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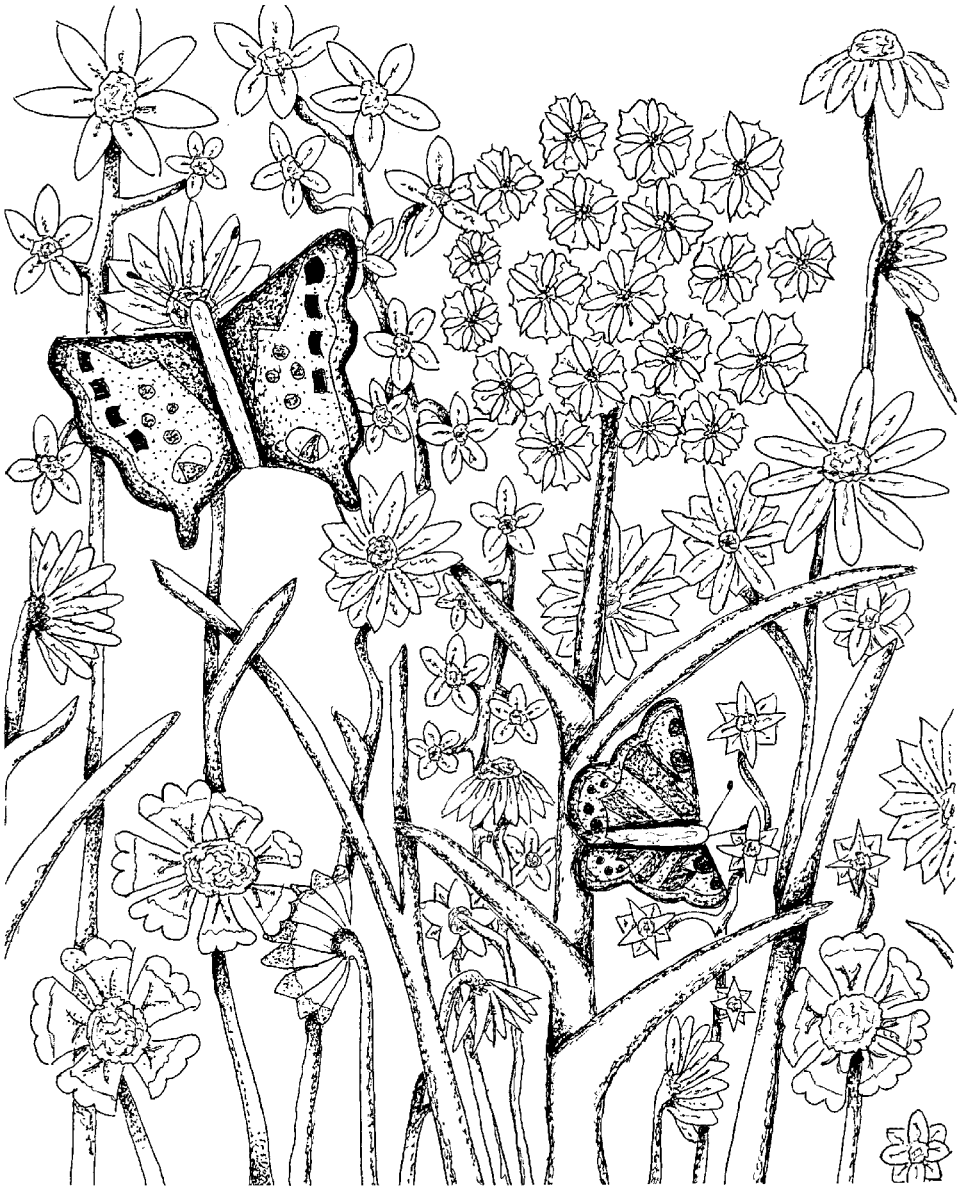

This month's front cover artwork:

Artist: *Jessica Phillips*
10th grade
Rockwall High School

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

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

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WITHDRAWN RULES

ADOPTED RULES

Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
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To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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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.

OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion No. JC-0376

The Honorable Karen H. Meinardus, Wharton County Attorney, 103 South Fulton, Wharton, Texas 77488

Re: Whether excess contributions refunded to a county under section 26.008 of the Government Code may be paid as one-time salary supplements to employees of a county court (RQ 0315-JC)

S U M M A R Y

Compensation of court personnel is a "court-related purpose" within the meaning of section 21.006 of the Government Code. Retroactive increases in compensation for services already rendered violate article III, section 53 of the Texas Constitution. Prospective increases in compensation do not.

Opinion No. JC-0377

The Honorable Michael A. Stafford, Harris County Attorney, 1019 Congress, 15th Floor, Houston, Texas 77002-1700

Re: Whether a taxing unit may, by a "blanket" resolution, authorize that tax-foreclosure-sale property be resold as directed by the taxing unit's private tax-collection attorneys (RQ-0322-JC)

S U M M A R Y

A taxing unit may not by a "blanket" resolution authorize that tax-foreclosure-sale property be resold as directed by its private tax-collection attorneys. In the absence of legislative authority providing otherwise, a taxing unit may not delegate its authority to direct the resale of specific property at a public sale by authorizing its private tax-collection attorneys to direct the sheriff or a constable as to when specific properties are sold.

Opinion No. JC-0378

Mr. Jim Nelson, Commissioner of Education, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494

Re: Application of nepotism and conflict of interest statutes to the governing boards of open- enrollment charter schools (RQ-0331-JC)

S U M M A R Y

Open-enrollment charter schools may be established by a nonprofit corporation and certain other entities under Education Code chapter 12, subchapter D. Members of the governing board of a nonprofit corporation that establishes an open-enrollment charter school and the governing board of the school, if there is one, are not governmental entities subject to the prohibitions against nepotism in Government Code chapter 573 or the regulation of local public officers' conflicts of interest in Local Government Code chapter 171.

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

TRD-200102752
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: May 16, 2001

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PROPOSED RULES

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

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES

SUBCHAPTER P. DIAPREPES ROOT WEEVIL QUARANTINE

4 TAC §§19.160 - 19.164,

The Texas Department of Agriculture (the department) proposes new §§19.160-19.164, concerning a quarantine for the Diaprepes root weevil, *Diaprepes abbreviatus* (L). The quarantine is proposed to prevent the spread of the Diaprepes root weevil into other citrus and nursery growing areas of Texas and to facilitate its eradication. The new sections require application of treatments to achieve eradication and prescribe specific restrictions on the handling and movement of quarantined articles. To date, several adult and larvae of the Diaprepes root weevil have been found in an orange grove located 0.2 miles West of the intersection of Hobbs Drive and North 2nd Street in McAllen, Texas. Adult emergence of this pest begins in the spring as new foliage appears during the bloom period. As a result of the detections, the department adopted a quarantine on an emergency basis for the Diaprepes root weevil on March 16, 2001, which was published in the March 30, 2001 issue of the *Texas Register* (26 TexReg 2457). An amendment to §19.163 was adopted on an emergency basis on March 27, 2001, as published in the *Texas Register* on April 13, 2001.

New §19.160 defines the quarantined pest. New §19.161 designates quarantine areas based on the location of the Diaprepes root weevil detection. New §19.162 lists the quarantined articles. New §19.163 identifies articles exempt from regulations and provides for restrictions on the movement of quarantined articles, and new §19.164 provides for treatment or destruction of quarantined articles.

Ed Gage, coordinator for pest management programs, has determined that for the first five-year period the proposed new sections are in effect, there is no anticipated fiscal impact on state or local government as a result of administration and enforcement of the sections.

Mr. Gage has also determined that for each year of the first five years the proposed new sections are in effect, the public benefit of adopting these rules is the eradication of the pest and prevention from it becoming widespread. Measures will be taken to prevent the spread of the Diaprepes root weevil to non- infested areas and will include the treatment of host trees or shrubs located within non-structural residential properties and commercial citrus groves in the quarantined area of Texas. There may be a cost to eradicate the pest from the quarantined area, by property owners required to comply with the new quarantine. Treatments to eradicate the quarantined pest will be required in those areas identified by the quarantine. In order to provide some assistance to property owners, the department, through a cooperative effort from Texas Citrus Mutual (TCM) and the Texas Nursery and Landscape Association (TNLA), is investigating the availability of resources to support the cost of eradication. Costs to treat homeowner areas with a product approved by the department will range from $150-175 per application. Two applications will be required per year on each of the properties affected by the quarantine. The cost to treat commercial citrus grove owners to comply with the quarantine for eradication of the pest will be approximately $400 per acre for treatment products per year plus an additional $150 per acre for application costs per year.

