of

brine water that are substantially uncharacteristic of surface waters in the area of discharge. In addition, adverse effects caused by concentrations of dissolved salts that are added to source water by industrial processes are not excluded from the requirements of §307.6(e) of this title, except as specifically noted in §307.6(e)(2)(B) of this title, which concerns requirements for toxicity testing of 100% effluent. This definition of toxicity does not affect the standards for dissolved salts in this chapter other than §307.6(e) of this title. The standards implementation procedures contain provisions to protect surface waters from adverse effects of dissolved salts and methods to address the effects of dissolved salts on total toxicity tests.

(78) Toxicity biomonitoring--The process or act of determining total toxicity. Documents that describe procedures for toxicity biomonitoring are cited in §307.6 of this title. Also referred to simply as biomonitoring.

(79) Water-effect ratio (WER)--The WER is calculated as the toxic concentration (LC_{50}) of a substance in water at a particular site, divided by the toxic concentration of that substance as reported in laboratory dilution water. The WER can be used to establish site-specific acute and chronic criteria to protect aquatic life. The site-specific criterion is equal to the WER times the statewide aquatic life criterion in §307.6(c) of this title.

(80) Water quality management program--The agency's overall program for attaining and maintaining water quality consistent with state standards, as authorized under the Texas Water Code, the Texas Administrative Code, and the Clean Water Act, §§106, 205(j), 208, 303(e) and 314 (33 United States Code, §§1251 *et seq.).*

(81) Wetland--An area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in: water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include irrigated acreage used as farmland; a man-made wetland of less than one acre; or a man-made wetland where construction or creation commenced on or after August 28, 1989, and that was not constructed with wetland creation as a stated objective, including but not limited to an impoundment made for the purpose of soil and water conservation that has been approved or requested by soil and water conservation districts. If this definition of wetland conflicts with the federal definition in any manner, the federal definition prevails.

(82) Wetland water quality functions--Attributes of wetlands that protect and maintain the quality of water in the state, which include storm water storage and retention and the moderation of extreme water level fluctuations; shoreline protection against erosion through the dissipation of wave energy and water velocity, and anchoring of sediments; habitat for aquatic life; and removal, transformation, and retention of nutrients and toxic substances.

(83) Zone of initial dilution--The small area at the immediate point of a permitted discharge where initial dilution with receiving waters occurs and that may not meet certain criteria applicable to the receiving water. A zone of initial dilution is substantially smaller than a mixing zone.

(b) Abbreviations. The following abbreviations apply to this chapter:

(1) ALU--aquatic life use.

(2) AP--aquifer protection.

(3) AS--agricultural water supply.

(4) ASTER--Assessment Tools for the Evaluation of Risk.

(5) BCF--bioconcentration factor.

(6) CASRN--Chemical Abstracts Service Registry number.

(7) CFR--Code of Federal Regulations.

(8) cfs--cubic feet per second.

(9) Cl^{-1}--chloride.

(10) CR--county road.

(11) DO--dissolved oxygen.

(12) E--exceptional aquatic life use.

(13) EPA--United States Environmental Protection Agency.

(14) degrees F--Degree(s) Fahrenheit.

(15) FM--Farm to Market Road.

(16) ft^3/s--cubic feet per second.

(17) H--high aquatic life use.

(18) HEAST--Health Effects Assessment Summary Tables.

(19) I--intermediate aquatic life use.

(20) IBWC--International Boundary and Water Commission.

(21) IRIS--Integrated Risk Information System.

(22) IS--industrial water supply.

(23) km--kilometer.

(24) L--limited aquatic life use.

(25) M--minimal aquatic life use.

(26) m--multiplier.

(27) m/km--meters per kilometer.

(28) MCL--maximum contaminant level (for public drinking water supplies).

(29) MDL--method detection limit.

(30) mg/L--milligrams per liter.

(31) mi--mile.

(32) ml--milliliter.

(33) N--navigation.

(34) NCR--noncontact recreation.

(35) O--oyster waters.

(36) PCR--primary contact recreation.

(37) PS--public water supply.

(38) RfD--reference dose.

(39) RR--ranch road.

(40) 7Q2--seven-day, two-year low-flow.

(41) SCR--secondary contact recreation.

(42) SH--state highway.

(43) SO_4^{-2}--sulfate.

(44) SU--standard units.

(45) TCEQ--Texas Commission on Environmental Quality.

(46) TDS--total dissolved solids.

(47) TEF--toxic equivalency factor.

(48) TMDL--total maximum daily load.

(49) TPDES--Texas Pollutant Discharge Elimination System.

(50) TRE--toxicity reduction evaluation.

(51) TSS--total suspended solids.

(52) US--United States.

(53) USFDA--United States Food and Drug Administration.

(54) USGS--United States Geological Survey.

(55) WER--Water-effect ratio.

(56) WF--waterfowl habitat.

(57) WQM--water quality management.

(58) µg/L--micrograms per liter.

(59) ZID--zone of initial dilution.

§307.4. General Criteria.

(a) Application. The general criteria set forth in this section apply to surface water in the state and specifically apply to substances attributed to waste discharges or human activities. General criteria do not apply to those instances when surface water, as a result of natural phenomena, exhibit characteristics beyond the limits established by this section. General criteria are superseded by specific exemptions stated in this section or in §307.8 of this title (relating to the Application of Standards), or by site-specific water quality standards for classified segments. Provisions of the general criteria remain in effect in mixing zones or below critical low-flow conditions unless specifically exempted in §307.8 of this title.

(b) Aesthetic parameters.

(1) Concentrations of taste and odor producing substances must not interfere with the production of potable water by reasonable water treatment methods, impart unpalatable flavor to food fish including shellfish, result in offensive odors arising from the waters, or otherwise interfere with the reasonable use of the water in the state.

(2) Surface water must be essentially free of floating debris and suspended solids that are conducive to producing adverse responses in aquatic organisms or putrescible sludge deposits or sediment layers that adversely affect benthic biota or any lawful uses.

(3) Surface waters must be essentially free of settleable solids conducive to changes in flow characteristics of stream channels or the untimely filling of surface water in the state. This provision does not prohibit dredge and fill activities that are permitted in accordance with the Federal Clean Water Act.

(4) Surface waters must be maintained in an aesthetically attractive condition.

(5) Waste discharges must not cause substantial and persistent changes from ambient conditions of turbidity or color.

(6) No foaming or frothing of a persistent nature is permissible.

(7) Surface waters must be maintained so that oil, grease, or related residue do not produce a visible film or sheen of oil or globules of grease on the surface or coat the banks or bottoms of the watercourse; or cause toxicity to man, aquatic life, or terrestrial life in accordance with subsection (d) of this section.

(c) Radiological substances. Radioactive materials must not be discharged in excess of the amount regulated by Chapter 336 of this title (relating to Radioactive Substance Rules).

(d) Toxic substances. Surface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life. Additional requirements and criteria for toxic substances are specified in §307.6 of this title (relating to Toxic Materials). Criteria to protect aquatic life from acute toxicity apply to all surface waters in the state except as specified in §307.8(a)(3) of this title. Criteria to protect aquatic life from chronic toxicity apply to surface waters with an aquatic life use of limited, intermediate, high, or exceptional as designated in §307.10 of this title (relating to Appendices A - G) or as determined on a case-by-case basis in accordance with subsection (l) of this section. Toxic criteria to protect human health for consumption of fish apply to waters with a sustainable or incidental fishery, as described in §307.6(d) of this title. Additional criteria apply to water in the state with a public drinking water supply use, as described in §307.6(d) of this title. The general provisions of this subsection do not change specific provisions in §307.8 of this title for applying toxic criteria.

(e) Nutrients. Nutrients from permitted discharges or other controllable sources must not cause excessive growth of aquatic vegetation that impairs an existing, designated, presumed, or attainable use. Site-specific nutrient criteria, nutrient permit limitations, or separate rules to control nutrients in individual watersheds are established where appropriate after notice and opportunity for public participation and proper hearing. Site-specific numeric criteria related to chlorophyll *a* are listed in Appendix F of §307.10 of this title.

(f) Temperature. Consistent with §307.1 of this title (relating to General Policy Statement) and in accordance with state water rights permits, temperature in industrial cooling lake impoundments and all other surface water in the state must be maintained so as to not interfere with the reasonable use of such waters. Numerical temperature criteria have not been specifically established for industrial cooling lake impoundments, which in most areas of the state contribute to water conservation and water quality objectives. The following temperature criteria, expressed as a maximum temperature differential (rise over ambient) are established except for industrial cooling impoundments, temperature elevations due to discharges of treated domestic (sanitary) effluent, and temperature elevations within designated mixing zones. The maximum temperature differentials are:

(1) freshwater streams: 5 degrees Fahrenheit (degrees F);

(2) freshwater lakes and impoundments: 3 degrees F; and

(3) tidal river reaches, bay, and gulf waters: 4 degrees F in fall, winter, and spring, and 1.5 degrees F in summer (June, July, and August).

(4) Additional temperature criteria (expressed as maximum temperatures) for classified segments are specified in Appendix A of §307.10 of this title.

(g) Salinity.

(1) Concentrations and the relative ratios of dissolved minerals such as chlorides, sulfates, and total dissolved solids must be maintained such that existing, designated, presumed, and attainable uses are not impaired.

(2) Criteria for chlorides, sulfates, and total dissolved solids for classified freshwater segments are specified in Appendix A of §307.10 of this title.

(3) Salinity gradients in estuaries must be maintained to support attainable estuarine dependent aquatic life uses. Numerical salinity criteria for Texas estuaries have not been established because of the high natural variability of salinity in estuarine systems, and because long-term studies by state agencies to assess estuarine salinities are still ongoing. Absence of numerical criteria must not preclude evaluations and regulatory actions based on estuarine salinity, and careful consideration must be given to all activities that may detrimentally affect salinity gradients.

(h) Aquatic life uses and dissolved oxygen.

(1) Dissolved oxygen concentrations must be sufficient to support existing, designated, presumed, and attainable aquatic life uses. Aquatic-life use categories and corresponding dissolved oxygen criteria are described in §307.7(b)(3) of this title (relating to Site-Specific Uses and Criteria).

(2) Aquatic life use categories and dissolved oxygen criteria for classified segments are specified in Appendix A of §307.10 of this title. Aquatic life use categories and dissolved oxygen criteria for other specific water bodies are specified in Appendix D of §307.10 of this title. Where justified by sufficient site-specific information, dissolved oxygen criteria that differ from §307.7(b)(3) of this title may be adopted for a particular water body in §307.10 of this title.

(3) Perennial streams, rivers, lakes, bays, estuaries, and other appropriate perennial waters that are not specifically listed in Appendix A or D of §307.10 of this title are presumed to have a high aquatic life use and corresponding dissolved oxygen criteria. Applicable dissolved oxygen criteria are described in §307.7(b)(3)(A) of this title. Higher uses are protected where they are attainable.

(4) When water is present in the streambed of intermittent streams, a 24-hour dissolved oxygen mean of at least 2.0 mg/L and 24-hour minimum dissolved oxygen concentration of 1.5 mg/L must be maintained. Intermittent streams that are not specifically listed in Appendix A or D of §307.10 of this title are considered to have a minimal aquatic life use except as indicated below in this subsection. For intermittent streams with seasonal aquatic life uses, dissolved oxygen concentrations commensurate with the aquatic life uses must be maintained during the seasons when the aquatic life uses occur. Unclassified intermittent streams with perennial pools are presumed to have a limited aquatic life use and corresponding dissolved oxygen criteria. Higher uses are protected where they are attainable.

(i) Aquatic life uses and habitat. Vegetative and physical components of the aquatic environment must be maintained or mitigated to protect aquatic life uses. Procedures to protect habitat in permits for dredge and fill are specified in Federal Clean Water Act, §404 and in Chapter 279 of this title (relating to Water Quality Certification).

(j) Aquatic recreation.

(1) Existing, designated, presumed, and attainable uses of aquatic recreation must be maintained, as determined by criteria that indicate the potential presence of pathogens. Categories of recreation and applicable criteria are established in §307.7(b)(1) of this title.

(2) Recreational use categories and criteria for classified segments are specified in Appendix A of §307.10 of this title. Site-specific recreational use categories and criteria for selected unclassified water bodies are specified in Appendix G of §307.10 of this title. Where justified by sufficient site-specific information, recreational uses and criteria that differ from §307.7(b)(1) of this title may be adopted for a particular water body in §307.10 of this title. For water bodies not specifically listed in Appendix A or Appendix G of §307.10 of this title, the following recreational uses are presumed to apply.

(A) Primary contact recreation. Primary contact recreation is presumed for lakes, reservoirs, and tidal water bodies. Primary contact recreation is presumed to apply to intermittent streams, intermittent streams with perennial pools, nontidal wetlands, and perennial freshwater streams and rivers, except where site-specific information indicates that recreational activities that involve a significant risk of ingestion have little to no likelihood of occurring, in accordance with subparagraph (B) of this paragraph.

(B) Secondary contact recreation 1. Secondary contact recreation 1 applies to water bodies where water recreation can occur, but the nature of the recreation does not involve a significant risk of ingestion. Secondary contact recreation 1 applies to intermittent and perennial freshwaters where site-specific information demonstrates that primary contact recreation has little to no likelihood of occurring. At a minimum, the following characteristics must be demonstrated for a presumed use of secondary contact recreation 1 to apply:

(i) during dry weather flows, the average depth at the thalweg (mid-channel) is less than 0.5 meters and there are not substantial pools with a depth of 1 meter or greater; and

(ii) there are not existing recreational activities that create a significant risk of ingestion or a use for primary contact recreation.

(C) Secondary contact recreation 2. Secondary contact recreation 2 applies to water bodies where water recreation activities do not involve a significant risk of water ingestion and where activities occur less frequently than for secondary contact recreation 1 due to physical characteristics of the water body or limited public access. No water body is presumed to have a use of secondary contact recreation 2. This use is applicable when designated for an individual water body as listed in Appendix A or G in §307.10 of this title.

(D) Noncontact recreation. Noncontact recreation applies to water bodies where recreation activities do not involve a significant risk of water ingestion and where primary and secondary contact recreation uses should not occur because of unsafe conditions. No water body is presumed to have a use of noncontact recreation. This use is applicable when designated for an individual water body as listed in Appendix A or G in §307.10 of this title.

(3) Assigning recreational uses to an unclassified water body.

(A) Applying presumed uses. Recreational uses and associated numerical criteria are assigned to an unclassified water body in accordance with the presumed uses and guidelines established in paragraph (2) of this subsection. To assign uses other than primary contact recreation, a reasonable level of inquiry is conducted to determine if a different presumed use is appropriate for a particular water body. A reasonable level of inquiry includes review of available relevant information or completed site surveys.

(B) Assigning presumed uses. Presumed uses of primary contact recreation and secondary contact recreation 1 can be assigned to an individual water body for regulatory action without individually designating the recreational use and criteria in Appendix G in §307.10 of this title. Regulatory action may include issuing Texas Pollutant Discharge Elimination System permits, revising the list of im-

paired water bodies under Clean Water Act, §303(d), or setting and implementing a total maximum daily load. The presumed secondary contact recreation 1 use is included in the public notice of a regulatory action that could affect recreational water quality, and the assigned recreational uses are subject to applicable public comment and approval by the United States Environmental Protection Agency (EPA). For tracking purposes, presumed recreational uses that have been determined to be less stringent than primary contact recreation are noted in a publicly available list such as the EPA's Water Quality Standards Repository prior to a water quality standards revision. Presumed uses that have been determined for particular water bodies are listed in Appendix G in §307.10 of this title when the water quality standards are revised.

(C) Assigning a use less stringent than presumed use. A recreational use that is less stringent than the applicable presumed use can only be assigned to an individual water body for a regulatory action after that use is approved by the EPA and designated in Appendix A or G in §307.10 of this title. Support for designating a use less stringent than an applicable presumed use requires a use-attainability analysis (UAA). 40 Code of Federal Regulations §131.1(g) lists six reasons for a change in use in a water body. At least one of these reasons must be included in the UAA.

(k) Antidegradation. Nothing in this section is intended to be construed or otherwise used to supersede the requirements of §307.5 of this title (relating to Antidegradation).

(l) Assessment of unclassified waters for aquatic life uses. Waters that are not specifically listed in Appendices A or D of §307.10 of this title are assigned the specific uses that are attainable or characteristic of those waters. Upon administrative or regulatory action by the commission that affects a particular unclassified water body, the characteristics of the affected water body must be reviewed by the commission to determine which aquatic life uses are appropriate. Additional uses so determined must be indicated in public notices for discharge applications. Uses that are not applicable throughout the year in a particular unclassified water body are assigned and protected for the seasons where such uses are attainable. Initial determinations of use are considered preliminary, and in no way preclude redeterminations of use in public hearings conducted under the provisions of the Texas Water Code. For unclassified waters where the presumed minimum uses or criteria specified in this section are inappropriate, site-specific standards may be developed in accordance with §307.2(d) of this title (relating to Description of Standards). Uses and criteria are assigned in accordance with this section and with §307.7(b)(3) of this title. Procedures for assigning uses and criteria are described in the standards implementation procedures.

(m) pH. Consistent with §307.1 of this title, pH levels in all surface water in the state must be maintained so as to not interfere with the reasonable use of such waters.

§307.5. Antidegradation.

(a) Application. The antidegradation policy and implementation procedures set forth in this section apply to actions regulated under state and federal authority that would increase pollution of the water in the state. Such actions include authorized wastewater discharges, total maximum daily loads (TMDLs), waste load evaluations, and any other miscellaneous actions, such as those related to man-induced nonpoint sources of pollution, that may impact the water in the state.

(b) Antidegradation policy. In accordance with the Texas Water Code, §26.003, the following provisions establish the antidegradation policy of the commission.

(1) Tier 1. Existing uses and water quality sufficient to protect those existing uses must be maintained. Categories of existing uses are the same as for designated uses, as defined in §307.7 of this title (relating to Site-Specific Uses and Criteria).

(2) Tier 2. No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses must be maintained. Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.

(3) Tier 3. Outstanding national resource waters are defined as high quality waters within or adjacent to national parks and wildlife refuges, state parks, wild and scenic rivers designated by law, and other designated areas of exceptional recreational or ecological significance. The quality of outstanding national resource waters must be maintained and protected.

(4) Discharges that cause pollution that are authorized by the Texas Water Code, the Federal Clean Water Act, or other applicable laws must not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.

(5) Anyone discharging wastewater that would constitute a new source of pollution or an increased source of pollution from any industrial, public, or private project or development is required to provide a level of wastewater treatment consistent with the provisions of the Texas Water Code and the Clean Water Act (33 United States Code, §§1251 *et seq.).* As necessary, cost-effective and reasonable best management practices established through the Texas Water Quality Management Program are achieved for nonpoint sources of pollution.

(6) Application of antidegradation provisions does not preclude the commission from establishing modified thermal discharge limitations consistent with the Clean Water Act, §316(a) (33 United States Code, §1326).

(c) Antidegradation implementation procedures.

(1) Implementation for specific regulatory activities.

(A) For TPDES permits for wastewater, the process for the antidegradation review and public coordination is described in the standards implementation procedures.

(B) For federal permits relating to the discharge of fill or dredged material under Federal Clean Water Act, §404, the antidegradation policy and public coordination is implemented through the evaluation of alternatives and mitigation under Federal Clean Water Act, §404(b)(1). State review of alternatives, mitigation, and requirements to protect water quality may also be conducted for federal permits that are subject to state certification, as authorized by Federal Clean Water Act, §401 and conducted in accordance with Chapter 279 of this title (relating to Water Quality Certification).

(C) Other state and federal permitted and regulated activities that increase pollution of water in the state are also subject to the provisions of the antidegradation policy as established in subsections (a) and (b) of this section.

(2) General provisions for implementing the antidegradation policy.

(A) Tier 1 reviews must ensure that water quality is sufficiently maintained so that existing uses are protected. All pollution

that could cause an impairment of water quality is subject to Tier 1 reviews. If the existing uses and criteria of a potentially affected water body have not been previously determined, then the antidegradation review must include a preliminary determination of existing uses and criteria. Existing uses must be maintained and protected.

(B) Tier 2 reviews apply to all pollution that could cause degradation of water quality where water quality exceeds levels necessary to support propagation of fish, shellfish, terrestrial life, and recreation in and on the water (fishable/swimmable quality). Guidance for determining water bodies that exceed fishable/swimmable quality is contained in the standards implementation procedures. For dissolved oxygen, analyses of degradation under Tier 2 must utilize the same critical conditions as are used to protect instream criteria. For other parameters, appropriate conditions may vary. Conditions for determining degradation are commensurate with conditions for determining existing uses. The highest water quality sustained since November 28, 1975 (in accordance with EPA Standards Regulation 40 Code of Federal Regulations Part 131) defines baseline conditions for determinations of degradation.

(C) Tier 3 reviews apply to all pollution that could cause degradation of outstanding national resource waters. Outstanding national resource waters are those specifically designated in this chapter.

(D) When degradation of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy is pertinent to the permit action must be included in the public notice for the permit application or amendment. If no degradation is anticipated, the public notice must so state.

(E) Evidence can be introduced in public hearings, or through the public comment process, concerning the determination of existing uses and criteria; the assessment of degradation under Tier 1, Tier 2, and Tier 3; the social and economic justification for lowering water quality; requirements and conditions necessary to preclude degradation; and any other issues that bear upon the implementation of the antidegradation policy.

(F) Interested parties are given the opportunity to provide comments and additional information concerning the determination of existing uses, anticipated impacts of the discharge, baseline conditions, and the necessity of the discharge for important economic or social development if degradation of water quality is expected under Tier 2.

(G) The antidegradation policy and the general provisions for implementing the antidegradation policy apply to the determination of TMDLs and to waste load evaluations that allow an increase in loading. If the TMDL or waste load evaluation indicates that degradation of waters exceeding fishable/swimmable quality is expected, the public hearing notice must so state. Permits that are consistent with an approved TMDL or waste load evaluation under this antidegradation policy are not subjected to a separate antidegradation review for the specific parameters that are addressed by the TMDL or waste load evaluation.

§307.6. Toxic Materials.

(a) Application. The toxic criteria set forth in this section apply to surface water in the state and specifically apply to substances attributed to waste discharges or human activity. With the exception of numeric human health criteria, toxic criteria do not apply to those instances where surface water, solely as a result of natural phenomena, exhibit characteristics beyond the limits established by this section. Standards and procedures set forth in this section are applied in accordance with §307.8 of this title (relating to Application of Standards) and §307.9 of this title (relating to Determination of Standards Attainment).

(b) General provisions.

(1) Water in the state must not be acutely toxic to aquatic life in accordance with §307.8 of this title.

(2) Water in the state with designated or existing aquatic life uses of limited or greater must not be chronically toxic to aquatic life, in accordance with §307.8 of this title.

(3) Water in the state must be maintained to preclude adverse toxic effects on human health resulting from contact recreation, consumption of aquatic organisms, consumption of drinking water or any combination of the three. Water in the state with sustainable fisheries or public drinking water supply uses must not exceed applicable human health toxic criteria, in accordance with subsection (d) of this section and §307.8 of this title.

(4) Water in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.

(c) Specific numerical aquatic life criteria.

(1) Numerical criteria are established in Table 1 of this paragraph for those specific toxic substances where adequate toxicity information is available and that have the potential for exerting adverse impacts on water in the state.
Figure: 30 TAC §307.6(c)(1)

(2) Numerical criteria are based on ambient water quality criteria documents published by the United States Environmental Protection Agency (EPA). EPA guidance criteria have been appropriately recalculated to eliminate the effects of toxicity data for aquatic organisms that are not native to Texas, in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical Site-specific Water Quality Criteria* (EPA 600/3-84-099) and Appendix B of the EPA draft guidance document entitled *Interim Guidance on the Determination and Use of Water-Effect Ratios for Metals* (EPA-823-B-94-001). Additional EPA guidelines that may be used to establish aquatic life criteria are detailed in the guidance documents.

(3) Specific numerical acute aquatic life criteria are applied as 24-hour averages, and specific numerical chronic aquatic life criteria are applied as seven-day averages.

(4) Ammonia and chlorine toxicity are addressed by total toxicity (biomonitoring) requirements in subsection (e) of this section.

(5) Specific numerical aquatic life criteria for metals and metalloids in Table 1 of paragraph (1) of this subsection apply to dissolved concentrations where noted. Dissolved concentrations can be estimated by filtration of samples prior to analysis, or by converting from total recoverable measurements in accordance with procedures approved by the commission in the standards implementation procedures (RG-194) as amended. Specific numerical aquatic life criteria for non-metallic substances in Table 1 of paragraph (1) of this subsection apply to total recoverable concentrations unless otherwise noted.

(6) Specific numerical acute criteria for toxic substances are applicable to all water in the state except for small zones of initial dilution (ZIDs) at discharge points. Acute criteria may be exceeded within a ZID and below extremely low streamflow conditions (one-fourth of critical low-flow conditions) in accordance with §307.8 of this title. There must be no lethality to aquatic organisms that move through a ZID, and the sizes of ZIDs are limited in accordance with §307.8 of this title. Specific numerical chronic criteria are applicable to all water in the state with designated or existing aquatic life uses of limited or greater, except inside mixing zones and below critical low-flow conditions, in accordance with §307.8 of this title.

(7) For toxic materials where specific numerical criteria are not listed in Table 1 of paragraph (1) of this subsection, the appropriate criteria for aquatic life protection may be derived in accordance with current EPA guidelines for deriving site-specific water quality criteria. When insufficient data are available to use EPA guidelines, the following provisions are applied in accordance with this section and §307.8 of this title. The LC_{50} data used in the subsequent calculations are typically obtained from traditional laboratory studies; however, if LC_{50} data are unavailable or incomplete, other methodologies (such as quantitative structure-activity relationships) may be used:

(A) acute criteria are calculated as 0.3 of the LC_{50} of the most sensitive aquatic species; LC_{50} x (0.3) = acute criteria;

(B) concentrations of nonpersistent toxic materials must not exceed concentrations that are chronically toxic as determined from appropriate chronic toxicity data obtained in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Life and Their Uses* (EPA 822-R-85-100) or calculated as 0.1 of acute LC_{50} values to the most sensitive aquatic species; LC_{50} x (0.1) = chronic criteria;

(C) concentrations of persistent toxic materials that do not bioaccumulate shall not exceed concentrations that are chronically toxic as determined from appropriate chronic toxicity data obtained in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Life and Their Uses* (EPA 822-R-85-100) or calculated as 0.05 of LC_{50} values to the most sensitive aquatic species; LC_{50} x (0.05) = chronic criteria; and

(D) concentrations of toxic materials that bioaccumulate must not exceed concentrations that are chronically toxic as determined from appropriate chronic toxicity data obtained in accordance with procedures in the EPA guidance document entitled *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Life and Their Uses* (EPA 822-R-85-100) or calculated as 0.01 of LC_{50} values to the most sensitive aquatic species; LC_{50} x (0.01) = chronic criteria.

(8) For toxic substances where the relationship of toxicity is defined as a function of pH or hardness, numerical criteria are presented as an equation based on this relationship. Site-specific values for each segment are given in the standards implementation procedures (RG-194) as amended.

(9) Criteria for most metals are multiplied by a water-effect ratio (WER) in order to incorporate the effects of local water chemistry on toxicity. The WER is assumed to be equal to one except where sufficient site-specific data are available to determine the WER for a particular water body or portion of a water body. A WER is only applicable to those portions of a water body that are adequately addressed by site-specific data. WERs that have been determined for particular water bodies are listed in Appendix E of §307.10 of this title (relating to Appendices A - G) when standards are revised. A site-specific WER that affects an effluent limitation in a wastewater discharge permit, and that has not been incorporated into Appendix E of §307.10 of this title, must be noted in a public notice during the permit application process. An opportunity for public comment must be provided, and the WER may be considered in any public hearing on the permit application.

(10) Freshwater copper aquatic-life criteria include a multiplier (m) to incorporate effects of local water chemistry on toxicity. This multiplier may be based on either a WER or a biotic ligand model. The multiplier is assumed to be equal to one except where sufficient site-specific data are available to determine the multiplier for a particular water body or portion of a water body. The multiplier is only applicable to those portions of a water body that are adequately addressed by site-specific data. As multipliers are determined for particular water bodies they are listed in Appendix E of §307.10 of this title when standards are revised. A site-specific multiplier that affects an effluent limitation in a wastewater discharge permit, and that has not been incorporated into Appendix E of §307.10 of this title, is noted in a public notice during the permit application process. An opportunity for public comment must be provided, and the multiplier may be considered in any public hearing on the permit application.

(11) Additional site-specific factors may indicate that the numerical criteria listed in Table 1 of paragraph (1) of this subsection are inappropriate for a particular water body. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title (relating to Description of Standards). The application of a site-specific standard must not impair an existing, attainable, or designated use. Factors that may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic, additive, or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) measurements of total effluent toxicity;

(E) indigenous aquatic organisms, which may have different responses to particular toxic materials;

(F) technological or economic limits of treatability for specific toxic materials;

(G) bioavailability of specific toxic substances of concern, as determined by WER tests or other analyses approved by the commission; and

(H) new information concerning the toxicity of a particular substance.

(d) Specific numerical human health criteria.

(1) Numerical human health criteria are established in Table 2 of this paragraph.
Figure: 30 TAC §307.6(d)(1)

(2) Categories of human health criteria:

(A) concentration criteria to prevent contamination of drinking water, fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to surface waters that are designated or used for public drinking water supplies. (Column A in Table 2 of paragraph (1) of this subsection);

(B) concentration criteria to prevent contamination of fish and other aquatic life to ensure that they are safe for human consumption. These criteria apply to surface waters that have sustainable fisheries and that are not designated or used for public water supply (Column B in Table 2 of paragraph (1) of this subsection);

(3) Specific assumptions and procedures (except where noted in Table 2 of paragraph (1) of this subsection).

(A) Sources for the toxicity factors to calculate criteria were derived from EPA's Integrated Risk Information System (IRIS); EPA's *National Recommended Water Quality Criteria: 2002, Human Health Criteria Calculation Matrix* (EPA-822-R-02-012); EPA Health Effects Assessment Summary Tables (HEAST); Assessment Tools for the Evaluation of Risk (ASTER); and the computer program, CLOGP3.

(B) For known or suspected carcinogens (as identified in EPA's IRIS database), an incremental cancer risk level of 10^{-5} (1 in 100,000) was used to derive criteria. An RfD (reference dose) was determined for noncarcinogens and for carcinogens where EPA has not derived cancer slope factors.

(C) Consumption rates of fish and shellfish were estimated as 17.5 grams per person per day.

(D) Drinking water consumption rates were estimated as 2.0 liters per person per day.

(E) For carcinogens, a body-weight scaling factor of 3/4 power was used to convert data on laboratory test animals to human scale. Reported weights of laboratory test animals are used, and an average weight of 70 kilograms is assumed for humans.

(F) Childhood exposure was considered for all noncarcinogens. Consumption rates for fish and shellfish were estimated as 5.6 grams per child per day, and drinking water consumption rates were estimated as 0.64 liters per child per day. A child body weight was estimated at 15 kilograms. Both the water consumption rate and body weight are age-adjusted for a six-year-old child. The consumption rate for fish and shellfish for children is from Table 10-61 of EPA's 1997 *Exposure Factors Handbook* (EPA/600/P-95/002Fa-c).

(G) Numerical human health criteria were derived in accordance with the general procedures and calculations in the EPA guidance documents entitled *Technical Support Document for Water Quality-based Toxics Control* (EPA/505/2-90-001); *Guidance Manual for Assessing Human Health Risks from Chemically Contaminated Fish and Shellfish* (EPA/503/8-89-002); and *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000)* (EPA-822-B-00-004).

(H) If a calculated criterion to prevent contamination of drinking water and fish to ensure they are safe for human consumption (Column A in Table 2 of paragraph (1) of this subsection) was greater than the applicable maximum contaminant level (MCL) in Chapter 290 of this title (relating to Public Drinking Water), then the MCL was used as the criterion.

(I) If the concentration of a substance in fish tissue used for these calculations was greater than the applicable United States Food and Drug Administration Action Level for edible fish and shellfish tissue, then the acceptable concentration in fish tissue was lowered to the Action Level for calculation of criteria.

(4) Human health criteria for additional toxic materials are adopted by the commission as appropriate.

(5) Specific human health concentration criteria for water are applicable to water in the state that has sustainable fisheries or designation or use as a public drinking water supply except within mixing zones and below stream flow conditions as specified in §307.8 of this title. The following waters are considered to have sustainable fisheries:

(A) all designated segments listed in Appendix A of §307.10 of this title, unless specifically exempted;

(B) perennial streams and rivers with a stream order of three or greater, as defined in §307.3 of this title (relating to Definitions and Abbreviations);

(C) lakes and reservoirs greater than or equal to 150 acre-feet or 50 surface acres;

(D) all bays, estuaries, and tidal rivers; and

(E) any other waters that potentially have sufficient fish production or fishing activity to create significant long-term human consumption of fish.

(6) Waters that are not considered to have a sustainable fishery, but that have an aquatic life use of limited or greater, are considered to have an incidental fishery. Consumption rates assumed for incidental fishery waters are 1.75 grams per person per day. Therefore, numerical criteria applicable to incidental fishery waters are ten times the criteria listed in Column B of Table 2 of paragraph (1) of this subsection.

(7) Specific human health criteria are applied as long term average exposure criteria designed to protect populations over a life time. Attainment measures for human health are addressed in §307.9 of this title.

(8) For toxic materials of concern where specific human health criteria are not listed in Table 2 of paragraph (1) of this subsection, the following provisions apply:

(A) For known or suspected carcinogens (as identified in EPA's IRIS database), a cancer risk of 10^{-5} (1 in 100,000) is applied to the most recent numerical criteria adopted by EPA and published in the *Federal Register.* If an MCL or equivalent agency guideline for protection of drinking water sources is less than the resulting criterion, then the MCL applies to public drinking water supplies in accordance with paragraph (3)(H) of this subsection.

(B) For toxic materials not defined as carcinogens, the most recent numerical criteria adopted by EPA and published in the *Federal Register* are applicable. If an MCL or equivalent agency guideline for protection of drinking water sources is less than the resulting criterion, then the MCL applies to public drinking water supplies in accordance with paragraph (3)(H) of this subsection.

(C) In the absence of available criteria, numerical criteria may be derived from technically valid information and calculated in accordance with the provisions of paragraph (3) of this subsection.

(9) Numerical criteria for bioconcentratable pollutants are derived in accordance with the general procedures in the EPA guidance document entitled *Assessment and Control of Bioconcentratable Contaminants in Surface Water* (March 1991). The commission may develop discharge permit limits in accordance with the provisions of this section.

(10) Numerical human health criteria are expressed as total recoverable concentrations for nonmetals and selenium and as dissolved concentrations for other metals and metalloids. Criteria for several highly bioaccumulative pollutants are expressed as concentrations in fish tissue.

(11) Additional site-specific factors may indicate that the numerical human health criteria listed in Table 2 of paragraph (1) of this subsection are inappropriate for a particular water body. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title. The application of site-specific criteria must not impair an existing, attainable, presumed, or designated use or affect human health. Factors that may justify a temporary variance or site-specific standards amendment include the following:

(A) background concentrations of specific toxics of concern in receiving waters, sediment, or indigenous biota;

(B) persistence and degradation rate of specific toxic materials;

(C) synergistic or antagonistic interactions of toxic substances with other toxic or nontoxic materials;

(D) technological or economic limits of treatability for specific toxic materials;

(E) bioavailability of specific toxic substances of concern;

(F) local water chemistry and other site-specific conditions that may alter the bioconcentration, bioaccumulation, or toxicity of specific toxic substances;

(G) site-specific differences in the bioaccumulation responses of indigenous, edible aquatic organisms to specific toxic materials;

(H) local differences in consumption patterns of fish and shellfish or drinking water, but only if any changes in assumed consumption rates are protective of the local population that frequently consumes fish, shellfish, or drinking water from a particular water body; and

(I) new information concerning the toxicity of a particular substance.

(e) Total toxicity.

(1) Total (whole-effluent) toxicity of permitted discharges, as determined from biomonitoring of effluent samples at appropriate dilutions, must be sufficiently controlled to preclude acute total toxicity in all water in the state with the exception of small ZIDs at discharge points and at extremely low streamflow conditions (one-fourth of critical low-flow conditions) in accordance with §307.8 of this title. Acute total toxicity levels may be exceeded in a ZID, but there must be no significant lethality to aquatic organisms that move through a ZID, and the sizes of ZIDs are limited in accordance with §307.8 of this title. Chronic total toxicity, as determined from biomonitoring of effluent samples at appropriate dilutions, must be sufficiently controlled to preclude chronic toxicity in all water in the state with an existing or designated aquatic life use of limited or greater except in mixing zones at discharge points and at flows less than critical low-flows, in accordance with §307.8 of this title. Chronic toxicity levels may be exceeded in a mixing zone, but there must be no significant sublethal toxicity to aquatic organisms that move through the mixing zone.

(2) General provisions for controlling total toxicity.

(A) Dischargers whose effluent has a significant potential for exerting toxicity in receiving waters as described in the *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194) as amended are required to conduct whole effluent toxicity biomonitoring at appropriate dilutions.

(B) In addition to the other requirements of this section, the effluent of discharges to water in the state must not be acutely toxic to sensitive species of aquatic life, as demonstrated by effluent toxicity tests. Toxicity testing for this purpose is conducted on samples of 100% effluent, and the criterion for acute toxicity is mortality of 50% or more of the test organisms after 24 hours of exposure. This provision does not apply to mortality that is a result of an excess, deficiency, or imbalance of dissolved inorganic salts (such as sodium, calcium, potassium, chloride, or carbonate) that are in the effluent and are not listed in Table 1 in subsection (c)(1) of this section or that are in source waters.

(C) The latest revisions of the following EPA publications provide methods for appropriate biomonitoring procedures: *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms, Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms,* and the *Technical Support Document for Water Quality-based Toxics Control.* The use of other procedures approved by the agency and EPA is also acceptable. Toxicity tests must be conducted using representative, sensitive aquatic organisms as approved by the agency, and any such testing must adequately determine if toxicity standards are being attained.

(D) If toxicity biomonitoring results indicate that a discharge is not sufficiently controlled to preclude acute or chronic toxicity as described in this subsection, then the permittee will be required to eliminate sources of toxicity and may be required to conduct a toxicity reduction evaluation (TRE) in accordance with the permitting procedures of the commission. In accordance with the implementation procedures, permits are amended to include appropriate provisions to eliminate toxicity. Such provisions may include total toxicity limits, chemical-specific limits, best management practices, or other actions (such as moving a discharge location) designed to reduce or eliminate toxicity. Where sufficient to attain and maintain applicable numeric and narrative state water quality standards, a chemical-specific limit, best management practices, or other actions designed to reduce or eliminate toxicity rather than a total toxicity limit may be established in the permit. Where conditions may be necessary to prevent or reduce effluent toxicity, permits must include a reasonable schedule for achieving compliance with such additional conditions.

(E) Discharge permit limits based on total toxicity may be established in consideration of site-specific factors, but the application of such factors must not result in impairment of an existing, attainable, presumed, or designated use. These factors are applied as a site-specific standards modification in accordance with §307.2(d) of this title. A demonstration that uses are protected may consist of additional effluent toxicity testing, instream monitoring requirements, or other necessary information as determined by the agency. Factors that may justify a temporary variance or site-specific standards amendment include the following:

(i) background toxicity of receiving waters;

(ii) persistence and degradation rate of principal toxic materials that are contributing to the total toxicity of the discharge;

(iii) site-specific variables that may alter the impact of toxicity in the discharge;

(iv) indigenous aquatic organisms, that may have different levels of sensitivity than the species used for total toxicity testing; and

(v) technological, economic, or legal limits of treatability or control for specific toxic material.

§307.7. Site-Specific Uses and Criteria.

(a) Uses and numerical criteria are established on a site-specific basis in Appendices A, B, D, E, F, and G of §307.10 of this title (relating to Appendices A - G). Site-specific uses and numerical criteria may also be applied to unclassified waters in accordance with §307.4 of this title (relating to General Criteria) and §307.5(c) of this title (relating to Antidegradation). Site-specific criteria apply specifically to substances attributed to waste discharges or human activity. Site-specific criteria do not apply to those instances when surface waters exceed criteria due to natural phenomena. The application of site-specific uses and criteria is described in §307.8 of this title (relating to the Application of Standards) and §307.9 of this title (relating to the Determination of Standards Attainment).

(b) Appropriate uses and criteria for site-specific standards are defined as follows.

(1) Recreation. Recreational use consists of four categories--primary contact recreation, secondary contact recreation 1, secondary contact recreation 2, and noncontact recreation waters. Classified segments are designated for primary contact recreation unless sufficient site-specific information demonstrates that elevated concentrations of indicator bacteria frequently occur due to sources of pollution that cannot be reasonably controlled by existing regulations, wildlife sources of bacteria are unavoidably high and there is limited aquatic recreational potential, or primary or secondary contact recreation is considered unsafe for other reasons such as ship or barge traffic. In a classified segment where contact recreation is considered unsafe for reasons unrelated to water quality, a designated use of noncontact recreation may be assigned either noncontact recreation criteria or criteria normally associated with primary contact recreation. A designation of primary or secondary contact recreation is not a guarantee that the water so designated is completely free of disease-causing organisms. Indicator bacteria, although not generally pathogenic, are indicative of potential contamination by feces of warm blooded animals. Recreational criteria are based on these indicator bacteria rather than direct measurements of pathogens. Criteria are expressed as the number of bacteria per 100 milliliters (ml) of water (in terms of colony forming units, most probable number, or other applicable reporting measures). Even where the concentration of indicator bacteria is less than the criteria for primary or secondary contact recreation, there is still some risk of contracting waterborne diseases. Additional guidelines on minimum data requirements and procedures for evaluating standards attainment are specified in the *TCEQ Guidance for Assessing and Reporting Surface Water Quality in Texas,* as amended.

(A) Freshwater

(i) Primary contact recreation. The geometric mean criterion for *E. coli* is 126 per 100 ml. In addition, the single sample criterion for *E. coli* is 399 per 100 ml.

(ii) Secondary contact recreation 1. The geometric mean criterion for *E. coli* is 630 per 100 ml.

(iii) Secondary contact recreation 2. The geometric mean criterion for *E. coli* is 1,030 per 100 ml.

(iv) Noncontact recreation. The geometric mean criterion for *E. coli* is 2,060 per 100 ml.

(v) For high saline inland water bodies where Enterococci is the designated recreational indicator in Appendix A of §307.10 of this title, Enterococci is the applicable recreational indicator for instream bacteria sampling at all times for the classified water body and for the unclassified water bodies that are within the watershed of that classified segment, unless it is demonstrated that an unclassified water body is not high saline. *E. coli* is the applicable recreational indicator for instream bacteria sampling at all times for unclassified water bodies where conductivity values indicate that the water bodies are not high saline. For high saline inland waters with primary contact recreation, the geometric mean criterion for Enterococci is 33 per 100 ml and the single sample criterion is 78 per 100 ml. For high saline inland waters with secondary contact recreation 1, the geometric mean criterion for Enterococci is 165 per 100 ml. For high saline inland waters with secondary contact recreation 2, the geometric mean criterion for Enterococci is 270 per 100 ml. For high saline inland water bodies with noncontact recreation, the geometric mean criterion for Enterococci is 540 per 100 ml.

(B) Saltwater.

(i) Primary contact recreation. The geometric mean criterion for Enterococci is 35 per 100 ml. In addition, the single sample criterion for Enterococci is 104 per 100 ml.

(ii) Secondary contact recreation 1. A secondary contact recreation 1 use for tidal streams and rivers can be established on a site-specific basis in §307.10 of this title if justified by a use-attainability analysis and the water body is not a coastal recreation water as defined in the Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act). The geometric mean criterion for Enterococci is 175 per 100 ml.

(iii) Noncontact recreation. A noncontact recreation use for tidal streams and rivers can be established on a site-specific basis in §307.10 of this title if justified by a use-attainability analysis and the water body is not a coastal recreation water as defined in the BEACH Act. The geometric mean criterion for Enterococci is 350 per 100 ml.

(C) Fecal coliform bacteria. Fecal coliform bacteria can be used as an alternative instream indicator of recreational suitability in high saline inland water bodies where Enterococci is the designated recreational indicator in Appendix A of §307.10 of this title for two years after the adoption of this title to allow time to collect sufficient data for Enterococci. Fecal coliform criteria for high saline inland water bodies are as follows:

(i) Primary contact recreation. The geometric mean criterion for fecal coliform is 200 per 100 ml. In addition, the single sample criterion for fecal coliform is 400 per 100 ml.

(ii) Secondary contact recreation 1 and 2. The geometric mean criterion for fecal coliform is 1,000 per 100 ml.

(iii) Noncontact recreation. The geometric mean criterion for fecal coliform is 2,000 per 100 ml.

(D) Swimming advisory programs. For areas where local jurisdictions or private property owners voluntarily provide public notice or closure based on water quality, the use of any single-sample or short-term indicators of recreational suitability are selected at the discretion of the local managers of aquatic recreation. Guidance for single-sample bacterial indicators is available in the United States Environmental Protection Agency (EPA) document entitled *Ambient Water Quality Criteria for Bacteria - 1986.* Other short-term indicators to assess water quality suitability for recreation - such as measures of streamflow, turbidity, or rainfall - may also be appropriate.

(2) Domestic water supply.

(A) Use categories. Domestic water supply consists of three use subcategories - public water supply, sole-source surface drinking water supply, and aquifer protection.

(i) Public water supply. Segments designated for public water supply are those known to be used or exhibit characteristics that would allow them to be used as the supply source for public water systems as defined by Chapter 290 of this title (relating to Public Drinking Water).

(ii) Sole-source surface drinking water supplies and their protection zones. Water bodies that are sole-source surface drinking water supplies are listed in Appendix B of §307.10 of this title. Sole-source surface drinking water supplies and their protection zones are addressed in Chapter 321 of this title (relating to Subchapter B: Concentrated Animal Feeding Operations).

(iii) Aquifer protection. Segments designated for aquifer protection are capable of recharging the Edwards Aquifer. The principal purpose of this use designation is to protect the quality

of water infiltrating into and recharging the aquifer. The designation for aquifer protection applies only to those portions of the segments so designated that are on the recharge zone, transition zone, or contributing zone as defined in Chapter 213 of this title (relating to the Edwards Aquifer). Chapter 213 of this title establishes provisions for activities in the watersheds of segments that are designated for aquifer protection.

(B) Use criteria. The following use criteria apply to all domestic water supply use subcategories.

(i) Radioactivity associated with dissolved minerals in the freshwater portions of river basin and coastal basin waters should not exceed levels established by drinking water standards as specified in Chapter 290 of this title unless the conditions are of natural origin.

(ii) Surface waters utilized for domestic water supply must not exceed toxic material concentrations that prevent them from being treated by conventional surface water treatment to meet drinking water standards as specified in Chapter 290 of this title.

(iii) Chemical and microbiological quality of surface waters used for domestic water supply should conform to drinking water standards as specified in Chapter 290 of this title.

(3) Aquatic life. The establishment of numerical criteria for aquatic life is highly dependent on desired use, sensitivities of aquatic communities, and local physical and chemical characteristics. Six subcategories of aquatic life use are established. They include minimal, limited, intermediate, high, and exceptional aquatic life and oyster waters. Aquatic life use subcategories designated for segments listed in Appendix A of §307.10 of this title recognize the natural variability of aquatic community requirements and local environmental conditions.

(A) Dissolved oxygen.

(i) The characteristics and associated dissolved oxygen criteria for limited, intermediate, high, and exceptional aquatic life use subcategories are indicated in Table 3 of this clause. This table also includes dissolved oxygen criteria for a minimal aquatic life use subcategory that applies to intermittent streams without perennial pools as indicated in §307.4(h)(4) of this title.
Figure: 30 TAC §307.7(b)(3)(A)(i)

(ii) Critical low-flow values associated with the bedslopes and dissolved oxygen criteria in Table 4 of this clause apply to streams that have limited, intermediate, high, or exceptional aquatic life uses and to streams that are specifically listed in Appendix A or D of §307.10 of this title. The critical low-flow values in Table 4 of this clause apply to streams in Texas that are east of a line defined by Interstate Highways 35 and 35W from the Red River to the community of Moore in Frio County, and by United States Highway 57 from the community of Moore to the Rio Grande. Table 4 of this clause does not apply where specifically superceded by the equation that is listed in footnote 3 in the Cypress Creek Basin in Appendix A and in footnote 2 in Appendix D of §307.10 of this title. The critical low-flow values in Table 4 of this clause (at the appropriate stream bedslope) are utilized as headwater flows when the flows are larger than applicable seven-day, two-year low-flows in order to determine discharge effluent limits necessary to achieve dissolved oxygen criteria. For streams that have bedslopes less than the minimum bedslopes in Table 4, the flows listed for the minimum bedslope of 0.1 meters per kilometer (m/km) are applicable. For streams that have bedslopes greater than the maximum bedslope in Table 4 of this clause, the flows listed for the maximum bedslope of 2.4 m/km are applicable. The required effluent limits are those necessary to achieve each level of dissolved oxygen (as defined in clause (i) of this subparagraph, Table 3) at or below an assigned, designated, or presumed aquatic life use. Presumed aquatic life uses must be in accordance with those required by §307.4(h) of this title. The critical low-flow values in Table 4 of this clause do not apply to tidal streams.
Figure: 30 TAC §307.7(b)(3)(A)(ii)

(iii) The critical low-flow values in Table 4 of clause (ii) of this subparagraph for limited, intermediate, high, and exceptional aquatic life uses are based upon data from the commission's least impacted stream study (Texas Aquatic Ecoregion Project). Results of this study indicate a strong dependent relationship for average summertime background dissolved oxygen concentrations and several hydrologic and physical stream characteristics - particularly bedslope (stream gradient) and stream flow. The critical low-flow values in Table 4 of clause (ii) of this subparagraph are derived from a multiple regression equation for the eastern portion of Texas as defined in clause (ii) of this subparagraph. Further explanation of the development of the regression equation and its application are contained in the standards implementation procedures as amended.

(iv) The critical low-flow values in Table 4 of clause (ii) of this subparagraph may be adjusted based on site-specific data relating dissolved oxygen concentrations to factors such as flow, temperature, or hydraulic conditions in accordance with the standards implementation procedures as amended. Site-specific, critical low-flow values require approval by the commission. EPA must review any site-specific, critical low-flow values that could affect permits or other regulatory actions that are subject to approval by EPA. Critical low-flow values that have been determined for particular streams are listed in the standards implementation procedures.

(B) Oyster waters.

(i) A 1,000 foot buffer zone, measured from the shoreline at ordinary high tide, is established for all bay and gulf waters except those contained in river or coastal basins as defined in §307.2 of this title (relating to Description of Standards). Recreational criteria for indicator bacteria, as specified in §307.7(b)(1) of this title (relating to Site-Specific Uses and Criteria), are applicable within buffer zones.

(ii) The criteria for median fecal coliform concentration in bay and gulf waters, exclusive of buffer zones, are 14 colonies per 100 ml with not more than 10% of all samples exceeding 43 colonies per 100 ml.