Comments on the proposal may be submitted to Ed Gage, coordinator for pest management, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code, §71.001, which authorizes the department to establish a quarantine for an infested area against an in-state pest if it determines that the pest is dangerous and is not widely distributed in this state; §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 §12.020 which authorizes the department to assess administrative penalties for violations of Chapter 71.

The code affected by the proposal is the Texas Agriculture Code, Chapters 12 and 71.

§19.160. Quarantined Pest.

The quarantined pest is the Diaprepes root weevil, *Diaprepes abbreviatus* (L) in any living stage of development.

§19.161. Quarantined Areas.

The quarantined areas are:

(1) within Texas: The citrus grove located in Hidalgo County, McAllen, TX, 0.20 miles West of the intersection of Hobbs Drive and North 2nd Street and to include 300 yards in each direction, and any other areas where the quarantined pest is detected in Texas; and

(2) other areas: the state of Florida: the counties of Broward, Dade, DeSoto, Collier, Glades, Hendry, Highlands, Hillsborough, Indian River, Lake, Lee, Manatee, Marion, Martin, Orange, Osceola, Palm Beach, Pasco, Polk, Seminole, St. Lucie, Sumter, Volusia; the Commonwealth of Puerto Rico, the islands of the West Indies, and any other area where the quarantined pest is detected outside of Texas.

§19.162. Quarantined Articles.

The quarantined articles are:

(1) the quarantined pest;

(2) soil, sand, or gravel separately or with other potting media;

(3) all propagation material to include all plants and plant parts;

(4) citrus and all plants considered to be a host of the quarantined pest. A list of host plants is available for reference and may be obtained by contacting the Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711; and

(5) all nursery stock and field grown ornamentals that are potted or balled and burlaped.

§19.163. Restrictions.

(a) General. Movement of quarantined articles from a quarantined area into or through a non-quarantined area is prohibited, except as provided in subsections (b) and (c) of this section.

(b) Exemptions. The following articles are exempt from the provisions of this subchapter:

(1) seed;

(2) bare rooted cacti;

(3) fruits and vegetables grown above ground;

(4) fleshy roots, corms, tubers, and rhizomes that are free of soil;

(5) defoliated bare-rooted nursery stock;

(6) privately-owned indoor decorative houseplants;

(7) aquatic plants without soil, and those in containers with growing media if removed from water and shipped immediately;

(8) shipments moving under special permit established by the department to ensure such shipments do not present a pest risk; and

(9) dead plant material without roots or soil that has dried or is moved directly to a city or county sanitary landfill.

(c) Exceptions.

(1) All quarantined articles from outside Texas are admissible into Texas from a quarantined area if:

(A) accompanied by a phytosanitary certificate issued by an authorized inspector of the state of origin and have been treated for the quarantined pest as prescribed by the department and are free of the quarantined pest, or has originated in an area free of the quarantined pest; or

(B) originated from a location that has a signed compliance agreement in effect with the originating state's department of agriculture requiring treatment of all nursery stock as prescribed by the department and is free of the quarantined pest and verified by a stamp of the origin state department of agriculture on the bill of lading as such.

(2) Quarantined articles from quarantined areas in Texas may be moved to non-quarantined areas under the following provisions:

(A) a signed compliance agreement is in effect with the department requiring treatment of all nursery stock as prescribed by the department and is free of the quarantined pest; or

(B) the quarantined article or articles have been treated prior to shipment as prescribed by the department and are accompanied by a phytosanitary certificate issued by an authorized representative of the department; or

(C) the quarantined article or articles are grown within an enclosed structure approved by the department and accompanied by a phytosanitary certificate issued by an authorized representative of the department stating the quarantined article is free of the quarantined pest.

§19.164. Treatment of Quarantined Areas Within Texas.

(a) The business manager or property owner may be required to bear all treatment expenses.

(b) The business manager or property owner shall enter into a compliance agreement with the department to make the required treatments and handle nursery stock and host plants as prescribed by the department.

(c) In addition to assessment of administrative penalties as provided in the Texas Agriculture Code, §12.020, a violation of this subchapter may require destruction of quarantined articles.

(d) If the producer or handler of quarantined articles required to be treated or destroyed refuses to treat or destroy the articles, the department may treat or destroy the quarantined articles and may charge the cost of treatment and/or destruction to the producer or handler, in accordance with the Texas Agricultural Code, §71.009.

(e) The quarantined pest shall be considered eradicated when the pest in any development stage is not detected by surveys and trapping during 24 consecutive months.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102697
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.215

The Public Utility Commission of Texas (commission) proposes new §25.215, relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice. The proposed new rule will implement the Public Utility Regulatory Act, Texas Utilities Code Annotated, §39.203 (Vernon 1998, Supplement 2001) (PURA) as it relates to the establishment of reasonable and nondiscriminatory terms and conditions of open access to the transmission and/or distribution system of a municipally owned utility (MOU) or an electric cooperative (Coop) that has chosen to engage in retail competition (opted-in). This rulemaking is a continuation of Project Number 22187.

The proposed rule itself is short and is intended to incorporate a standard access tariff (pro-forma access tariff), which contains the terms and conditions of open access. Not later than 90 days before the date an MOU or Coop begins offering customer choice, the MOU or Coop shall file with the commission its access tariff, using the pro-forma access tariff set forth in subsection (d) of the proposed rule. Chapters 1, 3 and 4 of the pro-forma access tariff shall be used exactly as written, except for insertion of the name of the MOU or Coop where called for; however, the MOU or Coop may add to or modify Chapters 2 and 5 so as to reflect a description of its certificated service area and rate schedules. The pro-forma access tariff is divided into five chapters as follows: Chapter 1 defines various terms used throughout the pro-forma access tariff; Chapter 2 describes the particular MOU' s or Coop's certificated service area; Chapter 3 sets forth general rules and regulations regarding access by competitive retailers to an MOU's or Coop's delivery system; Chapter 4 sets forth specific rules and regulations regarding access by competitive retailers to an MOU's or Coop's delivery system; and Chapter 5 sets forth the particular MOU's or Coop's rate schedules as determined by that MOU or Coop.

As part of the drafting process, commission staff met with representatives of the MOUs and Coops on three occasions to discuss areas of the proposed pro-forma access tariff that should differ from those adopted in the investor-owned-utility pro-forma delivery service tariff due to the MOUs' and Coops' unique circumstances, particularly their provision of delivery service directly to the retail customer.

Evan Farrington, Attorney, Policy Development Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Farrington has also determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased competition in the sale of electric power to retail customers in those areas served by MOUs or Coops that opt-in to retail competition.

Furthermore, Mr. Farrington has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There may be economic costs to persons who are required to comply with the proposed section, but these costs are likely to vary from business to business and are difficult to ascertain. However, it is believed that the benefits accruing from implementation of the proposed section will outweigh these costs.

Mr. Farrington, has determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy. No local employment impact statement is required under Administrative Procedure Act §2001.022 to assess the potential effect on a local economy due to implementation of this section.

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

In addition to comments on specific subsections of the proposed rule, the commission requests that parties specifically address the following issues:

1. Should the Access Tariff contain an indemnity clause that would require Competitive Retailers to indemnify the Utility for any liability incurred from the Utility's disconnection of a Retail Customer at the Competitive Retailer's request? How might such an indemnity clause affect the competitive market?

2. Should Competitive Retailers have the same options for outage reporting that they have in the Tariff for Retail Delivery Service approved for Investor-Owned Utilities (IOUs) (P.U.C. Substantive Rule §25.214)?

3. Should the Access Tariff contain an option for the Competitive Retailer to provide a consolidated bill under the same conditions as in the IOU tariff?

4. What should be the default option if a Retail Customer fails to choose to receive either a single or consolidated bill?