(iii) Oyster waters should be maintained so that concentrations of toxic materials do not cause edible species of clams, oysters, and mussels to exceed accepted guidelines for the protection of public health. Guidelines are provided by the United States Food and Drug Administration Action Levels for molluscan shellfish, but additional information related to human health protection may also be considered in determining acceptable toxic concentrations.

(4) Additional criteria.

(A) Chemical parameters. Site-specific criteria for chloride, sulfate, and total dissolved solids are established as averages over an annual period for either a single sampling point or multiple sampling points.

(B) pH. Site-specific numerical criteria for pH are established as absolute minima and maxima.

(C) Temperature. Site-specific temperature criteria are established as absolute maxima.

(D) Toxic materials. Criteria for toxic materials are established in §307.6 of this title (relating to Toxic Materials).

(E) Nutrient criteria. Numeric and narrative criteria to preclude excessive growth of aquatic vegetation are intended to protect multiple uses such as primary, secondary, and noncontact recreation, aquatic life, and public water supplies. Nutrient numeric criteria for specific reservoirs, expressed as concentrations of chlorophyll *a* in water, are listed in Appendix F of §307.10 of this title.

(5) Additional uses. Other basic uses, such as navigation, agricultural water supply, industrial water supply, seagrass propagation, and wetland water quality functions must be maintained and protected for all water in the state where these uses can be achieved.

§307.8. Application of Standards.

(a) Flow conditions.

(1) The following standards do not apply below critical low-flows:

(A) site-specific criteria for dissolved oxygen, pH, temperature, and numerical chronic criteria for toxic materials, as listed in Appendices A, D, and E of §307.10 of this title (relating to Appendices A - G);

(B) numerical chronic criteria for toxic materials as established in §307.6 of this title (relating to Toxic Materials);

(C) total chronic toxicity restrictions as established in §307.6 of this title;

(D) maximum temperature differentials as established in §307.4(f) of this title (relating to General Criteria); and

(E) dissolved oxygen criteria for unclassified waters, as established in §307.4(h) of this title and §307.7(b)(3) of this title (relating to Site-Specific Uses and Criteria).

(2) Critical low-flows for streams or rivers that are dominated by springflow are listed in the standards implementation procedures as amended and are calculated as follows:

(A) for springflow-dominated streams or rivers that contain federally listed endangered or threatened aquatic or aquatic dependent species, the critical low-flow value is the 0.1 percentile value derived from a lognormal distribution for the period of record at the nearest United States Geological Survey (USGS) or International Boundary and Water Commission (IBWC) gage;

(B) for springflow-dominated streams or rivers that do not contain federally listed endangered or threatened species, the critical low-flow value is the 5th percentile value of the flow data for the period of record at the nearest USGS or IBWC gage.

(3) Numerical acute criteria for toxic materials and preclusion of total acute toxicity as established in §307.6 of this title are applicable at stream flows that are equal to or greater than one-fourth of critical low-flows.

(4) Harmonic mean flow is the applicable upstream flow when calculating wastewater permit limits for criteria that are assessed as long-term means, such as criteria for total dissolved solids, chlorides, sulfates in Appendix A of §307.10 of this title, and human health toxic criteria in Table 2 of §307.6(d)(1) of this title. These criteria are applicable at all flow conditions except as specified for the applicability of assessment data in §307.9 of this title (relating to Determination of Standards and Attainment).

(5) Critical low-flows and harmonic mean flows for some classified segments are listed in the standards implementation procedures as amended. These critical low-flows are not for the purpose of regulating flows in water bodies in any manner or requiring that minimum flows be maintained in classified segments.

(6) Critical low-flows and harmonic mean flows listed in the standards implementation procedures as amended apply only to river basin and coastal basin waters. They do not apply to bay waters, gulf waters, reservoirs, or estuaries.

(7) Critical low-flows and harmonic mean flows in the standards implementation procedures as amended were calculated from historical USGS or IBWC daily streamflow records. If the calculated critical low-flow or harmonic mean flow value was equal to or less than 0.1 cubic foot per second (ft^3/s), it was rounded up to 0.1 ft^3/s.

(8) Flow values are periodically recomputed to reflect alterations in the hydrologic characteristics of a segment, including reservoir construction, climatological trends, and other phenomena.

(9) The general criteria are applicable at all flow conditions except as specified in this section or in §307.4 of this title.

(b) Mixing zones. A reasonable mixing zone is allowed at the discharge point of permitted discharges into surface water in the state, in accordance with the following provisions.

(1) The following portions of the standards do not apply within mixing zones:

(A) site-specific criteria, as defined in §307.7 of this title and listed in Appendices A, D, E, F, and G of §307.10 of this title;

(B) numerical chronic aquatic life criteria for toxic materials as established in §307.6 of this title;

(C) total chronic toxicity restrictions as established in §307.6 of this title;

(D) maximum temperature differentials as established in §307.4(f) of this title;

(E) dissolved oxygen criteria for unclassified waters, as established in §307.4(h) of this title;

(F) dissolved oxygen criteria for intermittent streams, as established in §307.4(h)(4) of this title;

(G) aquatic recreation criteria for unclassified waters, as established in §307.4(j) of this title and in §307.7(b)(1) of this title;

(H) specific human health criteria for concentrations in water to prevent contamination of drinking water, fish and shellfish so as to ensure safety for human consumption, as established in §307.6 of this title.

(2) Numerical acute aquatic life criteria for toxic materials and preclusion of total acute toxicity as established in §307.6 of this title are applicable in mixing zones. Acute criteria and acute total toxicity levels may be exceeded in small zones of initial dilution (ZIDs) at discharge points of permitted discharges, but there must be no lethality to aquatic organisms that move through a ZID. ZIDs must not exceed the following sizes:

(A) 60 feet downstream and 20 feet upstream from a discharge point in a stream and river. In addition, ZIDs in streams and rivers must not encompass more than 25% of the volume of stream flow at or above seven-day, two-year low-flow conditions;

(B) a 25-foot radius in all directions (or equivalent volume or area for diffuser systems) from a discharge point in a lake or reservoir; and

(C) a 50-foot radius in all directions (or equivalent volume or area for diffuser systems) from a discharge point in a bay, tidal river, or estuary.

(3) Provisions of the general criteria in §307.4 of this title remain in effect in mixing zones unless specifically exempted in this section.

(4) Water quality standards do not apply to treated effluent at the immediate point of discharge prior to any contact with either ambient waters or a dry streambed. However, effluent total toxicity requirements may be specified to preclude acute lethality near discharge points, or to preclude acute and chronic instream toxicity.

(5) Where a mixing zone is defined in a valid permit of the Texas Commission on Environmental Quality, the Railroad Commission of Texas, or the United States Environmental Protection Agency, the mixing zone defined in the permit must apply.

(6) Mixing zones must not preclude passage of free-swimming or drifting aquatic organisms to the extent that aquatic life use is significantly affected, in accordance with guidelines specified in the standards implementation procedures as amended.

(7) Mixing zones must not overlap unless it can be demonstrated that no applicable standards will be violated in the area of overlap. Existing and designated uses must not be impaired by the combined impact of a series of contiguous mixing zones.

(8) Mixing zones must not encompass an intake for a domestic drinking water supply. Thermal mixing zones are excepted from this provision unless elevated temperatures adversely affect drinking water treatment.

(9) Mixing zones must be individually specified for all permitted domestic discharges with a permitted monthly average flow equal to or exceeding one million gallons per day and for all permitted industrial discharges to water in the state (excepting discharges that consist entirely of storm water runoff). For domestic discharges with permitted monthly average flows less than one million gallons per day, a small mixing zone must be assumed in accordance with guidelines for mixing zone sizes specified in the standards implementation procedures as amended; and the commission may require specified mixing zones as appropriate.

(10) The size of mixing zones for human health criteria may vary from the size of mixing zones for aquatic life criteria.

(c) Minimum analytical levels. The specified definition of permit compliance for a specific toxic material must not be lower than established minimum analytical levels, unless that toxic material is of particular concern in the receiving waters, or unless an effluent specific method detection limit has been developed in accordance with 40 Code of Federal Regulations Part 136. Minimum analytical levels are listed in the standards implementation procedures as amended.

(d) Once-through cooling water discharges. When a discharge of once-through cooling water does not measurably alter intake concentrations of a pollutant, then water-quality based effluent limits for that pollutant are not required. For facilities that intake and discharge cooling-water into different water bodies, this provision only applies if water quality and applicable water quality standards in the receiving water are maintained and protected.

(e) Storm water discharges. Pollution in storm water must not impair existing or designated uses. Controls on the quality of storm water discharges must be based on best management practices, technology-based limits, or both in combination with instream monitoring to assess standards attainment and to determine if additional controls on storm water quality are needed. The standards implementation procedures as amended describe how water quality standards are applied to Texas Pollutant Discharge Elimination System storm water discharges. The evaluation of instream monitoring data for standards attainment includes the effects of storm water, as described in §307.9 of this title.

§307.9. Determination of Standards Attainment.

(a) General standards attainment sampling and assessment procedures. The procedures listed in this section are solely for the purposes of assessing water quality monitoring data to determine if water quality standards are attained in individual water bodies. Unless otherwise stated in this chapter, additional details concerning sampling procedures for the measurement, collection, preservation and laboratory analysis of water quality samples are provided in the Texas Commission on Environmental Quality (TCEQ) *Surface Water Quality Monitoring Procedures* as amended, the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater,* 40 Code of Federal Regulations (CFR) Part 136, or other reliable sources acceptable to the commission. Laboratory accreditation requirements are specified in Chapter 25 of this title (relating to Environmental Testing Laboratory Accreditation and Certification). Unless otherwise stated in this chapter, additional details concerning how sampling data are evaluated to assess standards compliance are provided in the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

(b) Samples to determine standards attainment are collected at locations approved by the commission. Samples collected at non-approved locations may be accepted at the discretion of the commission. Samples to determine standards attainment in ambient water must be representative in terms of location, seasonal variations, and hydrologic conditions. Locations must be typical of significant areas of a water body. Temporal sampling must be sufficient to appropriately address seasonal variations of concern. Sample results that are used to assess standards attainment must not include samples that are collected during extreme hydrologic conditions such as high-flows and flooding immediately after heavy rains. Further guidance on representative sampling, both spatially, temporally, and hydrologically, can be found in the TCEQ *Surface Water Quality Monitoring Procedures* and the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

(c) Collection and preservation of water samples.

(1) To ensure that representative samples are collected and to minimize alterations prior to analysis, collection and preservation of attainment determination samples are in accordance with procedures set forth in the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater,* the TCEQ *Surface Water Quality Monitoring Procedures* as amended, 40 CFR Part 136, or other reliable procedures acceptable to the commission.

(2) Bacterial and temperature determinations must be conducted on samples or measurements taken at or near the surface in accordance with the TCEQ *Surface Water Quality Monitoring Procedures* as amended. Depth collection procedures for chloride, sulfate, total dissolved solids, dissolved oxygen, chlorophyll *a,* and pH to determine standards attainment may vary depending on the water body being sampled. Standards for chloride, sulfate, total dissolved solids, dissolved oxygen, chlorophyll *a,* pH are applicable to the mixed surface layer, but a single sample taken near the surface normally provides an adequate representation of these parameters.

(3) For toxic materials, numerical aquatic life criteria are applicable to water samples collected at any depth. Numerical human health criteria are applicable to the average (arithmetic) concentration from the surface to the bottom. For the purposes of standards attainment for aquatic life protection and human health protection, samples

that are collected at approximately one foot below the water surface are acceptable for assessing standards attainment of numerical criteria.

(d) Sample analysis.

(1) Numerical criteria. Procedures for laboratory analysis must be in accordance with the most recently published edition of the book entitled *Standard Methods for the Examination of Water and Wastewater,* the TCEQ *Texas Surface Water Quality Monitoring Procedures* as amended, 40 CFR Part 136, or other reliable procedures acceptable to the commission, and in accordance with Chapter 25 of this title.

(2) Radioactivity. Measurements must be made on filtered samples to determine radioactivity associated with dissolved minerals in accordance with current analytical methodology approved by the United States Environmental Protection Agency (EPA).

(3) Toxicity. Bioassay techniques must be selected as testing situations dictate but are generally conducted using representative sensitive organisms in accordance with §307.6 of this title (relating to Toxic Materials).

(e) Sampling periodicity and evaluation.

(1) Chloride, sulfate, total dissolved solids. Standards attainment determinations must be based on the long term mean in accordance with TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended. Results from all monitoring stations within the segment are used to allow for reasonable parametric gradients. Total dissolved solids determinations may be based on measurements of specific conductance.

(2) Radioactivity. The impact of radioactive sources on surface waters must be evaluated in accordance with Chapter 336 of this title (relating to Radioactive Substance Rules), and in accordance with Chapter 290 of this title (relating to Public Drinking Water).

(3) Bacteria. Standards attainment must be based on a long-term geometric mean of applicable samples in accordance with TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended, and data are evaluated in accordance with the provisions of §307.7(b)(1) of this title (relating to Site-Specific Uses and Criteria). Samples may be evaluated with the single sample maximum criterion for purposes of swimmer safety notification programs and wastewater permit compliance. Samples must not include extreme hydrologic conditions such as very high-flows and flooding immediately after heavy rains. The high-flow exemption applies for a 24-hour period following the last measured or estimated determination that extreme hydrologic conditions exist. A high-flow exemption applies during either of the following hydrologic conditions:

(A) freshwater stream flow that exceeds the 90th percentile flow using historical records for the nearest United States Geological Survey (USGS) or International Boundary and Water Commission (IBWC) gage, as found on the USGS or IBWC websites for many Texas gages, or by calculating the percentile flow for small freshwater streams without gages using statistical corrections to account for relative watershed size; or,

(B) an estimated flow severity index of flood or an equivalent category. This applies to tidal and freshwater streams.

(4) Toxic materials. Standards attainment must be evaluated in accordance with §307.6 of this title, and in accordance with §307.8 of this title (relating to Application of Standards). To protect aquatic life, specific numerical acute toxic criteria are applied as 24-hour averages, and specific numerical chronic toxic criteria are applied as seven-day averages. Human health criteria are applied as long-term average exposure criteria designed to protect populations over a life time. Standards attainment for acute and chronic toxic criteria for aquatic life and human health criteria must be in accordance with the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended. Standards attainment for human health criteria must be based on the mean of samples collected in accordance with the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

(5) Temperature and pH. Standards attainment must be in accordance with the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

(6) Dissolved oxygen.

(A) Criteria for daily (24-hour) average concentrations must be compared to a time-weighted average of measurements taken over a 24-hour period in accordance with TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

(B) Criteria for minimum concentrations must be compared to individual measurements in accordance with TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended. When data are collected over a 24-hour period, the lowest measurement observed during that 24-hour period is compared to the applicable minimum criterion.

(7) Chlorophyll *a* in reservoirs. Standards attainment must be based on the long term median of chlorophyll *a* measurements in accordance with TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended. Medians are compared to the chlorophyll *a* criteria for individual reservoirs in Appendix F of §307.10 of this title (relating to Appendices A - G). The data for the assessment must be collected at the sampling stations used for calculating the criteria and screening levels, as listed in Appendix F of §307.10 of this title, or from comparable stations in the main pool of the reservoir.

(8) Site-specific criteria for aquatic recreation (geometric mean), total dissolved solids, chloride, and sulfate as established in Appendix A of §307.10 of this title, and human health criteria as established in Table 2 of §307.6(d)(1) of this title do not apply in the following stream types and flow conditions:

(A) perennial streams when flows are below 0.1 cubic feet per second;

(B) intermittent streams when less than 20% of the stream bed of a 500 meter sampling reach is covered by pools; or when extremely dry conditions are indicated by comparable observations of flow severity.

(f) Biological integrity. Biological integrity, which is an essential component of the aquatic life categories defined in §307.7(b)(3) of this title (relating to Site-Specific Uses and Criteria), is assessed by sampling the aquatic community. Attainment of biological integrity is assessed by indices of biotic integrity that are described in the TCEQ *Surface Water Quality Monitoring Procedures* as amended. Primary criteria associated with assessing the attainment of aquatic life uses are indices of biotic integrity and criteria for dissolved oxygen. When monitoring data indicate that primary criteria are not being attained for a presumed high aquatic life use, as defined in §307.4(h) of this title (relating to General Criteria), the affected water body is not automatically considered impaired and placed in Category 5 of the Texas Integrated Report based on the primary criteria. Instead, the listing can be deferred until a use-attainability analysis of the water body is conducted to establish the appropriate aquatic life use. If the water body is not meeting the primary criteria for the aquatic life use that is determined to be appropriate, or if the use-attainability analysis has not been completed and submitted to EPA for review within the next two submissions of Texas' Integrated Report (approximately four years), then the

water body is listed as impaired. When the appropriate aquatic life use as determined by the use-attainability study is less stringent than the presumed high use, then the appropriate aquatic life use and dissolved oxygen criteria are listed in Appendix D of §307.10 of this title after approval by EPA. Water bodies that are not meeting a presumed high aquatic life use are identified and subject to notice and public comment during the development of Texas' Integrated Report.

(g) Additional parameters. Assessment of narrative criteria parameters must be performed in accordance with the TCEQ *Guidance for Assessing and Reporting Surface Water Quality in Texas* as amended.

§307.10. Appendices A - G.

The following appendices are integral components of this chapter of the Texas Surface Water Quality Standards.

(1) Appendix A - Site-specific Uses and Criteria for Classified Segments:
Figure: 30 TAC §307.10(1)

(2) Appendix B - Sole-source Surface Drinking Water Supplies:
Figure: 30 TAC §307.10(2)

(3) Appendix C - Segment Descriptions:
Figure: 30 TAC §307.10(3)

(4) Appendix D - Site-specific Uses and Criteria for Unclassified Water Bodies:
Figure: 30 TAC §307.10(4)

(5) Appendix E - Site-specific Toxic Criteria:
Figure: 30 TAC §307.10(5)

(6) Appendix F - Site-specific Nutrient Criteria for Selected Reservoirs:
Figure: 30 TAC §307.10(6)

(7) Appendix G - Site-specific Recreational Uses and Criteria for Unclassified Water Bodies:
Figure: 30 TAC §307.10(7)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 2, 2010.

TRD-201003720
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: January 29, 2010
For further information, please call: (512) 239-2548

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 354. MEMORANDA OF UNDERSTANDING

31 TAC §354.4

The Texas Water Development Board (Board) adopts an amendment to Chapter 354, Memoranda of Understanding, replacing §354.4, Memorandum of Understanding (MOU) Between Texas Water Development Board and the Office of Rural Community Affairs (ORCA), with an updated MOU between the Texas Water Development and the Texas Department of Rural Affairs (TDRA) (formerly ORCA). The amendment is adopted without changes to the proposed text as published in the April 30, 2010, issue of the *Texas Register* (35 TexReg 3452).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE AMENDMENTS.

The Board adopts amended §354.4, MOU between the Board and the TDRA, to incorporate a new MOU with the TDRA. Pursuant to Rider 8 of the Board's appropriations and Rider 6 of TDRA's appropriations, 2010-2011 General Appropriations Act, 81st Legislature, the Board and TDRA are required to continue to coordinate funds as outlined in a MOU to assure that funds are not expended in a manner that aids the proliferation of colonias or are otherwise used in a manner inconsistent with the purpose of the Economically Distressed Areas Program administered by the Board to provide for the maximum delivery of the funds and minimum administrative delay in their expenditure.

PUBLIC COMMENTS.

No comments were received regarding the proposed amendment.

STATUTORY AUTHORITY.

The amendment is adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State; and §6.104 which authorizes the board to enter into memoranda of understanding with other state agencies.

The statutory provision affected by the amendment is Texas Water Code, Chapter 6.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 6, 2010.

TRD-201003772
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: July 26, 2010
Proposal publication date: April 30, 2010
For further information, please call: (512) 463-8061

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31 TAC §354.5, §354.6

The Texas Water Development Board (Board) adopts amendments to Chapter 354, Memoranda of Understanding. Section 354.5 is adopted without change, and §354.6 is adopted with one change to the proposed text as published in the May 14, 2010, issue of the *Texas Register* (35 TexReg 3795) and will be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE AMENDMENTS.

The Board adopts the amendment to Chapter 354 that adds §354.5, Letter of Agreement between the Board and the TCEQ. The Board provides financial assistance for the construction of water facilities, and therefore performs engineering reviews and analyses of projects constructed with state or federal funds administered by the Board. The TCEQ, through its regulatory authority, performs similar reviews and analyses of these same projects. The Letter of Agreement was implemented to accurately reflect interaction between the Board and the TCEQ on review of water supply projects.

The Board also adopts the addition of §354.6, Interagency Cooperation Contract between the Board, TCEQ, and DSHS. Pursuant to Water Code §17.933(b), the DSHS and Board may enter into a memorandum of understanding regarding public health nuisance surveys for the Board on behalf of applicants for financial assistance through the Board's Economically Distressed Areas Program (EDAP). Pursuant to Rider 17 of the Board's appropriations and Rider 24 of TCEQ's appropriations, the Board and TCEQ shall reimburse the DSHS through interagency contracts for the costs incurred in conducting these nuisance surveys.

Texas Water Code §6.104 requires the Board to adopt by rule any memorandum of understanding between the Board and any other state agency. Although these documents are not titled, "Memorandum of Understanding", the Board proposed and adopts the addition of §354.5 and §354.6 to comply with the intent of the Water Code §6.104 to give the public notice of certain agreements between state agencies.

PUBLIC COMMENTS.

No comments were received regarding the proposed amendments. A minor, non-substantive change has been made to the title of §354.6, changing the reference to "Texas Water Development" to "Texas Water Development Board".

STATUTORY AUTHORITY

The amendments are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State and §6.104 which authorizes the board to enter into memoranda of understanding with other state agencies.

The statutory provision affected by the amendments is Texas Water Code, Chapter 6 and Texas Water Code, §17.933.

§354.6. Interagency Cooperation Contract between the Texas Water Development Board, the Texas Commission on Environmental Quality and Department of State Health Services.

(a) This Interagency Contract is entered into by and between the State agencies shown below as Contracting Parties, pursuant to the authority granted and in compliance with the provisions of Chapter 771, Texas Government Code.

(b) Contracting Parties. The Texas Water Development Board (Board), the Texas Commission on Environmental Quality (Commission), and the Department of State Health Services (DSHS).

(c) Statement of Work.

(1) Upon the Board's request, DSHS shall conduct public health nuisance surveys for the Board on behalf of applicants for financial assistance through the Board's Economically Distressed Areas Program (EDAP). Each survey shall include a final determination by DSHS as to whether a public health nuisance exists that is dangerous to public health and safety and that results from water supply and/or sanitation problems in the area to be served by the proposed project. All work will be performed in a diligent and timely manner, in accordance with DSHS guidelines agreed upon by the participating agencies. Public health nuisance determinations by DSHS under this Contract shall be final.

(2) Requests for public health nuisance surveys shall originate from the Board's deputy executive administrator with oversight of the Economically Distressed Areas Program or that person's designee. Requests will be in writing, by means of postal or electronic mail.

(3) The Board and the Commission shall reimburse DSHS for actual costs incurred for the performance of each survey. DSHS shall adhere to the applicable State of Texas Travel allowances.

(d) Contract Amount.

(1) The total amount of this Contract shall not exceed Two Hundred Fifty Thousand Dollars ($250,000 ($125,000 per State of Texas fiscal year)) in reimbursement and payments to DSHS. The Board and the Commission shall not pay more than One Hundred and Twenty-Five Thousand Dollars ($125,000) each to DSHS for the biennium.

(2) DSHS understands and agrees that the amount actually paid under this Contract shall be only for the performance of public health nuisance surveys specifically requested by the Board and that the full amount of this Contract may not be expended during the term of this Contract.

(e) Payment.

(1) DSHS shall be reimbursed for its actual, reasonable, and necessary costs incurred while conducting public health nuisance surveys for the Board on behalf of applicants for financial assistance through the Board's Economically Distressed Areas Program. Actual, reasonable, and necessary costs include but are not limited to costs for administrative review, field work, report preparation, and travel.

(2) The Board shall reimburse DSHS for fifty percent (50%) of its actual, reasonable, and necessary costs incurred while conducting public health nuisance surveys for the Board on behalf of applicants for financial assistance through the Board's Economically Distressed Areas Program up to an amount not to exceed One Hundred Twenty-Five Thousand Dollars ($125,000) for the biennium.

(3) The Commission shall reimburse DSHS for the remaining fifty percent (50%) of its actual, reasonable, and necessary costs incurred while conducting public health nuisance surveys for the Board on behalf of applicants for financial assistance through the Board's Economically Distressed Areas Program up to an amount not to exceed One Hundred Twenty-Five Thousand Dollars ($125,000) for the biennium.

(4) DSHS shall submit requests for reimbursement of costs in the form of a cumulative summary "Outlay Report and Request for Reimbursement," Exhibit A, (Outlay Report) with line itemized documentation as required by the Board. Each Outlay Report shall also include a separate original invoice detailing the specific amount the Commission is being requested to pay. Requests for reimbursement shall be submitted on the Outlay Report on a per project basis as costs are incurred.

(5) Outlay Reports shall be submitted by DSHS concurrently to:

(A) Staff Services and Contract Administration, Texas Water Development Board, Attn: Agency Contract Administrator, P.O. Box 13231, Austin, Texas 78711-3231; (512) 463-3154; and

(B) Texas Commission on Environmental Quality, Attn: Contract Manager, Financial Support Section, Field Operations

Division, 12100 Park 35 Circle, Bldg. A, MC 174, Austin, Texas 78753.

(6) The Board and the Commission will independently review all submitted requests for reimbursement and process such requests in a timely manner. Upon approval of the Outlay Report, the Board and Commission shall separately make required payments to DSHS.

(7) DSHS shall maintain financial accounting documents and records in accordance with generally accepted governmental accounting practices and procedures. Such documents and records shall include copies of invoices, receipts, and approved travel vouchers. DSHS shall make such documents and records available for examination and audit by the Board or the Commission upon request.

(8) DSHS accepts the authority of the State Auditor's Office to conduct audits and investigations in connection with any and all state funds received pursuant to this Contract. DSHS shall comply with and cooperate in any such investigation or audit. DSHS also agrees to include a provision in any subcontract related to this Contract that requires the subcontractor to submit audits to, and agree to investigation by, the State Auditor's Office in connection with any and all state funds received pursuant to the subcontract.

(f) Term of Contract.

(1) This Contract is effective beginning October 1, 2009 and expires upon the occurrence of either of the following:

(A) automatically upon failure of the legislature to authorize appropriations; or

(B) upon thirty day written notice by one of the parties to the other parties.

(2) In the event of the occurrence of conditions in paragraph (1) of this subsection, funding shall continue until reimbursement is made to DSHS of all unreimbursed eligible expenses incurred, as described under subsection (e) of this section.

(g) Notices.

(1) Requests for EDAP surveys should be sent to: Kathryn C. Perkins, RN, MBA, Assistant Commissioner, Division for Regulatory Services, Texas Department of State Health Services, P.O. Box 149347, MC 1949, Austin, Texas 78714-9347.

(2) Other than requests for reimbursement and for EDAP surveys, all notices between the parties under this Contract shall be sent to:

(A) Texas Water Development Board, Attn: Deputy Executive Administrator, Project Finance and Construction Assistance, P.O. Box 13231, Austin, Texas 78711-3231;

(B) Texas Commission on Environmental Quality, Attn: Contract Manager, Financial Support Section, Field Operations Division, P.O. Box 13087, MC 174, Austin, Texas 78711-3087; and

(C) Department of State Health Services Client Services Contracting Unit Attn: Contract Manager MC 1886 P.O. Box 149347 Austin, Texas 78714-9347.

(h) Severance Provision. Should any one or more provisions of the Contract be held to be null, void, or for any reason without force or effect, such provision(s) shall be construed as severable from the remainder of the Contract and shall not affect the validity of all other provisions of the Contract, which shall remain in full force and effect.

(i) Amendment. The Contract may be amended only in writing at any time by the mutual consent of the Board, the Commission, and DSHS and by the officials indicated below or their designees.

(j) Miscellaneous Provisions. Force Majeure: DSHS may be excused from performance under this Contract for any period when performance is prevented as the result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party experiencing the event of Force Majeure has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance and to shorten the duration of the event of Force Majeure. The party suffering an event of Force Majeure shall provide notice of the event to the other parties as soon as practicable but not later than 36 hours after the termination of the event. Subject to this provision, such nonperformance shall not be deemed a default or a ground for termination.

(k) Certifications.

(1) The Undersigned Parties do hereby certify as follows:

(A) that the services above are necessary and essential for activities that are properly within the statutory functions and programs of the affected agencies of State Government;

(B) that the proposed arrangements serve the interest of efficient and economical administration of the State Government; and

(C) that the services, supplies, or materials contracted for are not required by §21 of Article 16 of the Constitution of Texas to be supplied under contract given to the lowest responsible bidder.

(2) The Board further certifies that it has the authority to enter into this Contract by authority granted in Chapter 6, §6.190 of the Texas Water Code and Chapter 771 of the Texas Government Code.

(3) The Commission further certifies that it has the authority to enter into this Contract by authority granted in Chapter 5, §5.229 of the Texas Water Code and Chapter 771 of the Texas Government Code.

(4) DSHS further certifies that it has authority to enter into this Contract and to perform the services of this Contract by authority granted in Chapter 2, §17.933(b) of the Texas Water Code, Chapter 1001 of the Texas Health and Safety Code, and Chapter 771 of the Texas Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 6, 2010.

TRD-201003771
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: July 26, 2010
Proposal publication date: May 14, 2010
For further information, please call: (512) 463-8061

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER T. ADMINISTRATION

40 TAC §19.1921

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to §19.1921, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification. The amendment to §19.1921 is adopted with changes to the proposed text published in the February 26, 2010, issue of the *Texas Register* (35 TexReg 1663) and will be republished.

The amendment is adopted, in part, to comply with the provisions of Senate Bill 806, 81st Legislature, Regular Session, 2009, that amended the Texas Health and Safety Code, §250.003 and §253.008. These sections require a nursing facility to annually search the nurse aide registry (NAR) and the employee misconduct registry (EMR) and to keep a copy of the results of the searches in the employee's personnel file.

The adoption also updates and clarifies several other requirements of nursing facilities. The adopted changes include revising the number of days' notice that a nursing facility must give to a resident's relatives or responsible parties before voluntarily closing, from seven to 30; clarifying the type and content of notices that must be posted in a nursing facility; clarifying the reports that must be made available for public inspection; and updating telephone numbers and the agency name.

Proposed §19.1921 was revised to ensure that employee background checks are conducted at least every 12 months for each employee, but not necessarily during the month of the employment anniversary. The change is consistent with other DADS program rules.

DADS received no comments regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities; Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR; and Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR.

§19.1921. General Requirements for a Nursing Facility.

(a) The facility must admit and retain only residents whose needs can be met through service from the facility staff, or in cooperation with community resources or other providers under contract.

(1) In any circumstance in which a facility refuses to admit a resident being transferred due to the emergency closure of another facility, the facility must provide the DADS regional director or program manager for the area in which the facility is located with a written statement of the reasons for the refusal within 10 working days after the refusal.

(2) Failure to submit the written statement timely or including false or misleading information in the statement will result in an administrative penalty.

(b) Individuals who have met the requirements of §19.2500 of this chapter (relating to Preadmission Screening and Annual Resident Review (PASARR)) and have mental or physical diseases, or both, that endanger other residents may be admitted or retained if adequate rooms and care are provided to protect the other residents.

(c) The term "hospital" may not be used as part of the name of a nursing facility unless it has been classified and duly licensed as a hospital by the appropriate state agency.

(d) In the event any facility ceases operation, temporarily or permanently, voluntarily or involuntarily, notice must be provided to the residents and residents' relatives or responsible parties of closure.

(1) If the closure is voluntary, notice to residents' relatives or responsible parties must be in writing, not later than one week after the date on which the decision to close is made, giving at least 30 days notice for relocation after receipt of notice.

(2) If the closure is involuntary, the facility must make the notification, whether orally or in writing, immediately on receiving notice of the closure.

(e) Each licensed facility must conspicuously and prominently post the information listed in paragraphs (1) - (12) of this subsection in an area of the facility that is readily available to residents, employees, and visitors. The posting must be in a manner that each item of information is directly visible at a single time. In the case of a licensed section that is part of a larger building or complex, the posting must be in the licensed section or public way leading to it. Any exceptions must be approved by DADS. The following items must be posted:

(1) the facility license;

(2) a complaint sign provided by DADS giving the toll-free telephone number;

(3) a notice in a form prescribed by DADS that inspection and related reports are available at the facility for public inspection;

(4) a concise summary prepared by DADS of the most recent inspection report;

(5) a notice of DADS' toll-free telephone number 1-800-458-9858 to request summary reports relating to the quality of care, recent investigations, litigation or other aspects of the operation of the facility that are available to the public;

(6) a notice that DADS can provide information about the nursing facility administrator at 512-438-2015;

(7) if a facility has been ordered to suspend admissions, a notice of the suspension, which must be posted also on all doors providing public ingress to and egress from the facility;

(8) a statement of resident rights using a form DADS provides;

(9) a notice that employees, other staff, residents, volunteers, and family members and guardians of residents are protected from discrimination or retaliation as provided by the Health and Safety Code, §242.133 and §242.1335; and that the facility has available for

public inspection a copy of the Health and Safety Code, Chapter 242, Subchapter E;

(10) for a facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders, a disclosure statement describing the nature of its care or treatment of residents with Alzheimer's disease and related disorders in accordance with §19.204(b)(4) of this chapter (relating to Application Requirements);

(11) at each entrance to the facility, a sign that states that a person may not enter the premises with a concealed handgun and that complies with Penal Code §30.06; and

(12) daily for each shift, the current number of licensed and unlicensed nursing staff directly responsible for resident care in the facility. In addition, the nursing facility must make the information required to be posted available to the public upon request.

(f) A facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders must give the required department disclosure statement to an individual:

(1) with Alzheimer's disease or a related disorder, seeking placement as a resident;

(2) attempting to place another individual as a resident with Alzheimer's disease or a related disorder; or

(3) seeking information about the facility's care or treatment of residents with Alzheimer's disease or a related disorder.

(g) The reports referenced in subsection (e)(3) of this section must be maintained in a well-lighted, accessible location and must include:

(1) a statement of the facility's compliance record that is updated at least bi-monthly and reflects at least one year's compliance record, in a form required by DADS; and

(2) if a facility has been cited for a violation of residents' rights, a copy of the citation, which must remain in the reports until any regulatory action with respect to the violation is complete and DADS has determined that the facility is in full compliance with the applicable requirement.

(h) The facility must inform the resident or responsible party or both upon the resident's admission that the inspection reports referenced in subsection (e)(3) of this section are available for review.

(i) A copy of the Health and Safety Code, Chapter 242, must be available for public inspection at the facility.

(j) Within 72 hours after admission, the facility must prepare a written inventory of the personal property a resident brings to the facility, such as furnishings, jewelry, televisions, radios, sewing machines, and medical equipment. The facility does not have to inventory the resident's clothing; however, the operating policies and procedures must provide for the management of resident clothing to prevent loss or damage. The facility administrator or his or her designee must sign and retain the written inventory and must give a copy to the resident or the resident's responsible party or both. The facility must revise the written inventory to show if property is lost, destroyed, damaged, replaced, or supplemented. Upon discharge of the resident, the facility must document the disposition of personal effects by a dated receipt bearing the signature of the resident or the resident's responsible party or both. See §19.416 of this chapter (relating to Personal Property).

(k) Each facility must comply with the provisions of the Health and Safety Code, Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities).

(l) Before a facility hires an unlicensed employee, the facility must search the employee misconduct registry (EMR) established under §253.007, Health and Safety Code, and the DADS nurse aide registry (NAR) to determine whether the individual is designated in either registry as unemployable. Both registries can be accessed on the DADS Internet website.

(m) A facility is prohibited from hiring or continuing to employ a person who is listed in the EMR or NAR as unemployable.

(n) A facility must provide notification about the EMR to an employee in accordance with §93.3 of this title (relating to Employment and Registry Information).

(o) In addition to the initial search of the EMR and NAR, a facility must:

(1) conduct a search of the NAR and EMR to determine if an employee of the facility is listed as unemployable in either registry as follows:

(A) for an employee most recently hired before September 1, 2009, by August 31, 2011, and at least every twelve months thereafter; and

(B) for an employee most recently hired on or after September 1, 2009, at least every twelve months; and

(2) keep a copy of the results of the initial and annual searches of the NAR and EMR in the employee's personnel file.

This agency hereby certifies that the proposal has been reviewed by 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 6, 2010.

TRD-201003753
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2010
Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §98.19 and §98.61, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements. The amendment to §98.61 is adopted with changes to the proposed text published in the February 26, 2010, issue of the *Texas Register* (35 TexReg 1727) and will be republished. The amendment to §98.19 is adopted without changes to the proposed text.

The amendments are adopted to implement portions of Senate Bill (SB) 806, 81st Legislature, Regular Session, 2009. SB 806, in part, amended the Texas Health and Safety Code, §250.003 and §253.008. The statutory amendments require an adult day care facility to search the nurse aide registry (NAR) and em-

ployee misconduct registry (EMR) annually and to maintain a copy of the results of the initial and annual searches in the personnel record of each employee. In addition, to increase consistency across DADS' programs, the required time period for disclosing certain background information was increased from two years to five years preceding the date the applicant submits an application.

Proposed §98.61 was revised to ensure that employee background checks are conducted at least every 12 months for each employee, but not necessarily during the month of the employment anniversary. The change is consistent with other DADS program rules.

DADS received no comments regarding adoption of the amendments.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.19

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Human Resources Code, Chapter 103, which provides DADS with the authority to license and regulate adult day care facilities; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter 253, which requires DADS to maintain the EMR.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 6, 2010.

TRD-201003751
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2010
Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

40 TAC §98.61

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Human Resources Code, Chapter 103, which provides DADS with the authority to license and regulate adult day care facilities; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain the NAR; and Texas Health and Safety Code, Chapter, 253, which requires DADS to maintain the EMR.

§98.61. General Requirements.

(a) For purposes of this subchapter, the term, "communicable diseases" has the meaning assigned to it under 25 TAC Chapter 97 (relating to Communicable Diseases).

(b) A facility must:

(1) comply with the requirements for advance directives as outlined under subsection (c) of this section;

(2) comply with the provisions of Chapter 250 of the Health and Safety Code (relating to criminal history checks of employees and applicants for employment in certain facilities serving the elderly or persons with disabilities);

(3) before offering employment, search the employee misconduct registry (EMR) established under §253.007, Health and Safety Code, and the DADS nurse aide registry (NAR) to determine if an individual is designated in either registry as unemployable. Both registries can be accessed on the DADS Internet website.

(A) A facility must not employ a person who is listed as unemployable in either registry.

(B) A facility must provide information about the EMR to an employee in accordance with §93.3 of this title (relating to Employment and Registry Information).

(C) In addition to the initial search of the EMR and NAR, a facility must:

(i) conduct a search of the NAR and EMR to determine if the employee is designated in either registry as unemployable as follows:

(I) for an employee most recently hired before September 1, 2009, by August 31, 2011 and at least every twelve months thereafter; and

(II) for an employee most recently hired on or after September 1, 2009, at least every twelve months; and

(ii) keep a copy of the results of the initial and annual searches of the NAR and EMR in the employee's personnel file;

(4) develop policies to comply with standards for universal precautions for HIV/AIDS and related conditions in the workplace;

(5) develop written policies for the control of communicable diseases in employees and clients, which include tuberculosis (TB) screening and provision of a safe and sanitary environment for clients and their families;

(6) comply with all relevant federal and state standards; and

(7) comply with all applicable provisions of the Human Resource Code, Chapter 102.

(c) A facility must maintain policies and procedures regarding the following rules with respect to all adult clients receiving services provided by the facility:

(1) The facility must provide a client with the following written information:

(A) the client's rights under Texas law (whether statutory or as recognized by the courts of the state) to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives;

(B) the facility's policies respecting the implementation of these rights; and

(C) a written list of the client's rights, as outlined under the Human Resource Code §102.004, Rights of the Elderly.

(2) The facility must document in the client's record whether the client has executed an advance directive.

(3) The facility must not condition the provision of care or otherwise discriminate against a client based on whether the client has executed an advance directive.

(4) The facility must ensure compliance with the requirements of Texas law, whether statutory or as recognized by the courts of Texas, respecting advance directives.

(5) The facility must educate the client, family members and staff, in a language they understand, on issues concerning advance directives.

(6) The facility must provide the attending physician with any information relating to a known existing Directive to Physicians or Living Will or Durable Power of Attorney for Health Care, and assist with coordinating physicians' orders with any directive.

(7) When a client is in an incapacitated state, and therefore is unable to receive information or articulate whether he has executed an advance directive, the family, surrogate, or other concerned person must receive the information concerning advance directives. The facility must provide this information to the client in a language he understands, if he is no longer incapacitated.

(8) When the client or a relative, surrogate, or other concerned or related individual presents the facility with a copy of the client's advance directive, the facility must comply with the advance directive including recognition of a durable power of attorney for health care, to the extent allowed under state law. If no one comes forward with a previously executed advance directive and the client is incapacitated or otherwise unable to receive information or articulate whether he has executed an advance directive, the facility must note that the client was not able to receive information and was unable to communicate whether an advance directive existed.

(d) A facility must:

(1) contact DADS at 1-800-458-9858 on learning of alleged abuse or neglect of a client and send a written investigation report to DADS no later than the fifth working day after the oral report;

(2) maintain incident reports;

(3) ensure the confidentiality of individual client records and other information related to clients; and

(4) inform the client orally and in writing of his rights, responsibilities, and grievance procedures in a language he understands.

(e) A facility must prominently and conspicuously post for display in a public area of the facility that is readily available to clients, employees, and visitors:

(1) the license issued under this chapter;

(2) a sign prescribed by DADS that describes complaint procedures and specifies how complaints may be filed with DADS;

(3) a notice in the form prescribed by DADS stating that inspection and related reports are available at the facility for public inspection and providing DADS' toll-free telephone number that may be used to obtain information concerning the facility;

(4) a copy of the most recent inspection report relating to the facility;

(5) a brochure or letter that outlines the facility's hours of operation, holidays, and a description of activities offered; and

(6) emergency telephone numbers, including the abuse hotline telephone number, near all telephones.

This agency hereby certifies that the proposal has been reviewed by 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 6, 2010.

TRD-201003752
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: September 1, 2010
Proposal publication date: February 26, 2010
For further information, please call: (512) 438-3734

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 47 concerning Employee Notice of Injury or Death and Claim for Benefits. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt the following rules:

§47.5. Information Constituting Claim

§47.10. Signature of Claimant

§47.15. Employer Advances Compensation

§47.20. Beneficiaries Filing Claim

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on August 16, 2010 and submitted to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-201003789
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: July 7, 2010

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The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 51 concerning Award of the Board. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt the following rules:

§51.10. Joint Payment of Award

§51.15. Periodic Installments

§51.20. Lump Sum Payment

§51.25. Request for Review

§51.30. Review of Award

§51.50. Payments of Attorney's Fees

§51.65. Attorney Fees

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m on August 16, 2010 and submitted to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-201003790
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: July 7, 2010

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The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 61 concerning Prehearing Conferences. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB 178, 76th Legislature.

The Division's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt the following rules:

§61.5. Request for Prehearing Conference

§61.7. Request for Prehearing Conference

§61.15. Setting under Texas Civil Statutes, Article 8306, §18a

§61.20. Setting on Hardship

§61.25. Setting at Carrier's Request

§61.30. Filing of Medical Information

§61.35. Exchange of Medical Information

§61.40. Additional Medical

§61.45. Charges for Reports

§61.50. Representatives Must Be Qualified

§61.55. Supply of Forms

§61.60. Attendance at Conference

§61.65. Request for Cancellation of Prehearing Conference

§61.70. Maintain Setting

§61.75. Failure to Appear

§61.80. Participation at Conference

§61.85. Carrier Self-Audit of Prehearing Conference

§61.90. Conduct at Prehearing Conference

§61.95. Consular Officers

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m on August 16, 2010 and submitted to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-201003791
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: July 7, 2010

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are 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.

Figure: 10 TAC §53.31(l)

AMFI	Form of Assistance
≤30% AMFI	0% interest, 5-year deferred, forgivable loan, or grant agreement.
>30% and ≤50% AMFI	0% interest, 10- year deferred, forgivable loan, or grant agreement.
>50% and ≤60% AMFI	0% interest, 15-year deferred, forgivable loan, or grant agreement.
>60% and ≤80% AMFI	0% interest, 15-year term repayable loan.

Figure: 10 TAC §53.80(4)

Rent	Resolution from Local Government	Maximum Award as % of TDC	% of TDC from other sources
FMR greater than High Home	No	90%	10%
FMR greater than High Home	Yes	92%	8%
FMR equal to High Home	No	93%	7%
FMR equal to High Home	Yes	95%	5%
FMR equal to Low Home	No	96%	4%
FMR equal to Low Home	Yes	98%	2%

Figure: 22 TAC §177.13(c)

AVISO SOBRE QUEJAS DE ORGANIZACIONES MÉDICAS SIN FINES DE LUCRO

La atención médica en esta instalación se brinda a través de una organización médica sin fines de lucro, aprobada y certificada por la Junta de Médicos de Texas. Las quejas sobre la atención médica prestada por esta organización y/o sus médicos, así como por otros profesionales acreditados e inscritos en la Junta de Examinadores Médicos del Estado de Texas, incluyendo asistentes de médicos, practicantes de acupuntura, y asistentes de cirugía, se pueden presentar en la siguiente dirección para ser investigadas:

Texas Medical Board
Attention: Investigations
333 Guadalupe, Tower 3, Suite 610
P.O. Box 2018, MC-263
Austin, Texas 78768-2018

Si necesita ayuda para presentar una queja, llame al:

1-800-201-9353

Para más información, visite nuestro sitio web en www.tmb.state.tx.us.

Figure: 22 TAC §851.32(k)

Texas Board of Professional Geoscientists
CONTINUING EDUCATION PROGRAM ACTIVITY LOG

NAME: _____ **P.G. NUMBER:** _____ **RENEWAL PERIOD COVERED:** _____

DATE(s)	ACTIVITY (Title, Location, Instructor)	SPONSORING ORGANIZATION (Name and Address)	Type Code*	Duration	PDH Earned[1]	Carry over (Max 30 PDH)[2]
			Total			

* Code: P=Participant Credit I=Instructor Credit A=Author Credit M=Meeting Credit E=Ethics Related Credit [3]

PDH = Professional Development Hours. This is the standard unit of credit for the TBPG Continuing Education Program.

1 - Minimum of 15 PDH per renewal is required for renewal.
2 - Maximum of 30 PDH can be carried over from the previous year.
3 - Minimum of 1 PDH is required to meet Ethics Requirement.

Conversion to PDH: Direct Hrs = 1 PDH
CEU, Papers, etc. = 10 PDH
College Semester 1 hr = 15 PDH
Professional Orgs = 5 PDH max
College Quarter 1 hr = 10 PDH
A maximum of 5 PDH is allowed for self-directed course work.

Figure: 22 TAC §851.156(b)

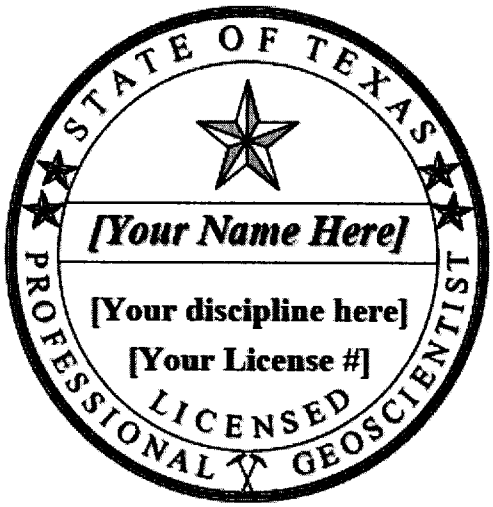

Figure: 30 TAC Chapter 17--Preamble

No.	Property	Description	%
B-1	Coal Cleaning or Refining Facilities	Used to remove impurities from coal in order to boost the heat content and to reduce potential air pollutants.	V
B-2	Atmospheric or Pressurized and Bubbling or Circulating Fluidized Bed Combustion Systems and Gasification Fluidized Bed Combustion Combined Cycle Systems	Combustion systems that reduce pollution through the use of a fluidized bed that can be atmospheric & bubbling or circulating; gasification combined cycle systems; or pressurized & bubbling or circulating systems.	V
B-3	Ultra-Supercritical Pulverized Coal Boilers.	Boiler system designed to provide 4500 psig/1100°/1100°/1100° double reheat configuration.	V
B-4	Flue Gas Recirculation Components	Ductwork, blowers, etc. - used to redirect part of the flue gas back to the combustion chamber for reduction of NO_x formation. May include flyash collection in coal fired units.	100 [~~V~~]
B-5	Syngas Purification Systems and Gas-Cleanup Units	A system, including all necessary appurtenances, that (1) produces synthesis gas from coal, biomass, petroleum coke, or solid waste and is then converted to electricity via combined cycle power generation equipment and (2) equipment that removes sulfur, carbon, and other polluting compounds from synthesis gas streams.	V
B-6	Enhanced Heat Recovery Systems	A heating system used to reduce the temperature and humidity of the exhaust gas stream and recover the heat so that it can be returned to the steam generator so as to increase the quantity of steam generated per quantity of fuel consumed.	V
B-7	Exhaust Heat Recovery Boilers	Used to recover the heat from boiler to generate additional steam.	V
B-8	Heat Recovery Steam Generators	A counter-flow heat exchanger consisting of a series of super-heater, boiler (or evaporator) and economizer tube sections, arranged from the gas inlet to the gas outlet to maximize heat recovery from the gas turbine exhaust gas.	V
B-9	Heat Transfer Sections for Heat Recovery Steam Generators [~~Super heaters and Evaporators~~]	Super-heaters, Evaporators, Re-heaters & Economizers.	V
B-10	Enhanced Steam Turbine Systems	Enhanced efficiency steam turbines.	V
B-11	Methanation	Coal Gasification process that removes carbon and produces methane, including the necessary support systems and appurtenances.	V
B-12	Coal Combustion or Gasification By-product and Co-product Handling, Storage, and Treatment Facilities	Used for handling, storage, or treatment of byproducts or co-products produced (resulting) from the combustion or gasification of coal such as boiler and Gasifier slag, bottom ash, flue gas desulfurization (FGD) material, fly ash, and sulfur.	100 [~~V~~]
B-13	Biomass Cofiring Storage, Distribution, and Firing Systems	Installed to reduce pollution by using biomass as a supplementary fuel.	V

B-14	Coal Cleaning or Drying Processes, such as coal drying/moisture reduction, air jigging, precombustion decarbonization, and coal flow balancing technology	Used to produce a cleaner burning coal (such as coal drying, moisture reduction, air jigging, precombustion decarbonization, and coal flow balancing technology).	V
B-15a	Oxy-Fuel Combustion Technology[~~, Amine or Chilled Ammonia Scrubbing, Catalyst based Fuel or Emission Conversion Systems, Enhanced Scrubbing Technology, Modified Combustion Technologies, Cryogenic Technology~~]	Installed to allow the feeding of O2, rather than air, and a proportion of recycled flue gases to the boiler.	V
B-15b	Amine or Chilled Ammonia Scrubbing	Installed to provide post combustion capture of pollutants (including carbon dioxide upon the effective date of a final rule adopted by the USEPA regulating carbon dioxide as a pollutant).	100
B-15c	Catalyst based Systems	Installed to allow the use of catalysts to reduce emissions.	100
B-15d	Enhanced Scrubbing Technology	Installed to enhance scrubber performance, including equipment that promotes the oxidation of elemental mercury in the flue gas prior to entering the scrubber.	100
B-15e	Modified Combustion Technologies	Systems such as chemical looping and biomass co-firing that are designed to enhance pollutant removal.	V
B-15f	Cryogenic Technology	Cryogenic cooling systems used to reduce pollution (including carbon dioxide upon the effective date of a final rule adopted by the USEPA regulating carbon dioxide as a pollutant).	V
B-16	Greenhouse Gas Capture & Sequestration Equipment [~~If the United States Environmental Protection Agency adopts a final rule or regulation regulating carbon dioxide as a pollutant, property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in this state that is geologically sequestered in this state~~]	Used, constructed, acquired, or installed wholly or partly to capture carbon dioxide or other regulated greenhouse gasses from an anthropogenic source in this state that is then sequestered in this state. (This item is only in effect upon the effective date of a USEPA final rule regulating carbon dioxide as a pollutant.)	V
B-17	Fuel Cells [~~used to generate electricity using hydrogen derived from coal, biomass, petroleum coke, or solid waste.~~]	Used to generate electricity using hydrogen derived from coal, biomass, petroleum coke, or solid waste.	V
B-18	Regulated Air Pollutant Control Equipment [~~Any other equipment designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant.~~]	Any other facility, device, or method designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant.	V

Figure: 30 TAC §17.14(a)

Tier I Table

The property listed in this table is property that the executive director has determined is used wholly for pollution control purposes when used as shown in the Description section of the table and when no marketable product arises from using the property. The items listed are described in generic terms without the use of brand names or trademarks. The use percentages on all property on the table are established based on standard uses of the pieces of equipment involved. If the executive director determines that the equipment is not being used in a standard manner (*e.g.*, use in production or recovery of a marketable product), the executive director may require that a Tier III application, using the Cost Analysis Procedure, be filed by the applicant to calculate the appropriate use determination percentage. For items where the description limits the use determination to the incremental cost difference, the cost of the property or device with the pollution control feature is compared to a similar device or property without the pollution control feature. The table is a list adopted under Texas Tax Code, §11.31(g).