5. When the Utility provides a consolidated bill (*i.e.*, one that includes both the Utility's delivery service charges and the Competitive Retailer's charges), how many days should the Utility have to remit payment to the Competitive Retailer for the Competitive Retailer's charges?

6. If the Competitive Retailer provides a consolidated bill, should Competitive Retailer be allowed to address Retail Customer's billing inquiries?

7. If Utility provides a consolidated bill, should the Competitive Retailer be provided a copy of the entire bill sent to the customer?

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 22187.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes this rule pursuant to PURA §39.203, which provides that an MOU offering customer choice or a Coop offering customer choice shall provide transmission and/or distribution service at retail in accordance with the commission's rules applicable to terms and conditions of access; §40.004(5), which grants the commission jurisdiction over MOUs to establish terms and conditions for open access to transmission and distribution facilities for MOUs providing customer choice, as provided by §39.203; §40.054(c), which grants the commission jurisdiction over MOUs participating in customer choice to establish terms and conditions for access by other retail electric providers to the MOU's distribution facilities; §40.058, which provides that before the 90th day preceding the date an MOU offers customer choice, it shall file with the commission both the tariffs implementing the open access rules established by the commission under §39.203 and the rates for open access on distribution facilities as set by the municipal regulatory authority; §41.004(4), which grants the commission jurisdiction over Coops to establish terms and conditions for open access to distribution facilities for Coops providing customer choice; §41.054(c), which grants the commission jurisdiction over Coops participating in customer choice to establish terms and conditions for access by other electric providers to the Coop's distribution facilities; and §41.058, which provides that before the 90th day preceding the date a Coop offers customer choice, it shall file with the appropriate regulatory authorities having jurisdiction over the transmission and distribution service of the Coop tariffs implementing the open access rules established by the commission under §39.203.

Cross Reference to Statutes: PURA §§14.002, 39.203, 40.004(5), 40.054(c), 40.058, 41.004(4), 41.054(c), and 41.058.

§25.215. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of access by competitive retailers to the delivery systems of municipally owned utilities and electric cooperatives that have implemented customer choice. Retail delivery service, including delivery service to a retail customer at transmission voltage, shall be provided directly to retail customers by a municipally owned utility or an electric cooperative that has implemented customer choice. A municipally owned utility or an electric cooperative that has implemented customer choice shall provide retail delivery service in accordance with the rates, terms and conditions set forth in the delivery service tariffs promulgated by the municipally owned utility or an electric cooperative.

(b) Application. This section and the pro-forma access tariff set forth in subsection (d) of this section governs the terms and conditions of access by competitive retailers at the point of supply to retail customers connected to the delivery systems of municipally owned utilities and electric cooperatives that have implemented customer choice.

(c) Access tariff. Not later than the 90th day before the date a municipally owned utility or electric cooperative in Texas begins offering customer choice, such municipally owned utility or electric cooperative shall file with the Public Utility Commission of Texas (commission) its access tariff, using the pro-forma access tariff in subsection (d) of this section, governing access by competitive retailers to retail customers connected to the delivery system of the municipally owned utility or electric cooperative. A municipally owned utility or an electric cooperative may add to or modify only Chapters 2 and 5 of the access tariff, reflecting individual characteristics and rates. Chapters 1, 3, and 4 of the pro-forma access tariff shall be used exactly as written; these Chapters can be changed only through the rulemaking process. The access tariff, however, shall contain the name of the municipally owned utility or electric cooperative in lieu of "{Utility}".

(d) Pro-forma access tariff. The commission adopts by reference the form "Tariff for Competitive Retailer Access," effective date of May 8, 2001. This form is available in the commission's Central Records division and on the commission's website at www.puc.state.tx.us.

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

Filed with the Office of the Secretary of State, on May 11, 2001.

TRD-200102642
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 936-7308

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PART 6. TEXAS MOTOR VEHICLE BOARD

CHAPTER 105. ADVERTISING RULES

16 TAC §§105.5, 105.10, 105.21, 105.28

The Texas Motor Vehicle Board proposes amendments to §§105.5, 105.10, 105.21 and 105.28, Advertising Rules. The sections set guidelines for truthful and accurate practices in the advertisement of motor vehicles. Previously published proposed amendments to §§105.10, 105.21 and 105.28 in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7291) were withdrawn on December 29, 2000 (25 TexReg 12975) and are republished for consideration with changes from the original publication.

The proposed amendment to §105.5 adds the option for a dealer to identify a specific vehicle in an advertisement with either a stock number or the vehicle identification number assigned to that vehicle. This permits the dealer more flexibility in advertising

specific vehicles and gives the buying public another means of identifying a specific vehicle.

The proposed amendment to §105.10 changes the wording regarding the featured price of a vehicle from "full cash price" to "a cash price for which a dealer is willing to sell" a vehicle to a retail buyer. Amendments to subsection (c) change the phrase "full cash price" to "price". Sections 105.10 (a), (b) and (c) contain new graphics that provide examples of acceptable dealer price advertising. Amendments to the graphics in §§ 105.10(d) and (e) make the graphics uniform throughout the section.

Section 105.21 is rewritten for clarity without making substantive changes. Dealers must disclose if a dealer's contribution to a manufacturer's rebate, interest or finance charge reduction might affect the final negotiated price of a vehicle. Proposed amendments to §105.28 clarify the section by adding additional examples of lowest price claims.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the amendments are in effect there will be no fiscal implication for state or local government as a result of enforcing or administering the amendments and new rule.

Mr. Bray has also determined that for each of the first five years the amendments are in effect, the public benefit anticipated from enforcement of the proposed amendments will be stronger protection of the public and dealers from those dealers who engage in false, deceptive or misleading practices, as well as better understanding of the law by licensees who are required to comply with the rules. Mr. Bray has also certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the sections.

Comments on the proposed amendments may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas 78768. Please submit fifteen copies by June 29, 2001. The Texas Motor Vehicle Board will consider the adoption of the proposed amendments at its meeting on July 19, 2001.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt and amend rules as necessary and convenient to effectuate the provisions of this act.

Texas Motor Vehicle Commission Code §3.05(b) is affected by the proposed amendments.

§105.5. Availability of Vehicles.

(a) A licensee may advertise a specific vehicle or line-make of vehicles for sale if:

(1) the specific vehicle or line is in the possession of the licensee at the time the advertisement is placed, or the vehicle may be obtained from the manufacturer or distributor or some other source, and this information is clearly and conspicuously disclosed in the advertisement; and

(2) the price advertisement sets forth the number of vehicles available at the time the advertisement is placed or a dealer can show he has available a reasonable expectable public demand based on prior experience. In addition, if an advertisement pertains to only one specific vehicle, then the advertisement must also disclose the vehicle's stock number or vehicle identification number.

(b) - (c) (No change.)

§105.10. Dealer Price Advertising.

(a) The featured sale price of a new or used motor vehicle, when advertised, must be a [~~the full cash~~] price for which a dealer is willing to sell the advertised vehicle [~~will be sold~~] to any retail buyer [~~and all members of the buying public~~]. The only charges that may be excluded from the advertised price are:

(1) any registration, certificate of title, license fees, or an additional registration fee, if any, charged by a full service deputy as provided by County Road and Bridge Act, §4.202(g);

(2) any taxes; and

(3) any other fees or charges that are allowed or prescribed by law.

(b) A qualification may not be used when advertising the price of a vehicle such as "with trade," "with acceptable trade," "with dealer-arranged financing," "rebate assigned to dealer," or "with down payment."