Air Pollution Control Equipment				
No.	Media	Property	Description	%
Particulate Control Devices				
A-1	Air	Baghouse Dust Collectors	Structures containing filters, blowers, ductwork - used to remove particulate matter from exhaust gas streams.	100
A-2	Air	Demisters or Mist Eliminators Added	Mesh pads or cartridges - used to remove entrained liquid droplets from exhaust gas streams.	100
A-3	Air	Electrostatic Precipitators	Wet or dry particulate collection created by an electric field between positive or negative electrodes and collection surface.	100
A-4	Air	Dry Cyclone Separators	Single or multiple inertial separators with blowers and ductwork used to remove particulate matter from exhaust gas streams.	100
A-5	Air	Scrubbers	Wet collection device using spray chambers, wet cyclones, packed beds, orifices, venturi, or high-pressure sprays to remove particulates and chemicals from exhaust gas streams. System may include pumps, ductwork, and blowers needed for the equipment to function.	100
A-6	Air	Water/Chemical Sprays and Enclosures for Particulate Suppression	Spray nozzles, conveyor and chute covers, windshields, piping, and pumps used to reduce fugitive particulate emissions.	100
A-7	Air	Smokeless Ignitors	Installed on electric generating units to control particulate emissions and opacity on start-up.	100
Combustion Based Control Devices				
A-20	Air	Thermal Oxidizers	Thermal destruction of air pollutants by direct flame combustion.	100
A-21	Air	Catalytic Oxidizer	Thermal destruction of air pollutants that uses a catalyst to promote oxidation.	100
A-22	Air	Flare/Vapor Combustor	Stack, burner, flare tip, and blowers used to destroy air contaminants in a vent gas stream.	100

Non-Volatile Organic Compounds Gaseous Control Devices				
A-40	Air	Molecular Sieve	Microporous filter used to remove hydrogen sulfide (H_2S) or nitrogen oxides (NO_x) from a waste gas stream.	100
A-41	Air	Strippers Used in Conjunction with Final Control Device	Stripper, with associated pumps, piping - used to remove contaminants from a waste gas stream or waste liquid stream.	100
A-42	Air	Chlorofluorocarbon (CFC) Replacement Projects	Projects to replace one CFC with an environmentally cleaner CFC or other refrigerant where there is no increase in the cooling capacity or the efficiency of the unit. Includes all necessary equipment needed to replace the CFC and achieve the same level of cooling capacity.	100
A-43	Air	Halon Replacement Projects	All necessary equipment needed to replace the Halon in a fire suppression system with an environmentally cleaner substance.	100
Monitoring and Sampling Equipment				
A-60	Air	Fugitive Emission Monitors	Organic vapor analyzers - used to discover leaking piping components.	100
A-61	Air	Continuous & Noncontinuous Emission Monitors	Monitors, analyzers, buildings, air conditioning equipment, and optical gas imaging instruments to demonstrate compliance with emission limitations of regulated air contaminants (including flow and diluent gas monitors and dedicated buildings).	100
A-62	Air	Monitoring Equipment on Final Control Devices	Temperature monitor or controller, flow-meter, pH meter, and other meters for a pollution control device. Monitoring of production equipment or processes is not included.	100
A-63	Air	On or Off-Site Ambient Air Monitoring Facilities	Towers, structures, analytical equipment, sample collectors, monitors, and power supplies used to monitor for levels of contaminants in ambient air.	100
A-64	Air	Noncontinuous Emission Monitors, Portable	Portable monitors, analyzers, structures, trailers, air conditioning equipment, and optical gas imaging instruments used to demonstrate compliance with emission limitations.	100
A-65	Air	Predictive Emission Monitors	Monitoring of process and operational parameters that are used solely to calculate or determine compliance with emission limitations.	100
A-66	Air	Sampling Ports	Construction of stack or tower sampling ports used for emission sampling or for the monitoring of process or operational parameters that are used to calculate or determine compliance with emission limitations.	100
A-67	Air	Automotive Dynamometers	Automotive dynamometers used for emissions testing of fleet vehicles.	100

Nitrogen Oxides Controls				
A-80	Air	Selective Catalytic and Non-catalytic Reduction Systems	Catalyst bed, reducing agent injection and storage, monitors - used to reduce nitrogen oxides (NO_x) emissions from combustion sources. Non-selective systems use a reducing agent without a catalyst.	100
A-81	Air	Catalytic Converters for Stationary Sources	Used to reduce NO_x emissions from internal combustion engines.	100
A-82	Air	Air/Fuel Ratio Controllers for Piston-Driven Internal Combustion Engines	Used to control the air/fuel mixtures and reduce NO_x formation for fuel injected, naturally aspirated, or turbocharged engines.	100
A-83	Air	Flue Gas Recirculation	Ductwork and blowers used to redirect part of the flue gas back to the combustion chamber for reduction of NO_x formation. May include flyash collection in coal fired units.	100
A-84	Air	Water/Steam Injection	Piping, nozzles, and pumps to inject water or steam into the burner flame of utility or industrial burners or the atomizer ports for gas turbines, used to reduce NO_x formation.	100
A-85	Air	Overfire Air & Combination of asymmetric over fire air with the injection of anhydrous ammonia or other pollutant-reducing agents	The asymmetric over fire air layout injects preheated air through nozzles through a series of ducts, dampers, expansion joints, and valves also anhydrous ammonia or other pollutant-reducing agent injection is done at the same level.	100
A-86	Air	Low-NO_x Burners	Installation of low-NO_X burners. The eligible portion is the incremental cost difference. For a replacement burner, the incremental cost difference is calculated by comparing the cost of the new burner with the cost of the existing burner. For new installations, the incremental cost difference is calculated by comparing the cost of the new burner to the cost of a similarly sized burner without NO_X controls from the most recent generation of burners.	100
A-87	Air	Water Lances	Installed in the fire box of boilers and industrial furnaces to eliminate hot spots, thereby reducing NO_X formation.	100
A-88	Air	Electric Power Generation Burner Retrofit	Retrofit of existing burners on electric power generating units with components for reducing NOx including directly related equipment.	100
A-89	Air	Wet or Dry Sorbent Injection Systems	Use of a sorbent for flue gas desulfurization or NOx control.	100

Volatile Organic Compounds (VOC) Control				
A-110	Air	Carbon Absorption Systems	Carbon beds or liquid-jacketed systems, blowers, piping, condensers - used to remove VOCs or odors from exhaust gas streams.	100
A-111	Air	Storage Tank Secondary Seals and Internal Floating Roofs	Used to reduce VOC emissions caused by evaporation losses from aboveground storage tanks.	100
A-112	Air	Replacement of existing pumps, valves, or seals in piping service	The incremental cost difference between the cost of the original equipment and the replacement equipment is eligible only when the replacement of these parts is done for the sole purpose of eliminating fugitive emissions of VOCs. New systems do not qualify for this item.	100
A-113	Air	Welding of pipe joints in VOC service (Existing Pipelines)	Welding of existing threaded or flanged pipe joints to eliminate fugitive emission leaks.	100
A-114	Air	Welding of pipe joints in VOC Service (New construction)	The incremental cost difference between the cost of using threaded or flanged joints and welding of pipe joints in VOC service.	100
A-115	Air	External Floating Roofs	Used to reduce VOC emissions caused by evaporation losses from aboveground storage tanks. Must be installed to meet or exceed §115.112 of this title (relating to Control Requirements).	100
Mercury Control				
A-130	Air	Sorbent Injection Systems	Sorbents sprayed into the flue gas that chemically reacts to absorb mercury. The sorbents are then removed by a particulate removal device. Equipment may include pumps, tanks, blowers, nozzles ductwork, hoppers, and particulate collection devices needed for the equipment to function.	100
A-131	Air	Fixed Sorbent Systems	Equipment, such as stainless steel plate with a gold coating that is installed in the flue gas to absorb mercury.	100
A-132	Air	Mercury Absorbing Filters	Filters that absorb mercury such as those using the affinity between mercury and metallic selenium.	100
A-133	Air	Oxidation Systems	Equipment used to change elemental mercury to oxidized mercury. This can be catalysts (similar to Selective Catalytic Reduction (SCR) catalyst) or chemical additives that can be added to the flue gas or directly to the fuel.	100
A-134	Air	Photochemical Oxidation	Use of an ultraviolet light from a mercury lamp to provide an excited state mercury species in flue gas, leading to oxidation of elemental mercury. These units are only eligible if mercury is removed from flue gas.	100

A-135	Air	Chemical Injection Systems	Equipment used to inject chemicals into the combustion zone or flue gas that chemically bonds mercury to the additive, which is then removed in a particulate removal device.	100
Sulfur Oxides Controls				
A-160	Air	Wet and Dry Scrubbers	Circulating fluid bed and moving bed technologies using a dry sorbent or various wet scrubber designs that inject a wet sorbent into the scrubber.	100
A-161	Air	Selective Catalytic and Non-catalytic Reduction Systems	Catalyst bed, reducing agent injection and storage, monitors - used to reduce sulfur oxide emissions from combustion sources. Non-selective systems use a reducing agent without a catalyst	100
Miscellaneous Control Equipment				
A-180	Air	Hoods, Duct and Collection Systems connected to Final Control Devices	Piping, headers, pumps, hoods, and ducts used to collect air contaminants and route them to a control device.	100
A-181	Air	Stack Modifications	Construction of stacks extensions to meet a permit requirement.	100
A-182	Air	New Stack Construction	The incremental cost difference between the stack height required for production purposes and the stack height required for pollution control purposes.	100
A-183	Air	Stack Repairs	Repairs made to an existing stack for that stack to provide the same level of pollution control as was previously provided.	100
A-184	Air	Vapor/Liquid Recovery Equipment (for venting to a control device)	Piping, blowers, vacuum pumps, and compressors used to capture a waste gas or liquid stream and vent to a control device, including those used to eliminate emissions associated with loading tank trucks, rail cars, and barges.	100
A-185	Air	Paint Booth Control Devices	Pollution control equipment associated with the paint booth - including the items such as the control device, water curtain, filters, or other devices to capture paint fumes.	100
A-186	Air	Blast Cleaning System - Connected to a Control Device	Particulate control device and blast material recycling system.	100
Water and Wastewater Pollution Control Equipment				
No.	Media	Property	Description	%
Solid Separation and De-watering				
W-1	Water	API Separator	Separates oil, water, and solids by settling and skimming.	100
W-2	Waste water	CPI Separator	Mechanical oil, water, and solids separator.	100

W-3	Waste water	Dissolved Air Flotation	Mechanical oil, water, and solids separator.	100
W-4	Waste water	Skimmer	Used to remove hydrocarbon from process wastewater.	100
W-5	Waste water	Decanter	Used to decant hydrocarbon from process wastewater.	100
W-6	Waste water	Belt Press, Filter Press, or Plate and Frame	Mechanical de-watering devices.	100
W-7	Water	Centrifuge	Separation of liquid and solid waste by centrifugal force, typically a rotating drum.	100
W-8	Water	Settling Basin	Simple tank or basin for gravity separation of suspended solids.	100
W-9	Water	Equalization	Tank, sump, or headbox used to settle solids and equilibrate process wastewater streams.	100
W-10	Water	Clarifier	Circular settling basins usually containing surface skimmers and sludge removal rakes.	100
Disinfection				
W-20	Water	Chlorination	Wastewater disinfection treatment using chlorine.	100
W-21	Water	De-chlorination	Equipment for removal of chlorine from water or wastewater.	100
W-22	Water	Electrolytic Disinfection	Disinfect water by the use of electrolytic cells.	100
W-23	Water	Ozonization	Equipment that generates ozone for the disinfection of wastewater.	100
W-24	Water	Ultraviolet	Disinfection of wastewater by the use of ultraviolet light.	100
W-25	Water	Mixed Oxidant Solution	Solution of chlorine, chlorine dioxide, and ozone to replace chlorine for disinfection.	100
Biological Systems				
W-30	Water	Activated Sludge	Biologically activating carbon matter in wastewater by aeration, clarification, and return of the settled sludge to aeration.	100
W-31	Water	Adsorption	Use of activated carbon to remove organic water contaminants.	100
W-32	Water	Aeration	Passing air through wastewater to increase oxygen available for bacterial activities that remove contaminants.	100
W-33	Water	Rotary Biological Contactor	Use of large rotating discs that contain a bio-film of microorganisms that promote biological purification of the wastewater.	100
W-35	Water	Trickling Filter	Fixed bed of highly permeable media in which wastewater passes through and forms a slime layer to remove contaminants.	100

W-36	Water	Wetlands and Lagoons (artificial)	Artificial marsh, swamp, or pond that uses vegetation and natural microorganisms as bio-filters to remove sediment and other pollutants.	100
W-37	Water	Digester	Enclosed, heated tanks for treatment of sludge that is broken down by bacterial action.	100
Other Equipment				
W-50	Water	Irrigation	Equipment that is used to disburse treated wastewater through irrigation on the site.	100
W-51	Water	Outfall Diffuser	Device used to diffuse effluent discharge from an outfall.	100
W-52	Water	Activated Carbon Treatment	Use of carbon media such as coke or coal to remove organics and particulate from wastewater. May be used in either fixed or fluidized beds.	100
W-53	Water	Oxidation Ditches and Ponds	Process of pumping air bubbles into a pond to assist in oxidizing organic and mineral pollution.	100
W-54	Water	Filters: Sand, Gravel, Microbial	Passing wastewater through a sand or gravel bed to remove solids and reduce bacteria.	100
W-55	Water	Chemical Precipitation	Process used to remove heavy metals from wastewater.	100
W-56	Water	Ultra-filtration	Use of semi-permeable membrane and hydrostatic pressure to filter solids and high molecular weight solutes.	100
W-57	Water	Conveyances, Pumps, Sumps,Tanks, Basins	Used to segregate storm water from process water, control storm water runoff, or convey contaminated process water.	100
W-58	Water	Water Recycling Systems	Installed systems, excluding cooling towers, that clean, recycle, or reuse wastewater or use grey water or storm water to reduce the amount of a facility's discharge or the amount of new water used as process or make-up water including Zero Discharge Systems.	100
W-59	Water	Wastewater Treatment Facility/Plant	New wastewater treatment facilities (including on-site septic systems) constructed to process wastewater generated on site.	100
W-60	Water	High-Pressure Reverse Osmosis	The passing of a contaminated water stream over a permeable membrane at high pressure to collect contaminants.	100
W-61	Water	Hydro-cyclone Vapor Extraction	An air-sparged hydro-cyclone for the removal of VOCs from a wastewater stream.	100
W-62	Water	Recycled Water Cleaning System	Equipment used to collect and recycle the water used in a high-pressure water system for cleaning contaminants from equipment and pavement.	100
W-63	Water	Chemical Oxidation	Use of hydrogen peroxide or other oxidants for wastewater treatment.	100

W-64	Water	Storm water Containment Systems	Structures or liners used for containment of runoff from rainfall. The land that is actually occupied by the containment structure is eligible for a positive use determination.	100
W-65	Water	Wastewater Impoundments	Ponds used for the collection of water after use and before circulation.	100
W-66	Water	Oil/Water Separator	Mechanical device used to separate oils from storm water.	100
Control/Monitoring Equipment				
W-70	Water	pH Meter, Dissolved Oxygen. Meter, or Chart Recorder	Used for wastewater operations control and monthly reporting requirements.	100
W-71	Water	On-line Analyzer	Device that conducts chemical analysis on sample streams for wastewater operations control.	100
W-72	Water	Neutralization	Control equipment used to adjust pH of wastewater treatment components.	100
W-73	Water	Respirometer	Device used to measure oxygen uptake or carbon dioxide (CO_2) release in wastewater treatment systems.	100
W-74	Water	Diversion	Structures used for the capture and control of storm water and process wastewater or emergency diversion of process material. Land means only land that is actually occupied by the diversion or storage structure.	100
W-76	Water	Building	Used for housing wastewater control and monitoring equipment.	100
W-77	Water	De-foaming Systems	Systems consisting of nozzles, pilings, spray heads, and piping used to reduce surface foam.	100
Solid Waste Management Pollution Control Equipment				
No.	Media	Property	Description	%
Solid Waste Management				
S-1	Land/ Water	Stationary Mixing and Sizing Equipment	Immobile equipment used for solidification, stabilization, or grinding of self-generated waste material for the purpose of disposal.	100
S-2	Land/ Water	Decontamination Equipment	Equipment used to remove waste contamination or residues from vehicles that leave the facility.	100
S-3	Land/ Water	Solid Waste Incinerator (not used for energy recovery and export or material recovery)	Solid waste incinerators, feed systems, ash handling systems, and controls.	100
S-4	Land/ Water/Air	Monitoring and Control Equipment	Alarms, indicators, and controllers, for high liquid level, pH, temperature, or flow in waste treatment system. Does not include fire alarms.	100
S-5	Land/ Water	Solid Waste Treatment Vessels	Any vessel used for waste treatment.	100

S-6	Land/ Water	Secondary Containment	External structure or liner used to contain and collect liquids released from a primary containment device and/or ancillary equipment. Main purpose is to prevent groundwater or soil contamination.	100
S-7	Land/ Water	Liners (Noncommercial Landfills and Impoundments)	A continuous layer or layers of natural and/or man-made materials that restrict downward or lateral escape of wastes or leachate in an impoundment or landfill.	100
S-8	Land/ Water	Leachate Collection and Removal Systems	A system capable of collecting leachate or liquids, including suspended solids, generated from percolation through or drainage from a waste. Systems for removal of leachate may include sumps, pumps, and piping.	100
S-9	Land/ Water	Leak Detection Systems	A system capable of detecting the failure of a primary or secondary containment structure or the presence of a liquid or waste in a containment structure.	100
S-10	Land/ Water	Final Cover Systems for Landfills (Noncommercial)	A system of liners and materials to provide drainage, erosion prevention, infiltration minimization, gas venting, and a biotic barrier.	100
S-11	Land/ Water	Lysimeters	An unsaturated zone monitoring device used to monitor soil-pore liquid quality at a waste management unit (e.g., below the treatment zone of a land treatment unit).	100
S-12	Water	Groundwater Monitoring Well and Systems	A groundwater well or system of wells designed to monitor the quality of groundwater at a waste management unit (e.g., detection monitoring systems or compliance monitoring systems).	100
S-13	Air	Fugitive Emission Monitors	A monitoring device used to monitor or detect fugitive emissions from a waste management unit or ancillary equipment.	100
S-14	Land/ Water	Slurry Walls/Barrier Walls	A pollution control method using a barrier to minimize lateral migration of pollutants in soils and groundwater.	100
S-15	Water	Groundwater Recovery or Remediation System	A groundwater remediation system used to remove or treat pollutants in contaminated groundwater or to contain pollutant (e.g., pump-and-treat systems).	100
S-16	Water	Noncommercial Injection Wells (Including Saltwater Disposal Wells) and Ancillary Equipment	Injection well, pumps, collection tanks and piping, pretreatment equipment, and monitoring equipment.	100

S-17	Land/ Water	Noncommercial Landfills (used for disposal of self generated waste materials) and Ancillary Equipment	Excavation, clay and synthetic liners, leak detection systems, leachate collection and treatment equipment, monitor wells, waste hauling equipment, decontamination facilities, security systems, and equipment used to manage the disposal of waste in the landfill.	100
S-18	Land/ Water	Resource Conservation Recovery Act Containment Buildings (used for storage or treatment of hazardous waste)	Pads, structures, solid waste treatment equipment used to meet the requirements of 30 TAC Chapter 335, Subchapter O - Land Disposal Restrictions.	100
S-19	Land/ Water	Surface Impoundments and Ancillary Equipment (Including Brine Disposal Ponds)	Excavation, ponds, clay and synthetic liners, leak detection systems, leachate collection and treatment equipment, monitor wells, and pumps.	100
S-20	Land/ Water	Waste Storage Used to Collect and/or Store Waste Prior to Treatment or Disposal	Tanks, containers and ancillary equipment such as pumps, piping, secondary containment, and vent controls (e.g., Resource Conservation Recovery Act Storage Tanks, 90-Day Storage Facilities, Feed Tanks to Treatment Facilities).	100
S-21	Air	Fugitive Emission Containment Structures	Structures or equipment used to contain or reduce fugitive emissions or releases from waste management activities (e.g., coverings for conveyors, chutes, enclosed areas for loading and unloading activities).	100
S-22	Water	Double-Hulled Barge	If double-hulled to reduce chance of leakage into public waters, calculate the incremental cost difference between a single-hulled barge and a double-hulled barge.	100
S-23	Land	Composting Equipment	Used to compost material where the compost will be used on site. (Does not include commercial composting facilities.)	100
S-24	Land	Compost Application Equipment	Equipment used to apply compost that has been generated on-site.	100
S-25	Land	Vegetated Compost Sock	Put in place as part of a facility's permanent Best Management Plan (BMP).	100
S-26	Air	Foundry Sand Reclamation Systems for Foundries	Components of a sand reclamation system that provide specific pollution control. Includes hooding over shaker screens vented to a dust collector, conveyor covers, and emission control devices at other points.	100
S-27	Air/Water/ Land	Concrete Reclaiming Equipment	Processes mixed, un-poured concrete batches to reclaim the sand and gravel for reuse and recycles the water in a closed loop system.	100

S-28	Land	Fencing installed for the control of windblown trash or access control.	Fencing installed at landfills, solid waste transfer stations, or storage/treatment areas located at hazardous waste management facilities to meet environmental regulations.	100
Miscellaneous Pollution Control Equipment				
No.	Media	Property	Description	%
M-1	Air/Land/ Water	Spill Response/Cleanup Equipment Pre-positioned and Stored for Addressing Future Emergencies	Boats, barges, booms, skimmers, trawls, pumps, power units, packaging materials and containers, vacuum trailers, storage sheds, diversion basins, tanks, and dispersants.	100
M-2	Air/Land	Hazardous Air Pollutant Abatement Equipment - required removal material contaminated with asbestos, lead, or some other hazardous air pollutant	High-Efficiency Particulate Arresting (HEPA) Vacuum Equipment, Negative Air Pressure Enclosures, Glove Bags, and Disposal.	100
M-3	Air/Land/ Water	Vacuum Trucks, Street Sweepers and Watering Trucks	Mobile Surface Cleaning Equipment - used exclusively to control particulate matter on plant roads. (Does not include sweepers or scrubbers used to control particulate matter within buildings.)	100
M-4	Land	Compactors, Barrel Crushers, Balers, Shredders	Compactors and similar equipment used to change the physical format of waste material for recycling/reuse purposes or on-site disposal of facility-generated waste.	100
M-5	Land/ Air/ Water	Solvent Recovery Systems	Used to remove hazardous content from waste solvents by heat, vaporization, and condensation, by filtration, or by other means. The recycled solvents must be reused at the facility generating the waste.	100
M-6	Land/ Water	Boxes, Bins, Carts, Barrels, Storage Bunkers	Collection/storage containers for source-separation of materials to be recycled or reused. Does not include product storage containers or facilities.	100
M-7	Air/ Land/ Water	Environmental Paving located at Industrial Facilities	Paving of outdoor vehicular traffic areas in order to meet or exceed an adopted air quality rule, regulation, or law. Does not include paving of parking areas or driveways for convenience purposes or storm water control. Does not include dirt or gravel. Value of the paving must be stated on a square foot basis with a plot plan provided that shows the paving in question.	100
M-8	Air/ Land/ Water	Sampling Equipment	Equipment used to collect samples of exhaust gas, wastewater, soil, or other solid waste to be analyzed for specific contaminants or pollutants.	100