(c) If a price advertisement discloses a rebate, cash back[~~,~~] or discount savings claim, [~~or other incentive,~~] the [~~full cash~~] price of the vehicle must be disclosed as well as the price of the vehicle after deducting the incentive. [~~The following is an acceptable format for advertising a price with rebates and other deductions.~~]
[~~Figure: 16 TAC 105.10(c)~~]

(1) If an advertisement discloses a discount savings claim, this incentive must be disclosed as a deduction from the manufacturer's suggested retail price (MSRP). The following is an acceptable format for advertising a price with a discount savings claim.
Figure: 16 TAC 105.10(c)(1)

(2) If an advertisement discloses a rebate, this incentive must be disclosed as a deduction from the advertised price. The following is an acceptable format for advertising a price with a rebate.
Figure: 16 TAC 105.10(c)(2)

(3) If an advertisement discloses both a rebate and a discount savings claim, the incentives must be disclosed as a deduction from the manufacturer's suggested retail price (MSRP). The following is an acceptable format for advertising a price with a rebate and a discount savings claim.
Figure: 16 TAC 105.10(c)(3)

(d) In the event that the manufacturer offers a discount on a package of options then that discount should be disclosed above or prior to the manufacturer's suggested retail price (MSRP) [~~in the example in subsection (c) of this section~~]with a total price of the vehicle before option discounts. The following is an acceptable format.
Figure: 16 TAC 105.10(d)

(e) If a rebate is only available to a selected portion of the public and not the public as a whole, the price should be disclosed as in subsection (c) of this section first and then the nature of the limitation and the amount of the limited rebate may be disclosed. The following is an acceptable format.
Figure: 16 TAC 105.10(e)

§105.21. Rebate and Financing Rate Advertising by Dealers.

(a) It is unlawful for a dealer to advertise an offer of a manufacturer's or distributor's rebate, interest or finance charge reduction, [~~refund, discount,~~] or other financial inducement or incentive if the dealer contributes to the [~~manufacturer's or distributor's~~] program , unless such advertising discloses that the dealer's contribution may affect the final negotiated price of the vehicle. [~~With respect to interest or finance charge expense programs, if a participating dealer contributes to the reduction of a financing rate, then a disclosure must state that the dealer's contribution may affect the final negotiated price of the vehicle.~~]

(b) - (c) (No change.)

§105.28. Lowest Price Claims.

(a) Representing a lowest price claim, best price claim, best deal claim or other similar superlative claims [~~claim~~] shall not be used in advertising.

(b) If a dealer advertises a "meet or beat" guarantee, then the advertisement must clearly and conspicuously disclose the conditions and requirements necessary in order for a person to receive any advertised cash amount.

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

Filed with the Office of the Secretary of State, on May 10, 2001.

TRD-200102623
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Proposed date of adoption: July 19, 2001
For further information, please call: (512) 416-4899

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING

SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) proposes an amendment to §109.41, concerning the "Financial Accountability System Resource Guide." The section adopts by reference the "Financial Accountability System Resource Guide" as the TEA's official rule. The "Resource Guide" describes rules for financial accounting such as financial reporting, budgeting, purchasing, auditing, site-based decision making, data collection and reporting, and management. Public school districts use the "Resource Guide" to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code (TEC) and other state statutes relating to public school finance. The "Resource Guide" is available at www.tea.state.tx.us/school.finance/ on the TEA website.

The proposed amendment to §109.41 changes the date from "December 1999" to "July 2001" to reflect the effective date of the proposed amendments to the "Resource Guide." Under §109.41(b), the commissioner of education shall amend the "Resource Guide," adopting it by reference, as needed. The proposed amendments to the "Resource Guide" include changes to auditing and financial accounting and reporting guidelines. The amendments are necessary to implement proposed new financial reporting standards established by the Governmental Accounting Standards Board, changes to fund codes for state and federally funded projects that will be effective September 2001, and other minor amendments to the "Resource Guide."

Thomas D. Canby, Jr., managing director for school financial audits, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Canby and Criss Cloudt, associate commissioner for accountability reporting and research, have determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be improving financial accountability for educational programs in the Texas school system and keeping financial management practices current with changes in state law and federal rules and regulations. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

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

The amendment is proposed under the Texas Education Code, §§7.055, 44.001, 44.007, and 44.008, which authorizes the commissioner of education to establish advisory guidelines relating to fiscal management of a school district and the State Board of Education to establish a standard school fiscal accounting system in conformity with generally accepted accounting principles.

The proposed amendment implements the Texas Education Code, §§7.055, 44.001, 44.007, and 44.008.

§109.41. Financial Accountability System Resource Guide.

(a) The rules for financial accounting are described in the official Texas Education Agency publication, Financial Accountability System Resource Guide, as amended July 2001 [~~December 1999~~], which is adopted by this reference as the agency's official rule. A copy is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(b) The commissioner of education shall amend the Financial Accountability System Resource Guide and this section adopting it by reference, as needed. The commissioner shall inform the State Board of Education of the intent to amend the Resource Guide and of the effect of proposed amendments before submitting them to the Office of the Secretary of State as proposed rule changes.

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

Filed with the Office of the Secretary of State, on May 9, 2001.

TRD-200102613
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 71. APPLICATIONS AND APPLICANTS

22 TAC §71.2

The Texas Board of Chiropractic Examiners proposes an amendment to §71.2(b), relating to the application for a license. By separate rulemaking in this issue of the *Texas Register*, the board is proposing to amend §75.7, to accept personal or company checks for payment of fees. At present, except for facility licenses, it requires a money order or a cashier's or certified check. The proposed amendment to §75.7 permit the use of a personal or company check, money order, cashier or certified check. To discourage checks drawn on insufficient funds, the board is also establishing a fee for a returned check in the amount of $25. The proposed amendment also sets out procedures and requirements for processing an application for which a check has been returned. In conjunction with this rulemaking, the board is proposing amendments to §§71.2(b), 73.2(a), 78.1, for consistency and conformity with the proposed amendment to §75.7. By this rulemaking, the board is deleting provisions in subsection (b) of §71.2 that will be covered in the amended §75.7. *See also* the separate rulemakings published in this issue of the *Texas Register*. Subsection (b) is also being amended to state when the fee for the initial license must be paid and to provide for prorated fees for the initial license, which reflects the current practice of the board.

Dr. Sergio François, D.C., Chair, Rules Committee, has determined that for the first five-year period the section as amended is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as amended.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing and administering the section, as amended, along with the changes being proposed in the other related rulemaking, will be more timely compliance with the board license and renewal requirements and collection of required fees. Submission of applications will be simplified and expedited if applicants, licensees and registrants no longer have to acquire money orders or certified checks before sending in their applications. There are no probable economic costs to persons required to comply with the section, as amended. There is no anticipated adverse economic effect on small or micro-businesses.

Comments may be submitted, in writing, no later than 30 days after the date of publication of this proposed rulemaking, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701.

The amendment is proposed under the Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the act, and §201.153, which the board interprets as authorizing it to adopt necessary fees for administration of its programs.

The following are the statutes, articles, or codes affected by the amendment: Chapter 71 -- Occupations Code, §201.152, §201.153

§71.2. Application for License.

(a) All individuals who wish to practice chiropractic in this state, and who are not otherwise licensed under law, must successfully pass an examination given by or at the direction of the board.

(b) An applicant for licensure through [~~Individuals who seek to take such~~] examination shall submit to the board a written application, on a form provided by the board.[~~,~~] The information contained in the application shall be verified by affidavit of the applicant. Along with the application, an applicant shall also submit a [~~accompanied by a~~] nonrefundable fee for verification of educational courses/grades for college and an examination fee, as [~~in amounts~~] provided by §75.7 of this title (relating to Fees and Charges for Public Information). At the examination, an applicant shall submit the fee for a new license as provided in §75.7 of this title. The amount of the fee shall be prorated from the month of the examination to the birth month of the applicant. [~~The information contained in the application shall be verified by affidavit of the applicant. Payment of fees shall be in the form of a bank-certified check, cashier's check, or money order payable to the order of the board.~~]

(c) Applications for examination must be legibly printed in ink or typewritten on the board form, which will be furnished by the board upon request.

(d) The completed application, required supporting materials, and fees must be received by the board in verified form not later than 30 days before the first day of the examination. Under extenuating circumstances, the board, at its discretion, may accept material supporting the application later than 30 days before the examination.

(e) The filing of an application and tendering of the fees to the board shall not in any way obligate the board to admit the applicant to examination until such applicant has been approved by the board as meeting the statutory requirements for admission to the examination for licensure.

(f) Any person furnishing false information on such application shall be denied the right to take the examination, or if the applicant has been licensed before it is made known to the board of the falseness of such information, such license shall be subject to suspension, revocation or cancellation in accordance with the Chiropractic Act, §14a.

(g) No application fee for examination will be returned to any applicant after the application has been approved by the board, because of the decision of the applicant not to take the examination for any reason.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102659
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6709

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CHAPTER 75. RULES OF PRACTICE

22 TAC §75.3

The Texas Board of Chiropractic Examiners proposes an amendment to §75.3, relating to persons with criminal convictions. The

amendment makes changes in text for clarification, delete the reference to "registered" facility and substitute "licensed" facility, to be consistent with the term used in the Chiropractic Act, chapter 201 of the Occupations Code, add a specific deadline for persons to respond to a notice of a conviction sent by the board, and add a specific reference to mail fraud as one of the offenses directly related to professions and businesses regulated by the board, instead of this offense being considered solely in connection with insurance billing fraud or the catch-all provision in paragraph 6 of subsection (k).

Dr. Serge P. François, D.C., Chair, Rules Committee, has determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as amended.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing the section as amended will be better notice to licensees and the public of board procedures and requirements relating to the licensure and registration of persons with criminal backgrounds. There is no anticipated economic effect on small or micro businesses or economic cost to persons who are required to comply with the proposed section. The section's requirements on these persons reflect current state law requirements; the section does not impose any additional requirements or costs.

Comments may be submitted, in writing, no later than 30 days after the date of publication of this proposed rulemaking, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701.

The amendment is proposed under the Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Chiropractic Act, and §53.025, which the board interprets as requiring it to adopt guidelines relating to the disciplinary practices of the board under Occupations Code, Chapter 53.

The following are the statutes, articles, or codes affected by the amendment: §75.3 -- Occupations Code, §§201.152, 53.025

§75.3. Individuals With Criminal Convictions.

(a) This section establishes guidelines and criteria on the eligibility of persons with criminal backgrounds, including each person who owns a 10% or more interest in a chiropractic facility, to obtain licenses or registrations as chiropractors, [~~or~~] chiropractic radiologic technologists (CRTs) or chiropractic facilities [~~facility registrations~~].

(b) The board may suspend or revoke a current license or registration, disqualify a person from receiving a license or registration, or deny to a person the opportunity to be examined for a license because of a [~~an~~] person's conviction of a felony or misdemeanor that directly relates to the duties and responsibilities of a licensed chiropractor, registered CRT, or licensed [~~registered~~] facility. This subsection applies to persons who are not imprisoned at the time the board considers the conviction.

(c) The board shall revoke a license or registration on the license or registration holder's imprisonment following a felony conviction[~~,~~] or revocation of felony community supervision, [~~revocation, revocation of~~] parole, or [~~revocation of~~] mandatory supervision. A person in prison is not eligible for a license or registration.

(d) In considering whether a criminal conviction directly relates to the occupation of chiropractic, chiropractic radiology, or facility operation, the board shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring a license or registration to engage in chiropractic, chiropractic radiology, or facility operation;

(3) the extent to which a license or registration might afford an opportunity to repeat the criminal activity in which the person 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 licensed chiropractor, registered CRT, or licensed [~~registered~~] facility.

(e) In reaching a decision required by this section, the board shall also determine the person's fitness to perform the duties and discharge the responsibilities of a licensed chiropractor, registered CRT, or licensed [~~registered~~] facility. In making this determination, the board shall consider the following factors listed in paragraphs (1)-(6) of this subsection:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person at the time of the commission of the crime;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person prior to and following the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of the person's present fitness, including letters of recommendation from:

(A) prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(B) the sheriff and chief of police in the community where the person resides; and

(C) any other persons in contact with the convicted person.

(f) An applicant for a license, including an owner with a 10% or more interest in a chiropractic facility, or registration from the board [~~or a current licensee or registrant~~] shall disclose in writing to the board any conviction against him or her at the time of application. A [~~or, if a~~] current licensee, including an owner with a 10% or more interest in a chiropractic facility, or registrant, shall disclose in writing to the board any conviction against him or her at the time of renewal or no later than 30 days after judgment in the trial court, whichever date is earlier.

(g) Upon notification of a conviction, the board shall provide a copy of this section to the person and request that the person respond [~~, in writing,~~] to the board as to why the board should not deny the application or take disciplinary action against the person, if already licensed or registered.

(h) A person with a [~~felony~~] conviction shall provide the [~~a~~] response in writing to the board within 15 days after receipt of the notice of a conviction and may submit any information that he or she believes is relevant to the determinations required by this section. If the person

fails to respond, the matter will be referred to the Enforcement Committee or the Licensure/Educational Standards Committee as provided in subsection (i) of this section. The person shall also:

(1) to the extent possible, secure and provide to the board the recommendations of the prosecution, law enforcement, and correctional authorities specified in subsection (e)(6) of this section;

(2) cooperate with the board by providing the information required by subsection (e) of this section, including proof, in the form indicated in subparagraphs (A)-(D) of this paragraph, that he or she has:

(A) maintained a record of steady employment, as evidenced by salary stubs, income tax records or other employment records for the time since the conviction and/or release from imprisonment;

(B) supported his or her dependents, as evidenced by salary stubs, income tax records or other employment records for the time since the conviction and/or release from imprisonment, and a letter from the spouse or other parent;

(C) maintained a record of good conduct as evidenced by letters of recommendation, absence of other criminal activity or documentation of community service since conviction; and

(D) paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted, as evidenced by certified copies of a court release or other documentation from the court system that all monies have been paid.

(i) Determinations under this section will be considered enforcement matters and made in accordance with this chapter, except that the executive director will review the application for licensure or registration of a person with a criminal conviction and refer it to the Licensure/Educational Standards Committee (LESC), upon receipt of all information required by this section. The LESC shall determine whether the applicant may sit for examination or be granted a certificate of registration or license. Upon a recommendation to deny an application by the LESC, the matter will be referred to the Executive Director for informal settlement or, if necessary, a hearing as provided by §75.9(d) of this title (relating to Complaint and Disciplinary Procedures).

(j) The board shall notify the affected person in its order that denies, suspends, or revokes a license or registration under this section, or otherwise in writing, after hearing, of:

(1) the reason for the suspension, revocation, denial, or disqualification;

(2) the review procedure provided by Occupations Code, §53.052; and

(3) the earliest date the person may appeal the action of the licensing authority.

(k) The Chiropractic Act, Occupations Code §201.302, requires that an applicant for licensure be of good moral character. Section 201.502 further authorizes the board to revoke or impose other sanctions for violations of certain specified conduct, including deception and fraud in the practice of chiropractic, conviction of a felony or a misdemeanor of moral turpitude, grossly unprofessional conduct, habitual conduct that is harmful to patients, and lack of diligence in the chiropractic profession. Chiropractors and the healthcare profession generally are held to high standards of professional conduct. To protect the public and patients, the board has a duty to ensure that licensees and registrants are persons who possess integrity, honesty and a high standard of conduct as well the skill, education, and training to perform their duties and responsibilities. The crimes listed in paragraphs (1)-(6) of this subsection relate to the licenses and registration [~~license and registrations~~] issued by the board. These crimes generally indicate an inability or a tendency for the person to be unable to perform or to be unfit for licensure or registration because violation of such crimes indicates a lack of integrity and respect for one's fellow human being and the community at large. The direct relationship to a board issued license or registration is obvious when the crime occurs in connection with the practice of chiropractic.