M-9	Water	Dry Stack Building for Poultry Litter	A pole-barn type structure used to temporarily store poultry litter in an environmentally safe manner.	100
M-10	Land/ Water	Poultry Incinerator	Incinerators used to dispose of poultry carcasses.	100
M-11	Land/ Water	Structures, Enclosures, Containment Areas, Pads for Composting Operations	Required to meet 'no contact' storm water regulations.	100
M-12	Air	Methane Capture Equipment	Equipment used to capture methane generated by the decomposition of waste material on site Methane must be sent to a control device rather than used.	100
M-13	Land	Drilling Mud Recycling System	Consisting of only the Shaker Tank System, Shale Shakers, Desilter, Desander, and Degasser.	100
M-14	Land	Drilling Rig Spill Response Equipment	Includes only the Ram Type Blowout Preventers, Closing Units, and Choke Manifold Systems.	100
M-15	Air	Odor Neutralization and Chemical Treatment Systems	Carbon absorption, zeolite absorption, and other odor neutralizing and chemical treatment systems to meet local ordinance or to prevent/correct nuisance odors at off-site receptors.	100
M-16	Air	Odor Dispersing and Removal Systems	Electrostatic precipitators, vertical dispersing fans, stack extensions, and other physical control equipment used to dilute, disperse, or capture nuisance odor vent streams.	100
M-17	Air	Low NOx Combustion System for drilling rigs	Equipment on power generating units designed solely to reduce NOx generation.	100
M-18	Air	Odor Detectors	Olfactometers, gas chromatographs, and other analytical instrumentation used specifically for detecting and measuring ambient odor, either empirically or chemical specific.	100
M-19	Land	Cathodic Protection	Cathodic protection installed to prevent corrosion of metal tanks and piping.	100
M-20	Water	Fish and Other Aquatic Organism Protection Equipment	Equipment installed to protect fish and other aquatic organisms from entrainment or impingement in an intake cooling water structure. Equipment includes: Aquatic Filter Barrier Systems, Fine-Mesh Traveling Intake Screens, Fish Return Buckets, Sprays, Flow-Altering Louvers, Fish Trough, Fish Behavioral Deterrents, and Wetland Creation.	100
M-21	Water/ Land	Double-Walled Piping	The difference between cost of single walled piping and the cost of double-walled piping, when the double-walled piping is installed to prevent unauthorized discharges.	100

M-22	Water/ Land	Double-walled Tanks	The difference between cost of single walled tanks and the cost of double-walled tanks, when the double-walled tanks are installed to prevent unauthorized discharges.	100
Equipment Located at Service Stations				
No.	Media	Property	Description	%
Spill and Overfill Prevention Equipment				
T-1	Water	Tight Fill Fittings	Liquid tight connections between the delivery hose and fill pipe.	100
T-2	Water	Spill Containers	Spill containment manholes equipped with either a bottom drain valve to return liquids to the tank or a hand pump for liquid removal.	100
T-3	Water	Automatic Shut-off Valves	Flapper valves installed in the fill pipe to automatically stop the flow of product.	100
T-4	Water	Overfill Alarms	External signaling device attached to an automatic tank gauging system.	100
T-5	Water	Vent Restriction Devices	Float vent valves or ball float valves to prevent backflow through vents.	100
Secondary Containment				
T-10	Water	Double-walled Tanks	The difference between cost of single-walled tanks and the cost of double-walled tanks, when the double-walled tanks are installed to prevent unauthorized discharges or leaks.	100
T-11	Water	Double-walled Piping	The difference between cost of single-walled piping and the cost of double-walled piping, when the double-walled piping is installed to prevent unauthorized discharges or leaks.	100
T-12	Water	Tank Top Sumps	Liquid tight containers to contain leaks or spills that involve tank top fittings and equipment.	100
T-13	Water	Under Dispenser Sumps	Contains leaks and spills from dispensers and pumps.	100
T-14	Water	Sensing Devices	Installed to monitor for product accumulation in secondary containment sumps.	100
T-15	Land/ Water	Concrete Paving above Underground Tanks and Pipes	Required concrete paving located above underground pipes and tanks. The use determination value is limited to the difference between the cost per square foot of the concrete paving and the cost per square foot of the other paving installed at the service station. This item only applies to service stations.	100
Release Detection for Tanks and Piping				
T-20	Water	Automatic Tank Gauging	Includes tank gauging probe and control console.	100
T-21	Water	Groundwater or Soil Vapor Monitoring	Observation wells located inside the tank excavation or monitoring wells located outside the tank excavation.	100

T-22	Water	Monitoring of Secondary Containment	Liquid sensors or hydrostatic monitoring systems installed in the interstitial space for tanks or piping.	100
T-23	Water	Automatic Line Leak Detectors	Devices installed at the pump that are designed to detect leaks in underground piping. Mechanical and electronic devices are acceptable.	100
T-24	Water	Under Pump Check Valve	Valve installed to prevent back flow in the fuel dispensing line. This device is only used on suction pump piping systems.	100
T-25	Water	Tightness Testing Equipment	Equipment purchased to comply with tank and/or piping tightness testing requirements.	100
Cathodic Protection				
T-30	Water	Isolation Fittings	Dielectric bushings and fittings to separate underground piping from aboveground tanks and piping.	100
T-31	Water	Sacrificial Anodes	Magnesium or zinc anodes packaged in low resistivity backfill to provide galvanic protection.	100
T-32	Water	Dielectric Coatings	Factory installed coal-tar epoxies, enamels, fiberglass reinforced plastic, or urethanes on tanks and/or piping. Field installed coatings limited to exposed threads, fittings, and damaged surface areas.	100
Emissions Control Equipment				
T-40	Air	Stage I or Stage II Vapor Recovery	Includes pressure/vacuum vent relief valves, vapor return piping, stage 2 nozzles, coaxial hoses, vapor processing units, and vacuum-assist units. Used for motor vehicle fuel dispensing facilities. Does not include fuel delivery components of fuel dispensing unit.	100

Figure: 30 TAC §17.17(c)(1)

$$\frac{(\text{Production Capacity Factor} \times \text{Capital Cost New}) - \text{Capital Cost Old} - \text{NPVMP}}{\text{Capital Cost New}} \times 100$$

Where:

[1] **The Production Capacity Factor (PCF)** is calculated by dividing the capacity of the existing equipment or process by the capacity of the new equipment or process. When there is an increase in production capacity, PCF is used to adjust the capacity of the new equipment or process to the capacity of the existing equipment or process. When there is a decrease in production capacity, PCF is used to adjust the capacity of the existing equipment or process to the production capacity of the new equipment or process. In this case, this calculation is modified so that PCF is applied to Capital Cost Old (CCO) rather than Capital Cost New.

[2] **Capital Cost New** is the estimated total capital cost of the new equipment or process.

[3] **Capital Cost Old** is the cost of comparable equipment or process without the pollution control. The standards used for calculating CCO are as follows:

[3.1] If comparable equipment without the pollution control feature is on the market in the United States, then an average market price of the most recent generation of technology must be used.

[3.2] If the conditions in variable 3.1 do not apply and the company is replacing an existing unit, then the company shall convert the original cost of the unit to today's dollars by using a published industry specific standard. If the production capacity of the new equipment or process is lower than the production capacity of the old equipment or process CCO is divided by the PCF to adjust CCO to reflect the same capacity as CCN.

[3.3] If the conditions in variables 3.1 and 3.2 do not apply, and the company can obtain an estimate of the cost to manufacture the alternative equipment without the pollution control feature, then an average estimated cost to manufacture the unit must be used. The comparable unit must be the most recent generation of technology. A copy of the estimate must be provided with the worksheet including the specific source of the information.

[4] **NPVMP**--The net present value of the marketable product recovered for the expected lifetime of the property, calculated using the equation in §17.17(c)(2) of this title. Typically, the most recent three-year average price of the material as sold on the open market should be used in the calculation. If the price varies from state-to-state, the applicant shall calculate an average, and explain how the figures were determined.

Figure: 30 TAC §17.17(c)(2)

$$NPVMP = \sum_{t=1}^{n} \frac{(\text{Marketable Product Value} - \text{Production Cost})_t}{(1 + \text{Interest Rate})^t}$$

[i] **Marketable Product Value**--The marketable product value may be calculated one of two ways.

1. The retail value of the product produced by the equipment for one year periods. Typically, the most recent three-year average price of the material as sold on the open market should be used in the calculation. If the price varies from state-to-state, the applicant shall calculate an average, and explain how the figures were determined.

2. If the material is used as an intermediate material in a production process, then the value assigned by to the material for internal accounting purposes may be used. It is the responsibility of the applicant to show that the internally assigned value is comparable to the value assigned by other similar producers of the product.

[ii] **Production Cost**--The costs directly attributed to the production of the product, including raw materials, storage, transportation, and personnel, but excluding non-cash costs, such as overhead and depreciation.

[iii] **n**--This is the estimated useful life in years of the equipment that is being evaluated for a use determination

[iv] **Interest Rate**--This is the current Prime Lending Rate that is in effect at the time the application is submitted. The Prime Lending Rate is defined by the *Wall Street Journal* as the base rate on corporate loans posted by at least 75% of the nation's 30 largest banks. The Prime Lending Rate is posted daily in the *Wall Street Journal* and on most financial or investment web sites.

Figure: 30 TAC Chapter 307--Preamble

	Inland Fresh E. coli	Inland Salt Enterococci	Inland Salt (Alt) Fecal Coliform	Coastal Salt Enterococci
Primary Contact	206	54	200	35
Sec. Contact 1	618	162	600	105
Sec. Contact 2	1,030	270	1,000	175
Noncontact	2,060	540	2,000	350

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 issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Request for Applications - Texans Feeding Texans: Home-Delivered Meal Grant Program

In accordance with Texas Agriculture Code, §12.042, as enacted by House Bill 407, and House Bill 1, 80th Legislature, Regular Session 2007, the state legislature has appropriated funding to the Texas Department of Agriculture (TDA) for distribution, pursuant to the Texans Feeding Texans: Home-Delivered Meal Grant Program (HDMGP), to governmental agencies or qualifying non-profit organizations that deliver meals to homebound persons that are elderly and/or have a disability. TDA will begin accepting applications from eligible organizations September 1, 2010. Total funding for this application period is approximately $10 million.

Eligibility Criteria. To be eligible for HDMGP funds an applying organization must meet the following criteria:

1. Must be a governmental agency or a nonprofit private organization that is exempt from taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code, that is a direct provider of home-delivered meals to the elderly or persons with disabilities in this state;

2. If a nonprofit private organization, must have a volunteer board of directors;

3. Must practice nondiscrimination;

4. Must have an accounting system or fiscal agent approved by the county in which it provides meals;

5. Must have a system to prevent the duplication of services to the organization's clients;

6. Must agree to use funds received under this section only to supplement and extend existing services related directly to home-delivered meal services;

7. Must have received a grant from the county in which the organization provides meals; and

8. Must submit the grant application using the form provided by TDA;

9. Must submit a completed county resolution form, as provided by TDA; and

10. Must comply with HDMGP rules adopted by TDA (4 TAC §§1.950 - 1.962); program guidelines and policies; and the HDMGP grant application and agreement.

11. If applicable, Applicant will be required to provide a current state/county health/food service permit (as applicable) before any grant funds will be released.

For purposes of this Grant Program, "Homebound" means a person who is unable to leave his or her residence without aid or assistance or whose ability to travel from his or her residence is substantially impaired; "Elderly" means an individual who is 60 years of age or older; and "Disability" means a physical, mental or developmental impairment, temporarily or permanently limiting an individuals capacity to adequately perform one or more essential activities of daily living, which include, but are not limited to, personal and health care, moving around, communicating and housekeeping.

Applicants should note that congregate meals are not eligible for reimbursement under HDMGP. A congregate meal is a meal served in a group setting, not at the eligible person's home.

Submitting an Application. Applications will be accepted beginning September 1, 2010, and must be submitted on the form provided by TDA. Application forms will be available July 6, 2010, on TDA's website at: www.TexasAgriculture.gov or available upon request from TDA by calling (512) 463-6695. Applications must be mailed to TDA headquarters in Austin by the deadline provided below. Applications must be certified by the applicant, include required supporting documentation, and bear the notarized signatures of the organization's executive director or other responsible executive officer, and board chair, if applicable. An organization must submit a separate application for each county in which it provides home-delivered meal services.

Deadline for Submission of Applications. To be eligible, applications mailed to TDA must have a postmark of **November 1, 2010 or earlier.**

TDA will distribute funds after all valid applications are processed. Funds must be distributed by February 1, 2011. In the event that the amount qualifying grants exceeds the amount of funds available, funds may be distributed on a pro rata basis.

Grant Agreement. Eligible organizations that qualify to receive grant funds must execute a Grant Agreement with TDA, prior to the disbursement of any grant funds.

Further Information. Additional information about the HDMGP, the application process and program rules can be found under the Grants/Funding tab on TDA's website at www.TexasAgriculture.gov. In addition, organizations may contact Ms. Lindsay Dickens, TDA Grants Specialist, at (512) 463-6695 or Lindsay.Dickens@TexasAgriculture.gov for more information.

TRD-201003796
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: July 7, 2010

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Office of the Attorney General

Notice of Settlement of a Texas Clean Air Act Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code and the Texas Water Code. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Acts.

Case Title and Court: *Harris County, Texas and State of Texas acting by and through the Texas Commission on Environmental Quality, a Necessary and Indispensable Party-Plaintiff v. Trung Ngoc Dang, individually, and Hanna Dang, individually, and d/b/a Dang-Ho Investments, Inc., a/k/a Dang Ho Corporation;* Cause No. 2009-58525, in the 334th District Court of Harris County, Texas.

Nature of Defendants' Operations: Harris County filed this suit alleging violations of the Texas Solid Waste Disposal Act. Defendants own and operate a retail center known as the Parkway Plaza Strip Center in Houston. On multiple occasions, Defendants allowed solid waste including putrescible food wastes to be dumped and stored in and around open garbage containers on the property which allowed the propagation of disease vectors. The Defendants also allowed the odors from the putrescible wastes to rise to such concentration as to adversely affect human health.

Proposed Agreed Final Judgment: The proposed settlement requires the Defendants to pay $20,000 in civil penalties to be divided equally between the State and Harris County. The Defendants will also pay the State $1,000 and Harris County $2,500 in attorney's fees.

For a complete description of the proposed settlement, the Agreed Final Judgment and Permanent Injunction should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201003786
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: July 6, 2010

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Comptroller of Public Accounts

Notice of Contract Amendment

Pursuant to Chapters 403 and 2156, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces amendment of contract awarded to JP Morgan Chase, 383 Madison Avenue, Floor 4, New York, NY 10179, under RFP #175k.

The notice of request for proposals was published in the February 24, 2006, issue of the *Texas Register* (31 TexReg 1348). The notice of award was published in the May 26, 2006, issue of the,*Texas Register* (31 TexReg 4499).

The contractor provides transition management services for the Texas Prepaid Higher Education Tuition Board. The term of the contract was May 5, 2006 through August 31, 2010. The amendment extends the term of the contract through August 31, 2011, with option to renew for an additional one year term. The amount of the contract is based on the percentage of securities transitioned.

TRD-201003730
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 2, 2010

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Notice of Contract Amendment

Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter A, Texas Government Code; and Chapter 404, Subchapter H, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the amendment of a contract with Andrews Kurth LLP, 111 Congress Avenue, Suite 1700, Austin, Texas 78701-4069, awarded under its Request for Proposals (RFP) for bond counsel services (RFP 192b).

The total amount of the contract was not to exceed of $200,000. The amendment adds $50,000 for a new total of not to exceed $250,000. The term of the contract is May 18, 2009 through August 31, 2011.

The RFP was published in the March 6, 2009, issue of *Texas Register* (34 TexReg 1731) and amended in the April 3, 2009, issue of *Texas Register* (34 TexReg 2271). The notice of award was published in the June 5, 2009, issue of *Texas Register* (34 TexReg 3531).

TRD-201003785
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 6, 2010

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Office of Consumer Credit Commissioner

Notice of Public Hearing on Agency Budget

The Office of Consumer Credit Commissioner will conduct a public hearing to receive public comment on its proposed budget for fiscal year 2011. The hearing will be held on July 20, 2010, at 1:00 p.m. at the State Finance Commission Building, 2601 North Lamar Boulevard, 3rd Floor Hearing Room, Austin, Texas 78705.

The agency will present the proposed budget for fiscal year 2011 and invite public comment. A copy of the proposed budget can be viewed on the Agency's website at www.occc.state.tx.us. Written comments on the proposed budget can be submitted to Steven O'Shields, Director of Administration, at steven.o'shields@occc.state.tx.us by 5:00 p.m. Friday, July 30, 2010.

Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Sue Jevning by calling (512) 936-6222, several days prior to the meeting so appropriate arrangements can be made.

TRD-201003688
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: June 30, 2010

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Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/12/10 - 07/18/10 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/12/10 - 07/18/10 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 07/01/10 - 07/31/10 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 07/01/10 - 07/31/10 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-201003784
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 6, 2010

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East Texas Council of Governments

Public Notice

East Texas Council of Governments is accepting proposals for operating plans for programs under Title III of the Older Americans Act to provide senior nutrition services in the East Texas Council of Governments' planning region.

The proposal packet may be obtained by submitting a request to Claude Andrews by fax (903) 983-1440 or by email at claude.andrews@etcog.org. Proposal packets are available in an electronic format upon request and may be obtained by going to www.etcog.org.

Deadline to submit a proposal is 5:00 p.m. (CST) on July 30, 2010. Proposals will be opened and read at the ETCOG Office after this date and time. The East Texas Council of Governments reserve the right to reject any and/or all proposals and to waive any technicalities in the best interest of the these entities.

The East Texas Council of Governments is an equal opportunity employer. Auxiliary Aids and Services are available upon request.

3800 Stone Road

Kilgore, Texas 75662

Phone: (903) 984-8641

TDD: 711 or 1-800-735-2989

Fax: (903) 983-1440

TRD-201003715
David Cleveland
Executive Director
East Texas Council of Governments
Filed: July 1, 2010

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with 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 proposed orders and 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 **August 16, 2010.** 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 indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission'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 proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 16, 2010.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission 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 shall be submitted to the commission in **writing.**

(1) COMPANY: Acacia Natural Gas Corporation; DOCKET NUMBER: 2010-0414-AIR-E; IDENTIFIER: RN102534278; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 Texas Administrative Code (TAC) §106.6(b) and (c) and §122.143(4), Federal Operating Permit (FOP) Number O-00939/Oil and Gas General Operating Permit Number 514 Site-wide Requirement Number (b)(7)(B), and Texas Health and Safety Code (THSC), §382.085(b), by failing to operate an engine at emissions rates represented under permit by rule Registration Number 48026; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-00939/Oil and Gas General Operating Permit Number 514 Site-wide Requirement Number (b)(2), and THSC, §382.085(b), by failing to submit a complete and accurate semi-annual deviation report; PENALTY: $14,345; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Jimmy W. Allen; DOCKET NUMBER: 2010-1031-WOC-E; IDENTIFIER: RN104508569; LOCATION: Hamshire, Jefferson County; TYPE OF FACILITY: occupational licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Aqua Texas, Inc.; DOCKET NUMBER: 2010-0494-PWS-E; IDENTIFIER: RN102691771; LOCATION: Hays County; TYPE OF FACILITY: public water supply (PWS); RULE VIOLATED: 30 TAC §290.47(e), by failing to issue a boil water notification; PENALTY: $546; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(4) COMPANY: Akber Ali dba Best Stop Food Mart; DOCKET NUMBER: 2010-0484-PST-E; IDENTIFIER: RN101497113; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding underground storage tanks (USTs); 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month; 30 TAC §334.42(i), by failing to inspect all sumps including the dispenser sumps, manways, overspill

containers, or catchment basins associated with the UST system; and 30 TAC §115.221 and THSC, §382.085(b), by failing to control displaced vapors by a vapor control or a vapor balance system during the transfer of gasoline from a tank-truck into the USTs at the station; PENALTY: $5,331; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(5) COMPANY: Bhima Corporation dba Handi Stop 52 Araon Food Mart 2; DOCKET NUMBER: 2010-0399-PST-E; IDENTIFIER: RN102467511; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month; PENALTY: $1,925; ENFORCEMENT COORDINATOR: Tate Barrett, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Boone & Boone Construction, Limited; DOCKET NUMBER: 2010-1002-WQ-E; IDENTIFIER: RN105931356; LOCATION: Winona, Smith County; TYPE OF FACILITY: general contractors; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: City of Edinburg; DOCKET NUMBER: 2009-1979-MWD-E; IDENTIFIER: RN102080603; LOCATION: Hidalgo County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010503002, Interim and Final Phase Effluent Limitations and Monitoring Requirements Number 1 and Standard Condition Number 11, by failing to comply with the permitted effluent limitations for carbonaceous biochemical oxygen demand, ammonia nitrogen (NH_3N), total suspended solids (TSS), and mercury; PENALTY: $60,900; Supplemental Environmental Project (SEP) offset amount of $30,450 applied to Keep Texas Beautiful - Stop Trashing Texas Program; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(8) COMPANY: Enbridge G & P (North Texas), L.P.; DOCKET NUMBER: 2010-0627-AIR-E; IDENTIFIER: RN105093512; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §101.201(a)(1)(B) and §122.143(4), FOP Number O-02986, Special Terms and Conditions (STC) Number 2.F., and THSC, §382.085(b), by failing to submit notification of a reportable emissions event within 24 hours; 30 TAC §§116.115(b)(2)(F), 116.615(2), and 122.143(4), FOP Number O-02986, STC 10.B., and THSC, §382.085(b), by failing to prevent the unauthorized release of 462.69 and 701.45 pounds (lbs) of volatile organic compounds, 247.18 and 377.53 lbs. of nitrogen oxide (NO_x), and 984.44 and 1,503.56 lbs. of carbon monoxide from the emergency flare; PENALTY: $3,900; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2010-0328-AIR-E; IDENTIFIER: RN100542281; LOCATION: Channelview, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 2933, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: FAVELLE FAVCO CRANES USA, INC.; DOCKET NUMBER: 2010-0339-AIR-E; IDENTIFIER: RN102952983; LOCATION: Harlingen, Cameron County; TYPE OF FACILITY: machinery manufacturing; RULE VIOLATED: 30 TAC §106.8(c)(2)(B) and THSC, §382.085(b), by failing to maintain records sufficient to demonstrate compliance with all applicable permit by rule conditions; and 30 TAC §106.452(2)(A), permit by rule Number 74116, and THSC, §382.085(b), by failing to comply with outside blast cleaning abrasive usage rate of 150 tons per year; PENALTY: $3,345; SEP offset amount of $1,338 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(11) COMPANY: Huntsman Petrochemical, LLC; DOCKET NUMBER: 2010-0315-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Numbers O-02286 and O-02288, SC Number 16, NSR Permit Numbers 19823, 19828, and 20134, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $29,600; SEP offset amount of $11,840 applied to Southeast Texas Regional Planning Commission - Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(12) COMPANY: JWK AUTO GROUP, INC.; DOCKET NUMBER: 2010-0392-PST-E; IDENTIFIER: RN102039229; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain all Stage II records at the station and make them immediately available; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $6,673; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Lower Colorado River Authority; DOCKET NUMBER: 2010-0533-MWD-E; IDENTIFIER: RN102334893; LOCATION: Bastrop County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013977001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for NH_3N; and 30 TAC §220.21 and the Code, §5.702, by failing to pay outstanding water usage fees and associated late fees; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(14) COMPANY: Marhaba Partners Limited Partnership; DOCKET NUMBER: 2010-0291-MWD-E; IDENTIFIER: RN104611942; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0014625001, Interim I Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS; and the Code, §5.702 and §26.0135(h), by failing to pay consolidated water quality fees; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Jordan Jones, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Market Place Innovation, Inc.; DOCKET NUMBER: 2010-0514-PWS-E; IDENTIFIER: RN102359908; LOCATION: Houston, Harris County; TYPE OF FACILITY: flea market with PWS; RULE VIOLATED: 30 TAC §290.41(c)(3)(O) and §290.43(e), by failing to provide an intruder-resistant fence for the well, all potable water storage tanks, and pressure maintenance facilities; 30 TAC §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a residual disinfectant concentration in the water within the distribution system of at least 0.2 milligrams per liter free chlorine; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility and its equipment; 30 TAC §290.42(e)(5), by failing to provide a proper covering for the hypochlorination solution container; 30 TAC §290.121(b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations; 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system; 30 TAC §290.46(f)(3)(D)(ii), by failing to compile, maintain on-site, and make available for commission review an up-to-date record of water work operations and maintenance activities; 30 TAC §290.46(m)(1)(B), by failing to perform annual inspections of the facility's four pressure tanks; 30 TAC §290.42(1), by failing to compile and maintain on-site an up-to-date plant operations manual; 30 TAC §290.47(i), by failing to install backflow prevention assemblies or an air gap at connections where an actual or potential contamination hazard exists; and 30 TAC §290.51(b) and the Code, §5.702, by failing to pay all annual public health service fees and any associated late fee; PENALTY: $3,262; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(16) COMPANY: Methodist Healthcare System of San Antonio, Limited, L.L.P. dba Metropolitan Methodist Hospital; DOCKET NUMBER: 2010-0669-PST-E; IDENTIFIER: RN100211804; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: hospital with UST; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the UST system; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly complete UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §334.42(i), by failing to conduct the required inspections on the UST system's sumps to assure they were liquid-tight and free from liquids or debris; PENALTY: $2,305; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(17) COMPANY: METROPLEX LUCKY STAR, LLC dba Valero Food Mart Number 3; DOCKET NUMBER: 2009-1759-PST-E; IDENTIFIER: RN102378080; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §115.246(6) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review; PENALTY: $3,689; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Miles Construction Company, Inc.; DOCKET NUMBER: 2010-1001-WQ-E; IDENTIFIER: RN105900047; LOCATION: Lindale, Smith County; TYPE OF FACILITY: general contractor; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3434, (903) 535-5100.

(19) COMPANY: Montgomery County Municipal Utility District 8; DOCKET NUMBER: 2010-0631-PWS-E; IDENTIFIER: RN101412922; LOCATION: Montgomery County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.42(l), by failing to compile and maintain a plant operations manual for operator review and reference; 30 TAC §290.46(f)(2) and (3)(A)(ii)(II), by failing to provide facility records to commission personnel at the time of the investigation; and 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance, regulations, or service agreement; PENALTY: $508; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(20) COMPANY: Montgomery County Municipal Utility District 9; DOCKET NUMBER: 2010-0630-PWS-E; IDENTIFIER: RN101411973; LOCATION: Montgomery County; TYPE OF FACILITY: PWS; RULE VIOLATED: 30 TAC §290.42(l), by failing to compile and maintain a plant operations manual for operator review and reference; 30 TAC §290.46(f)(2) and (3)(A)(ii)(II), by failing to provide facility records to commission personnel at the time of the investigation; and 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance, regulations, or service agreement; PENALTY: $508; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(21) COMPANY: Motiva Enterprises, LLC; DOCKET NUMBER: 2010-0381-AIR-E; IDENTIFIER: RN100209451; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: oil refinery; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a) and (c)(2), and 122.143(4), FOP Number O-01386, General Terms and Conditions (GTC), Flexible Air Permit Number 8404/PSD-TX-1062, General Condition Number 8, SC Number 1, and THSC, §382.085(b), by failing to comply with the emission limit stated in Flexible Air Permit Number 8404/PSD-TX-1062 for NO_x emissions; 30 TAC §117.145(c) and §122.143(4), FOP Number O-01386, GTC and STC Number 1A, and THSC, §382.085(b), by failing to submit test results within the required time frame; 30 TAC §§122.143(4), 122.145(2)(A), and 122.146(5)(C)(i) - (v), FOP Number O-01386, STC and STC Number 18, and THSC, §382.085(b), by failing to report all deviations in the semi-annual deviation reports and permit compliance certifications; and 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), FOP Number O-01386, GTC and STC Number 16, Flexible Air Permit Number 8404/PST-TX-1062, SC Numbers 1 and 5, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $97,167; SEP offset amount of $38,867 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(22) COMPANY: City of Muenster; DOCKET NUMBER: 2010-0527-MWD-E; IDENTIFIER: RN102065448; LOCATION: Muenster, Cooke County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010341001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a)(1), by failing to comply with permitted effluent limitations for TSS and flow; PENALTY: $3,740; ENFORCEMENT COORDINATOR: Martha Hott, (512) 239-2587; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: N.K.S.S. ENTERPRISES, INC. dba Petro Plus; DOCKET NUMBER: 2010-0722-PST-E; IDENTIFIER: RN104525324; LOCATION: Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the UST for releases; and 30 TAC §334.51(c)(1), by failing to maintain spill and overfill control records and make them immediately available for inspection; PENALTY: $5,775; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(24) COMPANY: Hector Ortiz; DOCKET NUMBER: 2010-0432-MLM-E; IDENTIFIER: RN105868822; LOCATION: Clint, El Paso County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §328.57(c), by failing to obtain authorization prior to transporting scrap tires, maintain records as a transporter using a manifest system, and ensure that scrap tires are transported to an authorized scrap tire facility; and 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste (MSW); PENALTY: $5,000; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915)834-4949.

(25) COMPANY: Quang Dang Pham dba Sunmart 302; DOCKET NUMBER: 2010-0718-PST-E; IDENTIFIER: RN102054434; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment, vapor space manifolding, and dynamic backpressure; PENALTY: $3,446; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: Patsy Tidwell; DOCKET NUMBER: 2010-0370-MSW-E; IDENTIFIER: RN105867741; LOCATION: Cleveland, San Jacinto County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(27) COMPANY: Travis Vista Water and Sewer Supply Corporation; DOCKET NUMBER: 2009-1008-MWD-E; IDENTIFIER: RN103014262; LOCATION: Travis County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011531001, Effluent Limitations and Monitoring Requirements Numbers 1 and 6, and the Code, §26.121(a), by failing to comply with permitted effluent limitations; 30 TAC §305.125(17) and TPDES Permit Number WQ0011531001, Sludge Provisions, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(17) and TPDES Permit Number WQ0011531001, Monitoring and Reporting Requirements Number 1, by failing to submit effluent monitoring results at the intervals specified in the permit; PENALTY: $27,974; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(28) COMPANY: Union Grove Independent School District; DOCKET NUMBER: 2010-0515-MWD-E; IDENTIFIER: RN101514958; LOCATION: Upshur County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013416001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for five-day biochemical oxygen demand and TSS; PENALTY: $1,550; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(29) COMPANY: UNITED TRANSMISSIONS, INC. dba Alvarez Chevron; DOCKET NUMBER: 2010-0584-PST-E; IDENTIFIER: RN102373172; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $2,796; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: LaVern Williamson; DOCKET NUMBER: 2010-1030-WOC-E; IDENTIFIER: RN105891188; LOCATION: Parker County; TYPE OF FACILITY: occupational licensing; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: WTG Gas Processing, L.P.; DOCKET NUMBER: 2010-0219-AIR-E; IDENTIFIER: RN100211473; LOCATION: Howard County; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 20137, SC Number 16F, and THSC, §382.085(b), by failing to conduct stack testing every five years; 30 TAC §106.512(2)(C)(iii) and THSC, §382.085(b), by failing to conduct biennial engine testing; and 30 TAC §122.145(2)(A) and THSC, §382.085(b), by failing to report all instances of deviation; PENALTY: $4,850; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3300 North A Street, Building 4-107, Midland, Texas 79705-5406, (432) 570-1359.

TRD-201003773
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 6, 2010

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 106

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 106, Permits by Rule, specifically, the repeal of §106.392, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would repeal §106.392 in its entirety to exclude the permit by rule authorization of thermoset resin facilities.

A public hearing for the proposed rulemaking is scheduled in Austin on August 9, 2010, at 10:00 a.m. in 201S of Building E, at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. There will be no discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte

Horn, General Law Division, at (512) 239-0779. Requests should be made as far in advance as possible.

Comments may be submitted to Patricia Duron, Texas Register Team, General Law Division, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-012-106-PR. Comments must be received by August 16, 2010. A copy of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Ms. Becky Southard, Technical Program Support Section, (512) 239-1638.

TRD-201003713
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 1, 2010

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Notice of a Public Meeting on August 24, 2010, in Coahoma, Texas Concerning the Moss Lake Road Groundwater Plume

The purpose of the meeting is to obtain public input and information concerning proposal of the Moss Lake Road Groundwater Site (Site) to the State Superfund Registry and the identification of potentially responsible parties.

The Texas Commission on Environmental Quality (TCEQ) is required under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361 *et seq.*, as amended (the Act), to annually publish a state registry that identifies facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The most recent State Superfund Registry listing of these facilities was published in the September 18, 2009, issue of the *Texas Register* (34 TexReg 6464).

Pursuant to the Act, §361.184(a), the TCEQ must publish in a newspaper of general circulation in the county in which a facility or area is located and in the *Texas Register* a notice of intent to list the facility or area on the state registry. With this publication, the TCEQ hereby gives notice of an area that the executive director determined eligible for listing, and which the executive director proposes to list on the state registry. This publication also specifies the general nature of the potential endangerment to public health and safety or the environment as determined by information currently available to the executive director. This notice of intent to list this area was also published on July 16, 2010, in the *Big Spring Herald.*

The area proposed for listing is the Moss Lake Road Groundwater Site, located in the vicinity of North Moss Lake Road, east of the city of Big Spring, north of Interstate Highway 20, in Howard County, Texas. The geographic coordinates of the Site are 32.278972 North and 101.371755 West. The description of the Site is based on information available at the time the Site was evaluated with the Hazard Ranking System (HRS). The HRS is the principal screening guide used by the TCEQ to evaluate potential, relative risk to public health and the environment from releases or threatened releases of hazardous substances. The description may change as additional information is gathered on the sources and extent of contamination.

The Site is designated as a contaminated groundwater plume originating from unknown sources where hazardous substances may have been released to the aquifer. Releases of hazardous substances to the groundwater pathway are the major concern for this site and the Ogallala Aquifer is the aquifer of concern. The primary chemical of concern evaluated for this HRS documentation record is tetrachloroethene, also known as tetrachloroethylene, perchloroethene, or perchloroethylene (PCE).

The Site is a PCE groundwater plume of unknown source, located four miles east of the city limits of Big Spring in Howard County, Texas. The Site is underlying North Moss Lake Road, north of Interstate Highway 20 in a predominantly residential/agricultural area. In the vicinity of the Site, the groundwater is used primarily for drinking and irrigation. The static groundwater levels are at a depth of approximately 40 feet. Groundwater ingestion by residents from private drinking water wells represents the most significant risk to human health. Based on sample results, 13 domestic water wells have been identified as having PCE concentrations above background levels and are identified as wells of concern. All of these wells of concern draw from the Ogallala Aquifer.

A public meeting will be held at 7:00 p.m., on Tuesday, August 24, 2010, at Coahoma High School, 606 North Main Street in Coahoma, Texas. The purpose of this meeting is to obtain additional information regarding the Site relative to its eligibility for listing on the state Registry and to identify additional potentially responsible parties. The public meeting is not a contested case hearing under the Texas Administrative Procedure Act (Texas Government Code, Chapter 2001).

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 p.m. on August 23, 2010, and should be sent in writing to Ms. April Palmie, Project Manager, TCEQ, Remediation Division, MC 143, P.O. Box 13087, Austin, Texas 78711-3087, or by facsimile at (512) 239-2450. The public comment period for this action will end at the close of the public meeting on August 24, 2010. A portion of the record for this site, including documents pertinent to the executive director's determination of eligibility, is available for review at the Howard County Library, 500 South Main Street in Big Spring, Texas, telephone (432) 264-2260, during regular business hours. Copies of the complete public record file may be obtained during regular business hours at the TCEQ, Building E, First Floor, Records Customer Service, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the TCEQ by telephone at (800) 633-9363. Requests should be made as far in advance as possible.

For further information about this site or the public meeting, please call Bruce McAnally, TCEQ Community Relations, at (800) 633-9363. Information is also available regarding the state Superfund program at: *http://www.tceq.state.tx.us/remediation/superfund/sites/index.html*.

TRD-201003774
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 6, 2010

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Notice of Water Quality Applications

The following notice was issued on June 25, 2010 through July 2, 2010.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of TPDES Permit No. WQ0002605000 issued to Southwest Shipyard, L.P., which operates a barge cleaning, maintenance, and repair facility which also receives and treats off-site third party wastes, to replace an invalid EPA Method for phenols with a valid EPA Method for phenols. The facility is located at 18310 Market Street in the city of Channelview, Harris County, Texas 77530.

OCCIDENTAL CHEMICAL CORPORATION which operates Occidental Chemical Corporation Ingleside Plant, has applied for a renewal of TPDES Permit No. WQ0003083000, which authorizes the discharge of treated process wastewater, utility wastewater, storm water and noncontact heating water at a daily average flow of effluent not to exceed 2,240,000 gallons per day via Outfall 001, and treated domestic wastewater via Outfall 102. The facility is located betweem Corpus Christi Bay and State Highway 361, approximately two (2) miles northwest of the intersection of State Highway 361 and State Highway 1069, west of the City of Ingleside, San Patricio County, Texas 78362.

AMERICAN CHROME AND CHEMICALS L P which operates the American Chrome & Chemicals Facility, a chromium chemicals manufacturing plant, has applied for a renewal of TPDES Permit No. WQ0000349000, which authorizes the discharge of once-through sea water for cooling, utility wastewaters, storm water, and previously monitored effluents (treated sodium dichromate and sodium chromate process wastewater, utility wastewater, recovered groundwater, and storm water via internal Outfall 101; chromic oxide and chromium oxide dehydrate process wastewater, and storm water via internal Outfall 201; and treated sanitary wastewater via internal Outfall 301) at a daily average flow not to exceed 20,000,000 gallons per day via Outfall 001. The facility is located 0.7 miles north of Interstate Highway 37 on Buddy Lawrence Drive in the extraterritorial jurisdiction of the City of Corpus Christi, Nueces County, Texas 78407.

AZTECA MILLING L P which operates the Edinburg Plant, has applied for a renewal of TCEQ Permit No. WQ0002525000, which authorizes the disposal of industrial wastewater from corn flour milling at a daily average flow not to exceed 300,000 gallons per day via irrigation of 165 acres of coastal Bermuda grass at a hydraulic application rate not to exceed 4.0 acre-feet/acre/year. This permit will not authorize a discharge of pollutants into water in the State. The facility site and disposal area are located approximately 0.25 miles west of U.S. Highway 281 on the north side of Chapin Road, north of the City of Edinburg, Hidalgo County, Texas 78540. The facility and land application site are located in the drainage area of the Laguna Madre, in Segment No. 2491 of the Bays and Estuaries.

BTB REFINING LLC which operates a petroleum facility, has applied for a major amendment without renewal to TPDES Permit No. WQ0002720000 to relocate Outfall 001 and rename it as Outfall 006; and to add storm water only Outfall 003. The current permit authorizes the discharge of treated process wastewater, treated storm water, water softener blow down, cooling tower blow down, boiler blow down, and hydrostatic test water at a daily average flow not to exceed 120,000 gallons per day via Outfall 001; and the discharge of storm water on an intermittent and flow variable basis via Outfall 002. The proposed permit authorizes the discharge of treated process wastewater, treated storm water, water softener blow down, cooling tower blow down, boiler blow down, and hydrostatic test water at a daily average flow not to exceed 120,000 gallons per day via Outfall 001 until Outfall 006 is operational and then via Outfall 006; and the discharge of storm water on an intermittent and flow variable basis via Outfalls 002 and 003.The facility is located at 6600 Up River Road, on the north side of Up River Road approximately one-half mile west of the intersection of Up River Road and Valero Way, northwest of the City of Corpus Christi, Nueces County, Texas 78409. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

EL PASO MERCHANT ENERGY-PETROLEUM COMPANY which operates the Coastal States - Falfurrias Station, a groundwater remediation site at an inactive pipeline gathering station, has applied for a major amendment to TCEQ Permit No. WQ0004761000 to change the frequency of effluent sampling from quarterly to annual. The current permit authorizes the disposal of treated groundwater at a volume not to exceed 7,200 gallons per day via evaporation, which will remain the same. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located on Jim Wells County Road 405, 1/2 mile west of Highway 281 and three miles north of Falfurrias, Jim Wells County, Texas 78375.

BROWNSVILLE NAVIGATION DISTRICT has applied for a renewal of TPDES Permit No. WQ0010332001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 98,000 gallons per day. The facility is located on the east side of the Keppel AmFELS (formerly Marathon-Le Tourneau Company) Plant which is located on the south side of State Highway 48, approximately 3.9 miles east of the intersection of State Highway 48 with Farm-to-Market Road 511, northeast of the City of Brownsville in Cameron County, Texas 78521.

CITY OF LINDALE has applied for a renewal of TPDES Permit No. WQ0010412002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 72,000 gallons per day. The facility is located adjacent to Interstate Highway 20 approximately 0.9 mile west of the intersection of Interstate Highway 20 and County Road 463 in Smith County, Texas 75771.

CITY OF WHITEWRIGHT has applied for a renewal of TPDES Permit No. WQ0010644001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 627,000 gallons per day. The facility is located at 810 1/2 North Bond Street, approximately one block west of the intersection of Farm-to-Market Road 898 and the MK&T Railroad, north of the City of Whitewright in Grayson County, Texas 75491.

LA JOYA INDEPENDENT SCHOOL DISTRICT has applied to for a renewal of TPDES Permit No. WQ0013523006, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,570 gallons per day. The facility is located on Farm-to-Market Road 886, approximately 0.4 mile south of the intersection of U.S. Highway 83 and Farm-to-Market Road 886 in Hidalgo County, Texas 78560.

BOSQUE UTILITIES CORPORATION has applied for a renewal of TPDES Permit No. WQ0014627001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. TCEQ received this application on April 23, 2010. The facility will be located on the northeast corner of the intersection of Helms Trail and Interstate Highway 20 in Kaufman County, Texas 75126.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-201003795
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 7, 2010

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Public Hearing on Proposed Revisions to 30 TAC Chapter 17

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed amendments to 30 Texas Administrative Chapter (TAC) Chapter 17, Tax Relief for Property Used for Environmental Protection, §§17.1, 17.2, 17.6, 17.10, 17.12, 17.14, 17.17, 17.20, and 17.25 and the proposed repeal of §17.15.

The purpose of this rulemaking is to implement the legislative requirements contained in House Bills 3206 and 3544 (81st Legislature, 2009, Regular Session) and resulting additions to Texas Tax Code §11.31(g-1) and (n), as they apply to Chapter 17. The proposed rulemaking would consolidate Tier III and IV applications, require Tier III applications for all property used partially for pollution control, modify the Cost Analysis Procedure, allow electronic transmittal of notices, require separate applications for non-integrated pollution control systems, facilitate prioritizing and processing applications, require certain information on applications, and allow the general counsel to remand appeals back to the executive director without formal action by the commission when the action is requested by the executive director or the public interest counsel.

The commission will hold five public hearings on this proposal. The first hearing will be held in Houston on August 9, 2010, at 1:00 p.m. in Conference Room A at the Houston Galveston Area Council (HGAC) located at 3555 Timmons, Suite 120, Houston. The second hearing will be held in Beaumont on August 10, 2010, at 9:00 a.m. in the commission's Beaumont regional office located at 3870 Eastex Freeway, Beaumont. The third hearing will be held in Austin on August 10, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The fourth hearing will be held on August 12, 2010, at 1:00 p.m. in Conference Room 1003 in the NRC Building on the Texas A&M Corpus Christi campus located at 6300 Ocean Drive, Corpus Christi. The fifth hearing will be held in Fort Worth on August 13, 2010, at 1:00 p.m. in the public meeting room of the commission's Dallas/Fort Worth regional office located at 2309 Gravel Drive, Fort Worth. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services, at (512) 239-0779. Requests should be made as far in advance as possible.

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2009-050-017-EN. The comment period closes August 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Emmanuel Wada, Air Quality Division, at (512) 239-1917.

TRD-201003701
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 1, 2010

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payments

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on August 2, 2010, at 1:30 p.m., to receive comment on proposed Medicaid payments for Case Management for Children and Pregnant Women (CPW). The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code, Title 1 (1 TAC), §355.105(g), which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The Medicaid Payments for CPW are proposed to be effective September 1, 2010.

Methodology and Justification. The Legislative Budget Board and the Governor's Office informed HHSC in a letter dated May 17, 2010, of their revision to the Spending Reduction Plan for the 2010-11 Biennium submitted by HHSC in response to the January 15, 2010 letter from the Governor, Lieutenant Governor, and Speaker requesting a spending reduction proposal. The result of this revision is that the payments for these programs will be reduced by one percent effective September 1, 2010, according to 1 TAC §355.8401, which addresses the reimbursement methodology for case management for children and pregnant women.

Briefing Package. A briefing package describing the proposed payments will be available at www.hhsc.state.tx.us/medicaid/programs/rad/ratepackets.html on or after July 15, 2010. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payments may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201003783
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: July 6, 2010

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Public Notice

The Texas Health and Human Services Commission (HHSC) intends to submit to the Centers for Medicare and Medicaid Services a request to amend the Consolidated Waiver Program: Waiver 0373 and Waiver 0374. These are Medicaid home and community-based services waivers under the authority of §1915(c) of the Social Security Act. The Consolidated Waiver Program waivers are currently approved for the five-year period beginning September 1, 2009, and ending August 31, 2014. The proposed effective date for the amendments is September 1, 2009.

The Consolidated Waiver Program is a pilot program that is testing the feasibility of combining five of the state's home and community-based services waiver programs, including: Community Based Alternatives; Community Living Assistance and Support Services; Medically Dependent Children Program; Home and Community-based Services; and Deaf Blind with Multiple Disabilities. The Consolidated Waiver Program is limited to serving 200 individuals in Bexar County.

The Consolidated Waiver Program is comprised of two §1915(c) Medicaid waivers. Waiver 0373 provides home and community-based services to adults and children who are eligible for nursing facility care. Waiver 0374 provides home and community-based services to adults and children who are eligible for care in an intermediate care facility for persons with mental retardation or related conditions. Services include adaptive aids, medical supplies, minor home modifications, adult foster care, assisted living, 24-hour residential care, personal assistance, residential habilitation, day habilitation, in-home and out-of-home respite, nursing, audiology, child-support services, independent advocacy, intervener, orientation and mobility, behavioral support, social work, physical, occupational, and speech/language therapies, dental, dietary, emergency response, family surrogate, home-delivered meals, and transportation.

The purpose of this amendment is to add Medicaid Buy-In as a route to financial eligibility for the Consolidated Waiver Program. Medicaid Buy-In allows people with disabilities who are working to purchase Medicaid coverage by paying a premium. Currently, individuals who access Medicaid through the Medicaid Buy-In program are not eligible for the Consolidated Waiver Program. Individuals will need to meet all other eligibility requirements and will still be required to register on an interest list for services until funding is available. Individuals currently in the Consolidated Waiver Program may be able to work, remain eligible for Medicaid and remain in the Consolidated Waiver Program through Medicaid Buy-In.

HHSC is requesting that the Centers for Medicare and Medicaid Services approve the Consolidated Waiver Program amendments for the period beginning September 1, 2009, and extending through August 31, 2014. The waivers maintain cost neutrality for waiver years 2009 through 2014.

To obtain copies of the proposed waivers, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail christine.longoria@hhsc.state.tx.

TRD-201003714
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: July 1, 2010

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Department of State Health Services

Correction of Error

The Department of State Health Services adopted new and repealed sections under 25 TAC Chapter 117, concerning the regulation of end stage renal disease (ESRD) facilities. The rules were published in the July 2, 2010, issue of the *Texas Register* (35 TexReg 5835).

The agency's submission included a referencing error under new §117.45(d)(6)(A) on page 5866. As published subparagraph (A) reads:

"(A) During treatment of seven or fewer patients, direct care staff shall consist of one registered nurse and one direct care staff as demonstrated in Table 1 of §117.106 of this title (relating to Definitions)."

As corrected the reference should read, "...as demonstrated in Table 1 of §117.106 of this title (relating to Tables)."