(1) practicing chiropractic without a license and other violations of the Chiropractic Act;

(2) deceptive business practices;

(3) medicare or medicaid fraud;

(4) a misdemeanor or felony offense involving:

(A) murder;

(B) assault;

(C) burglary;

(D) robbery;

(E) theft;

(F) sexual assault;

(G) injury to a child;

(H) injury to an elderly person;

(I) child abuse or neglect;

(J) tampering with a governmental record;

(K) forgery;

(L) perjury;

(M) failure to report abuse;

(N) bribery;

(O) harassment;

(P) insurance claim fraud, including under the Penal Code §32.55; [~~or~~]

(Q) solicitation under the Penal Code §38.12(d) or Occupations Code, Chapter 102; or

(R) mail fraud;

(5) delivery, possession, manufacture, or use of or the dispensing or prescribing a controlled substance, dangerous drug, or narcotic; or

(6) other misdemeanors or felonies, including violations of the Penal Code, Titles 4, 5, 7, 9, and 10, which indicate an inability or tendency for the person to be unable to perform as a licensee or registrant or to be unfit for licensure or registration if action by the board will promote the intent of the Chiropractic Act, board rules including this chapter, and Occupations Code, Chapter 53.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102660

Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6709

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22 TAC §75.7

The Texas Board of Chiropractic Examiners proposes an amendment to §75.7, relating to board fees. The board is proposing to accept personal or company checks for payment of fees. At present, except for facility licenses, it requires a money order or cashier's check. The proposed amendments permit the use of a personal or company check, money order, cashier or certified check. To discourage checks drawn on insufficient funds, the board is also establishing a fee for a returned check in the amount of $25. If a check is returned, the application for a license, registration or renewal is considered incomplete with all the attendant consequences. A licensee or registrant must immediately submit a money order or check on guaranteed funds before the application will be deemed complete. Any license or renewal cards already issued will be invalid pending resubmission of the fee, and a newly issued license or renewal card may not be displayed until the application is complete. If payment is past due as a result of a returned check, the licensee or registrant must also pay any late fees incurred and may not practice or operate under the license or registration until the application is complete. A person who fails to make good on the check and pay all required fees within 10 days will be required to remit future fees in the form of a money order or cashier's or certified check. Other non-substantive amendments have been made to the section for update and clarification. In conjunction with this rulemaking, the board is proposing amendments to §§71.2(b), 73.2(a), 78.1, for consistency and conformity with the proposed amendments to §75.7. *See* the separate rulemakings published in this issue of the *Texas Register*.

Dr. Sergio François, D.C., Chair, Rules Committee, has determined that for the first five-year period the section as amended is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as amended. The proposed returned check fee will offset any additional administrative costs as a result of bad checks.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing and administering the section, as amended, along with the changes being proposed in the other related rulemaking, will be more timely compliance with the board license and renewal requirements and collection of required fees. Submission of applications will be simplified and expedited if applicants, licensees and registrants no longer have to acquire money orders or certified checks before sending in their applications. There are no probable economic costs to persons required to comply with the rule, as amended, except the fee for returned checks. That cost can be avoided by paying with checks with sufficient funds. There is no anticipated adverse economic effect on small or micro-businesses.

Comments may be submitted, in writing, no later than 30 days after the date of publication of this proposed rulemaking, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701.

The amendment is proposed under the Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the act, and §201.153, which the board interprets as authorizing it to adopt necessary fees for administration of its programs.

The following are the statutes, articles, or codes affected by the amendment: §75.7 -- Occupations Code, §§201.152, .153

§75.7. Fees and Charges for Public Information.

(a) Current fees required by the board are listed in the following fee schedule table:
Figure: 22 TAC §75.7(a)

(b) The board is required to increase its fees for annual renewal, a provisional license, an examination, and re-examination by $200 pursuant to the Occupations Code §201.153(b) [~~Texas Civil Statutes, Article 4512b §11B~~]. That increase is reflected in subsection (a) of this section under the column entitled "153(b) FEE". [~~"§11B FEE."~~] The total amount of each of these fees must be paid before the board will process an application subject to such fee.

(c) Any remittance submitted to the board in payment of a required fee must be in the form of a personal or company check, cashier's or certified check for guaranteed funds, or money order, made out to the "Texas Board of Chiropractic Examiners." Checks from foreign financial institutions are not acceptable. Persons who have submitted a check which has been returned, and who have not made good on that check and paid the returned check fee provided in subsection (a) of this section, within 10 days from notice from the board of the returned check, for whatever reason, shall submit all future fees in the form of a cashier's or certified check or money order.

(d) An applicant for an initial license or registration, whose check for the application processing, examination or initial licensing fee is returned due to insufficient funds, account closed, or payment stopped, shall be allowed to reinstate the application by remitting a money order or cashier's or certified check for guaranteed funds, for the amount of the fee and the returned check fee, immediately upon receipt of the board's notice that the check was returned. Upon receipt of a returned check, the application is considered incomplete until all fees have been received and cleared through the appropriate financial institution. If the license has already been issued, it shall be invalid and may not be displayed until the application is complete.

(e) A licensee or registrant whose check for the renewal fee is returned due to insufficient funds, account closed, or payment stopped shall remit a money order or cashier's or certified check for guaranteed funds, for the amount of the fee and the returned check fee, immediately upon receipt of the board's notice that the check was returned. If the guaranteed funds are received after the expiration of the renewal deadline, a licensee or registrant must also include a late renewal fee as required by §73.2(d) of this title (relating to Expired Licenses), §74.3(c) of this title (relating to Annual Renewal (Facilities)), or §78.1(e) of this title (relating to Expired Registration (CRT)). Upon receipt of a returned check, the application will be considered incomplete until all fees have been received and cleared through the appropriate financial institution. If the renewal license or registration has already been issued, it shall be invalid and may not be displayed until the application is complete.

(f) [~~(c)~~] Copies of public information, not excepted from disclosure by the Texas Open Records Act, Chapter 552, Government Code, including the information listed in paragraphs (1)-(6) of this subsection may be obtained upon written request to the board, at the rates established by the General Services Commission for copies of public

information, 1 TAC §§111.61-111.70 (relating to Copies of Public Information).

(1) List of New Licensees;

(2) Lists of Licensees;

(3) Licensee Labels;

(4) Demographic Profile;

(5) Facilities List;

(6) Facilities Labels.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102661
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6709

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22 TAC §75.11

The Texas Board of Chiropractic Examiners proposes an amendment to §75.11, relating to its schedule of sanctions for violations of board rules and orders, or law, including the Chiropractic Act, Occupations Code, Chapter 201. The purpose of the amendment is to update the schedule of sanctions' table, Figure: 22 TAC §75.11(b), by changing the references to the Chiropractic Act and the Health Professions Council Act since their codification in the Occupations Code, and by adding or revising violations listed in the schedule as a result of other rule changes since the schedule was adopted. New listings in the schedule relate to practicing or operating without a facility license or an with an expired license or registration, overcharging for copies of patient records, failing to maintain patient records, displaying an invalid license or renewal card, and failure to report required *locum tenens* information or a criminal conviction. Other changes in text and form have been made to correct errors in citation and for clarification and consistency. Readers can compare the proposed schedule with the current schedule, by accessing the "attached graphic", in the current §75.11, at the secretary of state's website, for the Texas Administrative Code, at (Click on TAC Viewer, Title 22 Examining Boards, TBCE, Chapter 75, §75.11).

Dr. Serge P. François, D.C., Chair, Rules Committee, has determined that for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as amended.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing the section as amended will be better notice to licensees and the public of the possible maximum sanctions for violations of the Chiropractic Act, other law, and board rules. There is no anticipated economic effect on small or micro businesses or economic cost to persons who are required to comply with the proposed section.

Comments may be submitted, in writing, no later than 30 days after the date of publication of this proposed rulemaking, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701.

The amendment is proposed under the Chiropractic Act, Occupations Code §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Act, including Subchapters E, K, and L, which authorize the board to sanction licensees and others for violations of the Act and its rules and orders, and specifically §201.503, which the board interprets as requiring the board to adopt rules establishing a schedule of sanctions for violations of the Act.

The following are the statutes, articles, or codes affected by the proposed rule: §75.11 -- Occupations Code §§201.152, .503, and Subchapters E, K, L

§75.11. Schedule of Sanctions.

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

(1) AP--Administrative Procedure Act, Government Code, Chapter 2001.

(2) Board--Texas Board of Chiropractic Examiners;

(3) Chiropractic Act or CA--Occupations Code, Chapter 201 (formerly Texas Civil Statutes, Article 4512b);

(4) HPCA--Health Professions Council Act, Occupations Code, Chapter 101;

(5) HRC [~~HRS~~]--Human Resources Code;

[~~(6) H&S--Health and Safety Code;~~]

(6) [~~(7)~~] Licensee--A person who is licensed by the board to practice chiropractic in the State of Texas;

(7) [~~(8)~~] MRTCA--Medical Radiologic Technologist Certification Act, Occupations Code, Chapter 601; [~~and~~]

(8) Occ. Code--Occupations Code;

(9) Respondent--an individual or facility regulated by the board against whom a complaint has been filed;

(10) SOAH--State Office of Administrative Hearings;

(11) TDH--Texas Department of Health.