TRD-201003794

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Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX"" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Port Neches	Huntsman Petrochemical L.L.C.	L06323	Port Neches	00	06/07/10
Throughout TX	Professional Service Industries Inc.	L06338	Grand Prairie	00	06/10/10
Throughout TX	Warrior Energy Services Corporation	L06342	Odessa	00	06/14/10

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	102	06/04/10
Alvin	Ascend Performance Materials L.L.C.	L06271	Alvin	01	06/07/10
Arlington	Arlington Memorial Hospital dba Texas Health Arlington Memorial Hospital	L02217	Arlington	96	06/07/10
Arlington	Columbia Medical Center of Arlington Subsidiary L.P. dba Medical Center of Arlington	L02228	Arlington	70	06/03/10
Austin	St. David's Healthcare Partnership L.P. L.L.P. dba St. David's Medical Center	L00740	Austin	107	06/02/10
Austin	Texas Oncology	L06206	Austin	02	06/01/10
Austin	Applied Nanotech Inc.	L06277	Austin	02	06/01/10
Baytown	Rashid M. Siddiqi, M.D., P.A.	L06097	Baytown	03	06/03/10
Beaumont	Exxonmobil Oil Corporation	L00603	Beaumont	94	06/03/10
Beaumont	Lamar University	L04047	Beaumont	27	06/02/10
Bedford	Columbia North Hills Outpatient Imaging Center Subsidiary L.P. dba Bedford Imaging Center	L03455	Bedford	53	06/08/10
Borger	WRB Refining L.L.C. dba Conocophillips Company	L02480	Borger	55	06/04/10
Carrollton	Trinity MC L.L.C. dba Baylor Medical Center at Carrollton	L03765	Carrollton	62	06/15/10
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	102	06/09/10
Dallas	Medical City Dallas Hospital dba Medical City	L01976	Dallas	184	06/09/10
Dallas	Texas Health Presbyterian Hospital - Dallas	L04288	Dallas	27	06/07/10
Deer Park	Total Petrochemicals USA Inc.	L00302	Deer Park	57	06/03/10
Deer Park	Shell Chemical L.P.	L04933	Deer Park	23	06/09/10
Edinburg	Doctors Hospital at Renaissance Ltd. dba Doctors Hospital at Renaissance	L05761	Edinburg	24	06/07/10
El Paso	East El Paso Physicians Medical Center L.L.C.	L05676	El Paso	21	06/07/10
Fort Worth	Texas Health Harris Methodist Hospital Fort Worth	L01837	Fort Worth	126	06/04/10
Fort Worth	University of North Texas Health Science Center - Fort Worth	L02518	Fort Worth	37	06/15/10
Fort Worth	Radiology Associates	L03953	Fort Worth	57	06/01/10
Fort Worth	Radiology Associates	L03953	Fort Worth	58	06/04/10
Fort Worth	Radiology Associates	L03953	Fort Worth	59	06/11/10
Fort Worth	Physician Reliance L.P. dba Texas Oncology at Klabzuba	L05545	Fort Worth	36	06/14/10
Galveston	The University of Texas Medical Branch	L01299	Galveston	87	06/01/10
Grapevine	Cardiovascular Consultants of North Texas L.L.P.	L04627	Grapevine	20	06/07/10
Houston	Cardinal Health	L01911	Houston	142	06/07/10

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Bernardo Treistman, M.D., P.A. dba Cardiology Specialists of Houston	L05083	Houston	10	06/01/10
Houston	American Diagnostic Tech L.L.C.	L05514	Houston	57	06/11/10
Houston	Medi Physics Inc. dba G.E. Healthcare	L05517	Houston	20	06/11/10
Huntsville	Sam Houston Cancer Center	L06113	Huntsville	03	06/02/10
Kingsville	Texas A&M University - Kingsville	L01821	Kingsville	41	06/09/10
Kingsville	Christus Spohn Health System dba Christus Spohn Hospital Kleberg	L02917	Kingsville	48	06/01/10
Lamesa	Dawson County Hospital District dba Medical Arts Hospital	L06244	Lamesa	05	06/10/10
Lubbock	Rosa of the South Plains L.L.P. dba Rosa of the South Plains	L05484	Lubbock	15	06/08/10
McAllen	McAllen Hospitals L.P. dba McAllen Medical Center	L01713	McAllen	90	06/10/10
McAllen	Valley Nuclear Incorporated	L04521	McAllen	30	06/01/10
McAllen	Texas Oncology P.A. dba South Texas Cancer Center at McAllen	L04880	McAllen	12	06/03/10
McAllen	McAllen Hospitals L.P. dba McAllen Medical Heart Hospital	L04902	McAllen	20	06/10/10
Midland	T. Bob Amthor Holdings L.L.C.	L05964	Midland	02	06/01/10
Paris	Radiology Center of Paris Ltd.	L05445	Paris	16	06/15/10
Pasadena	Chevron Phillips Chemical Company L.P.	L00230	Pasadena	83	06/01/10
Pasadena	Equistar Chemicals L.P.	L01854	Pasadena	40	06/08/10
Pasadena	Tracerco	L03096	Pasadena	70	06/11/10
Plano	Cardiovascular Consultants of North Texas dba Cardiovascular Consultants Plano	L05690	Plano	08	06/07/10
Port Arthur	S. K. Rao, M.D., P.A.	L05415	Port Arthur	15	06/01/10
Rowlett	Lake Pointe Operating Company L.L.C. dba Lake Pointe Medical Center	L04060	Rowlett	16	06/07/10
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	185	06/11/10
San Antonio	Methodist Healthcare System of San Antonio Ltd. L.L.P.	L00594	San Antonio	271	06/08/10
San Antonio	Radiation Oncology of San Antonio P.A. dba Oncology San Antonio	L05853	San Antonio	11	06/02/10
Sherman	Texas Oncology P.A. dba Texas Cancer Center Sherman	L05019	Sherman	21	06/04/10
Stafford	Aloki Enterprise Inc.	L06257	Stafford	04	06/10/10
Sugar Land	Methodist Sugar Land Hospital	L05788	Sugar Land	24	06/11/10
Sugar Land	St. Luke's Sugar Land Partnership L.L.P. dba St. Luke's Sugar Land Hospital	L06180	Sugar Land	06	06/03/10
Temple	Specialty Pharmacy Services Inc.	L04883	Temple	29	06/14/10
Throughout TX	Rodriguez Engineering	L04700	Austin	16	06/02/10
Throughout TX	IRISNDT Inc.	L04769	Deer Park	88	06/09/10
Throughout TX	IRISNDT Inc.	L04769	Deer Park	89	06/15/10
Throughout TX	RTD Pipeline Services USA L.P.	L05985	Houston	14	06/03/10
Throughout TX	American X-Ray and Inspection Services Inc. dba AXIS Inc.	L05974	Midland	26	05/28/10
Throughout TX	Techcorr USA L.L.C. dba AUT Specialists L.L.C.	L05972	Palestine	77	06/10/10
Throughout TX	Texas Gamma Ray L.L.C.	L05561	Pasadena	94	06/01/10
Throughout TX	GCT Inspection Inc.	L02378	South Houston	107	06/14/10
Throughout TX	Schlumberger Technology Corporation	L00764	Sugar Land	116	06/01/10
Throughout TX	Schlumberger Technology Corporation	L00764	Sugar Land	117	06/02/10
Tyler	Mother Frances Hospital Regional Health Care Center	L01670	Tyler	154	06/04/10

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Uvalde	Uvalde County Hospital Authority dba Uvalde Memorial Hospital	L03327	Uvalde	19	06/07/10
Waco	Waco Cardiology Associates	L05158	Waco	16	06/03/10
Weatherford	Weatherford Texas Hospital Company L.L.C. dba Weatherford Regional Medical Center	L02973	Weatherford	24	06/15/10

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Baker Hughes Oilfield Operations Inc. dba Baker Atlas	L05104	Houston	14	06/08/10
Houston	Wyle Laboratories Inc.	L04813	Houston	09	06/04/10
Throughout TX	Professional Service Industries Inc.	L00203	Houston	129	06/04/10

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	El Paso Community College	L05069	El Paso	03	05/27/10
Port Neches	Huntsman Corporation	L06107	Port Neches	02	06/09/10

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, TX 78714-9347. For information call (512) 834-6688.

TRD-201003777
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: July 6, 2010

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Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Plano	Vista Pem Providers L.L.C.	L06341	Plano	00	06/18/10
Throughout TX	Schlumberger Technology Corporation	L06303	Sugar Land	00	06/23/10

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alice	Usman Qureshi, M.D., P.A.	L05366	Alice	05	06/18/10
Amarillo	Cardiology Center of Amarillo L.L.P.	L05736	Amarillo	12	06/15/10
Austin	St. David's Healthcare Partnership L.P. L.L.P. dba St. David's South Austin Medical Center	L03273	Austin	90	06/11/10
Austin	St. David's Healthcare Partnership L.P. L.L.P. dba St. David's South Austin Medical Center	L03273	Austin	91	06/23/10
Austin	Seton Healthcare dba Dell Children's Medical Center of Central Texas	L06065	Austin	18	06/22/10
Beaumont	Baptist Hospital of Southeast Texas	L00358	Beaumont	123	06/18/10
Bedford	Columbia North Hill's Outpatient Imaging Center Subsidiary L.P. dba Bedford Imaging Center	L03455	Bedford	54	06/23/10
Channelview	Lyondell Chemical Company	L04439	Channelview	25	06/17/10
College Station	TDI Brooks International Inc.	L06139	College Station	03	06/17/10
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	107	06/23/10
Dallas	Rosa of North Dallas L.L.C.	L06186	Dallas	02	06/17/10
Dallas	Mallinckrodt Inc.	L03580	Dallas	69	06/14/10
Dallas	Crown Imaging L.L.C.	L06223	Dallas	02	06/15/10
Dallas	GAF Materials Corporation	L03811	Dallas	17	06/15/10
Ennis	PRHC Ennis L.P. dba Ennis Regional Medical Center	L05427	Ennis	09	06/16/10
Fort Worth	Naresh H. Patel, M.D. dba Texas Cardiology Clinic	L05520	Fort Worth	08	06/18/10
Fort Worth	Fort Worth Surgicare Partners L.T.D. dba Baylor Surgical Hospital at Fort Worth	L05668	Fort Worth	08	06/25/10
Fort Worth	University of North Texas Health Science Center - Fort Worth	L02518	Fort Worth	38	06/25/10
Henderson	East Texas Medical Center - Henderson	L06281	Henderson	01	06/28/10
Houston	Columbia/HAC Healthcare Corporation dba Spring Branch Medical Center	L02473	Houston	76	06/22/10
Houston	RCOA Imaging Services	L06091	Houston	01	06/22/10
Houston	Cardinal Health	L05536	Houston	26	06/25/10
Irving	Baylor Medical Center at Irving dba Irving Healthcare System	L02444	Irving	80	06/25/10
Lewisville	Cardiovascular Specialists P.A.	L05507	Lewisville	17	06/18/10
Llano	Llano County Hospital Authority dba Llano Memorial Healthcare System	L04438	Llano	27	06/29/10
McAllen	Heart Clinic P.L.L.C.	L04514	McAllen	24	06/16/10
Midland	Midland County Hospital District dba Midland Memorial Hospital	L00728	Midland	97	06/15/10
North Richland Hills	Columbia North Hills Hospital Subsidiary L.P. dba North Hills Hospital	L02271	North Richland Hills	64	06/16/10
North Richland Hills	Columbia North Hills Hospital Subsidiary L.P. dba North Hills Hospital	L02271	North Richland Hills	65	06/23/10

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Palestine	Palestine Principal Healthcare Limited Partnership dba Palestine Regional Medical Center	L02728	Palestine	43	06/18/10
Perryton	Ochiltree County Hospital District dba Ochiltree General Hospital	L06006	Perryton	04	06/15/10
San Antonio	Accord Medical Management L.P.	L03531	San Antonio	31	06/18/10
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	186	06/16/10
San Antonio	VHS San Antonio Partners L.L.C.	L00455	San Antonio	198	06/17/10
San Antonio	Radiation Oncology of San Antonio P.A. dba Oncology San Antonio	L05853	San Antonio	12	06/21/10
San Antonio	Heart Hospital of San Antonio L.P. dba Texsan Heart Hospital	L05722	San Antonio	16	06/22/10
Sugar Land	St. Luke's Sugar Land Partnership L.L.P. dba St. Luke's Sugar Land Hospital	L06180	Sugar Land	07	06/25/10
Texarkana	Advanced Cardiology of Texarkana	L05976	Texarkana	04	06/25/10
Throughout TX	Weatherford U.S., L.P.	L02756	Alvin	26	06/28/10
Throughout TX	John E. Hearne dba Hearne Wireline Service	L05174	Asherton	06	06/24/10
Throughout TX	Texas Department of Transportation	L00197	Austin	151	06/21/10
Throughout TX	Weatherford International Inc.	L04286	Benbrook	85	06/28/10
Throughout TX	Xxtreme Pipe Services L.L.C.	L02576	Channelview	26	06/22/10
Throughout TX	Berry Fabricators	L01575	Corpus Christi	56	06/23/10
Throughout TX	Halliburton Energy Services Inc.	L00442	Houston	120	06/18/10
Throughout TX	Castle Engineering and Testing L.L.C.	L06143	Laredo	03	06/28/10
Throughout TX	All American Inspection Inc.	L01336	San Antonio	70	06/16/10
Throughout TX	Schlumberger Technology Corporation	L00109	Sugar Land	58	06/23/10
Throughout TX	Ludlum Measurements Inc.	L01963	Sweetwater	88	06/18/10
Tyler	Mother Frances Hospital Regional Health Care Center	L01670	Tyler	155	06/16/10
Victoria	Victoria of Texas L.P. dba Detar Hospital Navarro	L01630	Victoria	47	06/23/10
Victoria	Victoria Heart and Vascular Center	L05748	Victoria	07	06/25/10
Waco	Hillcrest Baptist Medical Center	L00845	Waco	91	06/16/10
Waco	Hillcrest Baptist Medical Center	L00845	Waco	92	06/21/10
Wichita Falls	United Regional Health Care System Inc.	L00350	Wichita Falls	109	06/23/10

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
San Marcos	Adventist Health System/Sunbelt Inc. dba Central Texas Medical Center	L03133	San Marcos	25	06/22/10
Seguin	Structural Metals Inc.	L02188	Seguin	22	06/24/10

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Corpus Christi	South Texas Imaging Venture L.L.P.	L06017	Corpus Christi	04	06/16/10
Midland	Tracer-Tec Services	L05375	Midland	10	06/14/10
Odessa	Black Warrior Wireline Corp.	L04473	Odessa	33	06/18/10
Plano	Plano Wellness Clinic	L06207	Plano	01	06/16/10
San Antonio	Radiology Associates of San Antonio P.A. dba Advanced Medical Imaging	L04305	San Antonio	40	06/25/10
San Benito	Healthmont of Texas I L.L.C.	L04567	San Benito	13	06/16/10
Throughout TX	E.D. Baker Company LTD	L04872	Borger	09	06/15/10

Location	Name	License #	City	Amend-ment #	Date of Action
Waco	Waco Hematology Oncology Endocrine Associates P.A.	L00910	Waco	17	06/18/10

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This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, TX 78714-9347. For information call (512) 834-6688.

TRD-201003782
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: July 6, 2010

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Houston-Galveston Area Council

Request for Proposals

The Houston-Galveston Area Council solicits qualified organizations to hire temporary workers for Hurricane Ike repair and restoration projects. A proposal package (RFP and attachments) will be available for download at www.h-gac.com and www.wrksolutions.com at 10:00 a.m. Central Standard Time on Tuesday, July 5, 2010. Hard copies of the proposal package will also be available at that time. Prospective bidders may contact Carol Kimmick at (713) 627-3200 or carol.kimmick@h-gac.com.

A bidder's conference is scheduled for Monday, July 12, 2010 at 1:30 pm at H-GAC offices, 3555 Timmons Lane, 2nd Floor, Conference Room A. Proposals are due at H-GAC offices on or before 12:00 noon Central Daylight Time on Tuesday, July 20, 2010. Mailed proposals must be postmarked no later than Friday, July 16, 2010. H-GAC will not accept late proposals; we will make no exceptions.

TRD-201003797
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: July 7, 2010

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Texas Department of Insurance

Company Licensing

Application to change the name of MARYLAND INSURANCE COMPANY to CAPSON PHYSICIANS INSURANCE COMPANY, a domestic fire and casualty company. The home office is in Dallas, Texas.

Application for admission to the State of Texas by AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INC., a foreign fire and/or casualty company. The home office is in Chicago, Illinois.

Application to change the name of CARDIF LIFE INSURANCE COMPANY to FINANCIAL AMERICAN LIFE INSURANCE COMPANY, a foreign life company. The home office is in Overland Park, Kansas.

Application to change the name of CARDIF PROPERTY AND CASUALTY INSURANCE COMPANY to FINANCIAL AMERICAN PROPERTY AND CASUALTY INSURANCE COMPANY, a domestic fire and/or casualty company. The home office is in Kerrville, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-201003792
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 7, 2010

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Texas Department of Licensing and Regulation

Vacancies on Advisory Board on Cosmetology

The Texas Department of Licensing and Regulation (Department) announces two vacancies on the Advisory Board on Cosmetology (Board) established by Texas Occupations Code, Chapter 1602. The pertinent rules may be found in 16 Texas Administrative Code §83.65. The purpose of the Advisory Board on Cosmetology is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on: education and curricula for applicants; the content of examinations; proposed rules and standards on technical issues related to cosmetology; and other issues affecting cosmetology.

The Board is composed of seven members appointed by the presiding officer of the Commission, with the Commission's approval. The Board consists of one member who holds a license for a beauty shop that is part of a chain of beauty shops; one member who holds a license

for a beauty shop that is not part of a chain of beauty shops; one member who holds a private beauty culture school license; two members who each hold an operator license; one member who represents a licensed public secondary or post secondary beauty culture school; and one public member. Members serve staggered six-year terms, with the terms of one or two members expiring on the same date each odd-numbered year. This announcement is for the vacancies of a two members who each hold an operator license.

Interested persons should request an application from the Texas Department of Licensing and Regulation by telephone (512) 475-4765, fax (512) 475-2874 or email advisory.boards@license.state.tx.us. Applications may also be downloaded from the Department website at: www.license.state.tx.us. Applicants may be asked to appear for an interview; however, any required travel for an interview would be at the applicant's expense.

TRD-201003733

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Filed: July 2, 2010

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Texas Lottery Commission

Instant Game Number 1281 "Super 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1281 is "SUPER 7'S." The play style for this game is "key number match with multiplier."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1281 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1281.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 7X SYMBOL, $1.00, $2.00, $3.00, $4.00, $5.00, $7.00, $10.00, $20.00, $70.00, $100, and $700.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1281 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
7X	WINX7
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$4.00	FOUR$
$5.00	FIVE$
$7.00	SEVEN$
$10.00	TEN$
$20.00	TWENTY
$70.00	SEVENTY
$100	ONE HUND
$700	SEV HUND

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $7.00, $14.00, $20.00 or $21.00.

G. Mid-Tier Prize - A prize of $35.00, $70.00 or $100.

H. High-Tier Prize - A prize of $700.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1281), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1281-0000001-001.

K. Pack - A pack of "SUPER 7'S" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SUPER 7'S" Instant Game No. 1281 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SUPER 7'S" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) Play Symbols. If a player reveals a "7" play symbol in the play area, the player wins the PRIZE shown below it. If a player reveals a "7X" play symbol, the player wins 7 TIMES THE PRIZE shown below it. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 12 (twelve) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 12 (twelve) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning play symbols on a ticket.

D. Non-winning prize symbols will never be the same as the winning prize symbol(s).

E. Non-winning play symbols will never appear with the same prize symbol (i.e. 5 and $5).

F. The "7X" (win x 7) play symbol will only appear on intended winning tickets as dictated by the prize structure.

G. The top prize will appear on every ticket unless otherwise restricted by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "SUPER 7'S" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $7.00, $14.00, $20.00, $21.00, $35.00, $70.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $35.00, $70.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "SUPER 7'S" Instant Game prize of $700, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SUPER 7'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

D. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SUPER 7'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SUPER 7'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,000,000 tickets in the Instant Game No. 1281. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1281 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,040,000	11.54
$2	1,200,000	10.00
$4	200,000	60.00
$5	80,000	150.00
$7	160,000	75.00
$14	40,000	300.00
$20	11,500	1,043.48
$21	3,750	3,200.00
$35	1,500	8,000.00
$70	3,500	3,428.57
$100	750	16,000.00
$700	300	40,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.38. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1281 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1281, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201003698
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 1, 2010

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Public Utility Commission of Texas

Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 1, 2010, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Buford Media Group, LLC d/b/a Alliance Communications Network II for a State-Issued Certificate of Franchise Authority, Project Number 38406 before the Public Utility Commission of Texas.

The requested CFA service area includes the City of Beckville, the City of Lakeport, the City of Tatum, the unincorporated areas of Gregg County known as Easton, Elderville, Lake Cherokee North and the unincorporated area adjacent to or connected with the City of Lakeport; the unincorporated area of Panola County adjacent to or connected with the City of Beckville; and the unincorporated area of Rusk County known as Lake Cherokee South and the unincorporated area adjacent to or connected with the City of Tatum.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Project Number 38406.

TRD-201003781
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 6, 2010

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on June 28, 2010, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Tell-All Telecom Inc. for a Service Provider Certificate of Operating Authority, Docket Number 38391.

Applicant intends to provide data, facilities-based, and resold telecommunications services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 23, 2010. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38391.

TRD-201003778
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 6, 2010

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on July 2, 2010, for an amendment to certificated service area boundaries within Real County, Texas.

Docket Style and Number: Joint Application of Pedernales Electric Cooperative and Bandera Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Real County. Docket Number 38417.

The Application: The proposed boundary change is for release of territory from Bandera Electric Cooperative (BEC) to Pedernales Electric Cooperative, Inc. (PEC). PEC received a customer request to provide service to the Kinsel Ranch in Real County. The ranch is bisected by the service area boundary line of BEC and PEC. Mr. Kinsel requests that PEC serve his entire 2100 acre ranch.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than July 23, 2010 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 38417.

TRD-201003780
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 6, 2010

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On July 1, 2010, Trinsic Communications, 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 60195. Applicant intends to relinquish its certificate.

The Application: Application of Trinsic Communications, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 38408.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 23, 2010. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 38408.

TRD-201003779
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 6, 2010

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Public Notice of Workshop on Project Number 37909 - Rulemaking Proceeding to Amend PUC Substantive Rule §25.193, Relating to Distribution Service Provider Transmission Cost Recovery Factors

The Public Utility Commission of Texas (commission) will hold a workshop on Thursday, July 29, 2010, regarding Project No. 37909, *Rulemaking Proceeding to Amend PUC Subsantive Rule §25.193, Relating to Distribution Service Provider Transmission Cost Recovery Factors (TCRF).* The workshop will be held from 9:30 a.m. to 12:00 p.m. in the Commissioner's Hearing Room on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

By Monday, July 26, 2010, the commission staff will make available in Central Records under Project No. 37909 a meeting agenda that will include revised rule language for discussion at the workshop. The agenda will also be available for download by visiting the commission's website at www.puc.state.tx.us and clicking on the Filings/Interchange and Filings Retrieval links.

Questions concerning the workshop or this notice should be referred to Darryl Tietjen, Director of Rate Regulation, at (512) 936-7436 or darryl.tietjen@puc.state.tx.us. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201003788
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 6, 2010

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The Texas A&M University System

Renewal of a Consulting Contract

In accordance with the provisions of Texas Government Code, Chapter 2254, The Texas A&M University System has renewed an existing contract for Environmental Management System (EMS) Consulting Services and EMS Implementation Services for TAMUS and for participating TAMUS members under the direction and supervision of The TAMUS Office of Risk Management and Safety.

The Name and Address of Consultant are as follows: Avery Environmental Services, Inc., 1900 Georgia Landing Cove, Austin, Texas 78746.

The contract renewal will begin on July 7, 2010 and shall terminate in one year, unless renewed for additional years not to exceed four years.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to TAMUS, no later than one year after completion of services.

Any questions regarding this posting should be directed to: Don Barwick, HUB and Procurement Manager, Office of HUB and Procurement Programs, The Texas A&M University System, 200 Technology Way, Ste. 1273, College Station, Texas 77845, Voice: (979) 458-6410, E-mail: dbarwick@tamu.edu.

TRD-201003697
Don Barwick
HUB and Procurement Manager
The Texas A&M University System
Filed: July 1, 2010

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Texas Water Development Board

Public Hearing Notice for State Fiscal Year 2011 Clean Water State Revolving Fund and Drinking Water State Revolving Fund Intended Use Plans

The Texas Water Development Board (TWDB) will hold a public hearing on the draft State Fiscal Year (SFY) 2011 Clean Water State Revolving Fund (CWSRF) Intended Use Plan (IUP) and the Drinking Water State Revolving Fund (DWSRF) IUP. The hearing for the DWSRF and CWSRF IUPs will begin promptly at 2:00 p.m. on August 19, 2010, in Room 170 of the Stephen F. Austin Building at 1700 N. Congress Avenue, Austin, Texas 78701.

The DWSRF IUP contains a list of water infrastructure projects in prioritized order which will be considered for funding in SFY 2011. The draft SFY 2011 DWSRF IUP has been prepared pursuant to the rules adopted by the TWDB in 31 Texas Administrative Code Chapter 371.

The CWSRF IUP contains a list of wastewater projects in prioritized order which will be considered for funding in 2011. The draft SFY 2011 CWSRF IUP has been prepared pursuant to rules adopted by the TWDB in 31 Texas Administrative Code Chapter 375.

Interested persons are encouraged to attend the hearings and to present relevant and material comments concerning the draft IUPs. In addition, persons may submit written comments to Ms. Stacy Barna, Texas Water Development Board, P.O. Box, 13231, Austin, Texas 78711, or may email comments to *iupcomments@twdb.state.tx.us.* Comments may also be received online utilizing an electronic form located at *http://www.twdb.state.tx.us/apps/iup.* Comments and supplemental information will only be accepted by electronic submission at the addresses stated, written comments to Ms. Stacy Barna, or at the public hearing on August 19, 2010. Any comments and supplemental information must be received by 5:00 p.m. central standard time, August 19, 2010 to be considered. Interested persons also may review the draft DWSRF and CWSRF IUPs at the Board's website at *www.twdb.state.tx.us/assistance/financial/fin_infrastructure/dwsrf.asp* and *www.twdb.state.tx.us/assistance/financial/fin_infrastructure/cwsrffund.asp* respectively.

Please note that time limits on public comments may be imposed to allow all members of the public to be heard.

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Leslie Anderson at (512) 463-7855 two (2) working days prior to the hearing so that appropriate arrangements can be made.

TRD-201003770
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Filed: July 6, 2010

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Workforce Solutions Deep East Texas

Public Notice

Request for Application #10-288 Individual Referral Providers

Date Issued: July 6, 2010

Workforce Solutions Deep East Texas is seeking qualified entities to enter into a contract to provide the following services on an individual referral basis:

1. Occupational skills training for persons funded under the Workforce Investment Act (WIA) Youth program and Temporary Assistance to Needy Families program. Occupational skills training is education/training of generally two (2) years or less in a program that leads to a degree, certification, or licensure that prepares an individual to enter employment in an occupation on the targeted occupation list for Deep East Texas.

2. Intensive services for persons funded under WIA (Adult, Dislocated Worker, and Youth) and Temporary Assistance to Needy Families (TANF) program. Intensive services are those programs or courses lasting six (6) months or less, not leading to a degree, certification, or licensure, that prepare an individual to enter/re-enter employment or training. Examples of intensive services are English-as-a-Second-Language, GED preparation, basic skills/literacy, tutoring, and computer literacy. (Note: If any of these services are provided in conjunction with occupational skills, they are not intensive services but are classified as training and a separate Training Provider application must be submitted.)

Qualified programs/services are those offered to the general public at a specified cost. Eligible entities include secondary and post-secondary education agencies; adult, literacy and continuing education providers; for-profit and not-for-profit providers; and community-based and charitable/faith-based organizations. Interested parties must submit a completed Request for Information Application (RFA) and meet minimum criteria for service providers set by the Board.

Request for a copy of the RFA and targeted occupations list can be made to:

Darla Johnson

Procurement/Contracts

Workforce Solutions Deep East Texas OR accessed at: www.detwork.org

539 S. Chestnut, Suite 300

Lufkin, TX 75901

Phone: (936) 639-8898

Fax: (936) 633-7491

Email: darla.johnson@twc.state.tx.us

Workforce Solutions retains the right to refuse any or all applications.

Equal Opportunity Employer/Programs

TRD-201003716

Charlene Meadows
Executive Director
Workforce Solutions Deep East Texas
Filed: July 2, 2010

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 35 (2010) is cited as follows: 35 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "35 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 35 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*