(b) The following table contains maximum sanctions that may be assessed for each category of violation listed in the table:
Figure: 22 TAC §75.11(b)

(c) In a case where a respondent [~~the licensee~~] has committed multiple violations or multiple occurrences of the same violation, board staff, the enforcement committee or an administrative law judge may recommend and the board may impose sanctions in excess of a maximum sanction specified in the maximum sanction table provided by subsection (b) of this section, if otherwise authorized by law. For the fourth and subsequent offenses of any violation listed in the maximum sanction table with three levels of sanctions, the maximum sanction is revocation and/or $1000 administrative penalty.

(d) An administrative penalty may not exceed $1,000 per day for each violation. Each day a violation continues or occurs is a separate violation for the purposes of imposing an administrative penalty.

(e) For violation of a statute which is not listed in the maximum sanction table and for which the board is authorized to take disciplinary action, the maximum sanction is revocation and/or $1000 administrative penalty.

This 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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Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6709

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CHAPTER 78. CHIROPRACTIC RADIOLOGIC TECHNOLOGISTS

22 TAC §78.1

The Texas Board of Chiropractic Examiners proposes an amendment to §78.1, relating to registration of chiropractic radiologic technologists (CRTs). By separate rulemaking in this issue of the *Texas Register*, the board is proposing to amend §75.7, to accept personal or company checks for payment of fees. At present, except for facility licenses, it requires a money order or a cashier's or certified check. The proposed amendments to §75.7 permit the use of a personal or company check, money order, cashier or certified check. To discourage checks drawn on insufficient funds, the board is also establishing a fee for a returned check in the amount of $25. The proposed amendments also set out procedures and requirements for processing an application for which a check has been returned. In conjunction with this rulemaking, the board is proposing amendments to §§78.1, 71.2(b), and 73.2(a), for consistency and conformity with the proposed amendment to §75.7. By this rulemaking, the board is deleting provisions in subsections (c) and (d) of §78.1 that will be covered in the amended §75.7. *See also* the separate rulemakings published in this issue of the *Texas Register*.

Dr. Sergio François, D.C., Chair, Rules Committee, has determined that for the first five-year period the section as amended is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section as amended.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of enforcing and administering the section, as amended, along with the changes being proposed in the other related rulemaking, will be more timely compliance with the board license and renewal requirements and collection of required fees. Submission of applications will be simplified and expedited if applicants, licensees and registrants no longer have to acquire money orders or certified checks before sending in their applications. There are no probable economic costs to persons required to comply with the section, as amended. There is no anticipated adverse economic effect on small or micro-businesses.

Comments may be submitted, in writing, no later than 30 days after the date of publication of this proposed rulemaking, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701.

The amendment is proposed under the Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the act, and §201.153, which the board interprets as authorizing it to adopt necessary fees for administration of its programs.

The following are the statutes, articles, or codes affected by the amendment: §78.1 -- Occupations Code, §§201.152, .153

§78.1. Registration of Chiropractic Radiologic Technologists.

(a) Registration required. Any person performing radiologic procedures in a chiropractic facility must register with the board, on a form prescribed by the board. This section does not apply to registered nurses or to persons certified under the Medical Radiologic Technologist Certification Act.

(b) Eligibility. An applicant for registration must either:

(1) submit proof of the applicant's registry with the Texas Department of Health (TDH) and completion of training and instruction as required by 25 TAC §143.17 (concerning mandatory training programs for non-certified technicians); or

(2) perform radiologic procedures for a licensee to whom a hardship exemption was granted by the TDH within the previous 12 months under 25 TAC §143.19 (concerning hardship exemptions).

(c) Application submission. An applicant shall submit an application for registration, proof of status as provided in subsection (b) of this section, along with the radiologic technologist application fee as provided in §75.7 of this title (relating to Fees and Charges for Public Information) [~~, payable to the Texas Board of Chiropractic Examiners by cashier's check or money order~~].

(d) Renewal. On or before January 1 of each year, a CRT shall renew his or her registration, by submitting:

(1) a registration application;

(2) the radiologic technologist application fee as provided in §75.7 of this title (relating to Fees and Charges for Public Information) [~~, payable to the Texas Board of Chiropractic Examiners by cashier's check or money order~~];

(3) proof of renewal status as provided in subsection (b) of this section; and

(4) proof of completion of continuing education or enrollment in mandatory training and instruction as provided by subsection (i) of this section.

(e) Expired registration.

(1) A CRT registration expires on January 1 of each year if it is not timely renewed.

(2) If a CRT's registration has expired, a person may renew his or her registration by submitting to the board all of the items required by subsection (d) of this section and a late fee of $25.

(3) A person who fails to renew his or her registration on or before the expiration date may also be subject to an administrative penalty and other disciplinary sanctions as provided in subsection (h) of this section.

(f) Incomplete applications. No registration will be issued on an incomplete submission. Application or renewal packages that are submitted without all of the required documents or fees will be deemed incomplete and returned to the applicant.

(g) TDH authorization. A person may not perform radiologic procedures if that person is removed from the TDH registry or the hardship exemption under which the person is working is expired or revoked even if the person holds a valid CRT registration with the board. A CRT

must provide to the board a copy of a hardship exemption granted by the TDH within five days of its issuance if the exemption is granted prior to the registration renewal deadline.

(h) Disciplinary sanctions. The board may refuse to issue or renew, suspend, or revoke a CRT registration and/or impose an administrative penalty for the following:

(1) violation of the rules or an order of the board;

(2) violation of the Medical Radiologic Technologist Certification Act;

(3) violation of the rules or an order of the TDH;

(4) violation of the Texas Chiropractic Act; or

(5) nonpayment of registration fees.

(i) Continuing education. A CRT shall complete six clock hours of continuing education each year in order to renew his or her registration. The continuing education required by this subsection shall meet the requirements of the rules of the TDH relating to continuing education for medical radiologic technologists. No continuing education will be required for any year in which a CRT is enrolled for the mandatory training and instruction program required by 25 TAC §143.17 (concerning mandatory training programs for non-certified technicians).

(j) TDH compliance. All registrants shall comply with the rules of the TDH for the control of radiation.

(k) Supervision required. A CRT shall perform radiological procedures only under the supervision of a licensee physically present on the premises.

(l) Cineradiography. Procedures that include cineradiography are limited to use by a licensee who has passed a course in its use, approved by the board.

(m) Non-static procedures. Any non-static procedure has the potential to be more dangerous and hazardous and by definition may only be performed by a licensee or a certified medical radiologic technologist.

(n) Licensee responsibility. A licensee shall not authorize or permit a person:

(1) who is not registered under this section to perform radiologic procedures on a patient unless otherwise authorized under the Medical Radiologic Technologist Act or 25 TAC, Chapter 143 (concerning medical radiologic technologists); or

(2) to perform radiologic procedures on a patient if that person has been removed from the registry of the TDH or the licensee's hardship exemption has been revoked or has expired.

(o) Licensee compliance. A licensee shall comply with the Medical Radiological Technologist Certification Act and all applicable rules of the TDH.

(p) Laws governing disciplinary action. Disciplinary action against a CRT, including the imposition of administrative penalties, is governed by the Administrative Procedures Act, Government Code, Chapter 2001, and applicable enforcement provisions of the Texas Chiropractic Act, Occupations Code, Chapter 201, including Subchapters K through M.

This 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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Gary K. Cain, Ed.D.
Executive Director
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For further information, please call: (512) 305-6709

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CHAPTER 79. PROVISIONAL LICENSURE

22 TAC §79.3

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

The Texas Board of Chiropractic Examiners proposes to repeal §79.3 relating to criminal convictions. The subject matter of §79.3 has been transferred to a §75.3. Accordingly, §79.3 is no longer needed.

Dr. Serge P. François, D.C., Chair, Rules Committee, has determined that for the first five-year period the section is repealed, there will be no fiscal implications for state or local government as a result of the repeal.

Dr. François also has determined that for each year of the first five years, the section as amended is in effect, the public benefit anticipated as a result of the repeal is clearer rules, with the duplicate provision being repealed. There are no probable economic costs to persons required to comply with the section, as amended. There is no anticipated adverse economic effect on small or micro-businesses.

Comments may be submitted no later than 30 days from the date of this publication, to Jessica Harwell, Rules Committee, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, TX 78701.

The repeal is proposed under the Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Chiropractic Act.

The following are the statutes, articles, or codes affected by the repeal: Chapter 79 -- Occupations Code, §201.152

§79.3. Criminal Convictions.

This 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 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 321. DEFINITIONS

22 TAC §321.1

The Texas Board of Physical Therapy Examiners proposes an amendment to §321.1, concerning Definitions. The amendment is intended to clarify the meaning of the word "asymptomatic."

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a clearer understanding of terms. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§321.1. Definitions.

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

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

(3) Asymptomatic--Without obvious signs or symptoms of disease [~~Without any significant perceptible change in the body or its functions that indicates disease~~].

(4) - (14) (No change.)

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

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John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
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CHAPTER 322. PRACTICE

22 TAC §322.1

The Texas Board of Physical Therapy Examiners proposes an amendment to §322.1, concerning Provision of Services. The amendment will allow physical therapists to accept referrals for treatment from physicians and other authorized healthcare practitioners who are licensed only in a country outside the United States.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be easier access to healthcare, as those who have referrals from physicians outside of the U.S. will be able to seek physical therapy treatment in the state. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§322.1. Provision of Services.

(a) Initiation of physical therapy services

(1) Referral requirement. A physical therapist is subject to discipline from the board for providing physical therapy treatment without a referral from a qualified healthcare practitioner licensed by the appropriate [state] licensing board [~~in any of the United States or its territories, or the District of Columbia~~], who within the scope of the professional licensure is authorized to prescribe treatment of individuals. The list of qualifying referral sources includes physicians, dentists, chiropractors, podiatrists, physician assistants, and advanced nurse practitioners.

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

(b) - (e) (No change.)

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

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John P. Maline
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CHAPTER 325. ORGANIZATION OF THE BOARD

22 TAC §325.1

The Texas Board of Physical Therapy Examiners proposes an amendment to §325.1, concerning Elections. The amendment eliminates confusion by changing the text of the rule to match the wording of the law more closely.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be increased administrative efficiency. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§325.1. Elections.

Elections of officers shall be held at the first board meeting after new members are appointed [~~in odd numbered calendar years~~]. Officers will assume duties at the next board meeting [~~60 days after elected~~]. Vacancies of offices shall be filled by election at the next board meeting.

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

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CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.2

The Texas Board of Physical Therapy Examiners proposes an amendment to §329.2, concerning License by Examination. The amendment changes the procedure for notifying the board about additional education, which has to be complete before an applicant can take the exam for the third or subsequent time. Also allows a PTA to be a tutor under certain circumstances, and adds exam review courses as an option.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be increased administrative efficiency, and faster processing of reexamination candidates. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§329.2. License by Examination.

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

(f) Re-examination.

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

(2) Second or subsequent re-examination. An applicant who fails the exam twice or more must complete additional education before taking the exam again. The amount of additional education is set forth in the attached chart. To be eligible to register for the exam again, the applicant must submit a letter that identifies the area(s) of weakness and describes the plan that addresses the weakness(s). The letter must be accompanied by proof that the additional education has been successfully completed. Additional education may be one or more of the following:[~~All additional education must be approved by the board before the applicant undertakes it. Additional education may be board-approved continuing education programs or individual tutorials.~~]

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

(B) An individual tutorial. The completed tutorial must be signed by the tutor and notarized, and include the tutor's curriculum vitae. If the applicant is applying for a PT license, the tutor must be a licensed PT. If the applicant is applying for a PTA license, the tutor must be a licensed PT, or a licensed PTA who is associated with a Texas PTA program.[~~Board-approved continuing education. The amount of additional education required is set forth in the following chart.~~]
Figure: 22 TAC §329.2 (f)(2)(B)(No change.)

(C) Board-approved continuing education

(g) - (h) (No change.)

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

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John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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22 TAC §329.5

The Texas Board of Physical Therapy Examiners proposes amendments to §329.5, concerning Licensing procedures for Foreign-trained Applicants. The amendments will allow an exception to the English language proficiency exam requirement for foreign-trained applicants who are citizens or lawful permanent residents of the United States, and who can prove to the Board's satisfaction that they attended no less than four years of secondary or post-secondary schooling in the United States. The amendments will also allow the board to distinguish between foreign-trained applicants for licensure by exam and by endorsement, so that applicants by endorsement have to prove that they were licensed to practice in the country of education when they received their first U.S. license, and not that they are currently licensed in the country of education. Further, the amendments will remove incorrect references to other rules and procedures, which have been updated, renumbered, or changed; and clarify that applicants must have received a passing grade on coursework required for licensure.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be less delay in the licensure of qualified foreign-trained physical therapists, and increased administrative efficiency. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

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

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

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

§329.5. Licensing Procedures for Foreign-trained Applicants.

(a) The provisions of §329.1 of this title (relating to General Licensing Procedure) apply to foreign-trained applicants [~~with the exception of §329.1(a)(1)(A)-(C)~~].

(b) - (d) (No change.)

(e) After arrival in the United States, the applicant must submit a United States residential address and pay all remaining fees. The residential address must be received before a temporary license may be issued [~~the second deadline set for the examination~~].

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

(h) Guidelines for board-approved education credentialing entities.

(1) The credentialing entity will review all of an applicant's post-secondary professional education credentials earned outside of the United States. The entity will evaluate allowable transfer credit for the 13th year based on recommendations of the National Council on the Evaluation of Educational Credentials or on current published reference materials. The applicant must have completed, with a passing grade of A, B, C, Pass or Credit, 60 semester hours credit or the equivalent in general education courses including courses in biological, social and physical sciences from an accredited institution of higher learning. This requirement may be met by credits earned at U.S. colleges or universities, by College Level Examination Program (CLEP) credits, or Advanced Placement (AP) according to standards of the American Council on Education. The number of credits earned by CLEP or AP may not exceed 12 semester credits.

(2) The credentialing entity must attest that the institution attended by the applicant has the recognition of the Ministry of Education or the equivalent in that country.

(3) All foreign-trained applicants must demonstrate the ability to communicate in English by making the minimum score accepted by the board on the following exams: Test of English as a Foreign Language (TOEFL), 580 (237 if computer-based test); Test of Written English (TWE), 5.0; Test of Spoken English (TSE), 55. If an applicant makes a score of 50 on the TSE, the board will allow the applicant to submit three original, notarized letters of recommendation from individuals who have practical knowledge of the applicant's ability to communicate successfully in spoken English. Individuals who provide this written testimony must be native English speakers, cannot be related by blood or marriage to the applicant, and at least one of the letters must be from a PT licensed to practice in Texas. These letters must be submitted by their authors directly to the board. At the board's discretion, the letters may be considered satisfactory evidence of proficiency in spoken English. The Board may grant an exception to the English language proficiency exams to an applicant who submits satisfactory proof that he/she is a citizen or lawful permanent resident of the United States, and has attended 4 or more years of secondary or post-secondary education in the U.S.

(4) [~~Licensing procedures for foreign-trained applicants.~~]The credentialing entity must attest that the applicant is or was licensed or [~~/registered/~~] authorized to practice in the country in which the entry-level degree in physical therapy was granted. If there is no licensure or authorization in such country, the applicant must be eligible for unrestricted practice there.[~~education and training were accomplished if the country has a licensure/registration/authorization system in place. Otherwise, the applicant must be eligible for unrestricted practice in that country.~~]

(A) If the application is by examination, the license or authorization in such country must be in good standing and the licensure current.

(B) If the application is by endorsement, and the applicant has passed the exam according to Texas standards, the license or other authorization must have been in good standing at the time the license or authorization in such country expired.

(5) - (12) (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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John P. Maline
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Texas Board of Physical Therapy Examiners
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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 proposes an amendment to §341.1, concerning Requirements for Renewal. The amendment establishes that licensees who are more than 90 days late in renewing a license are not included in the continuing education audit, and must submit documentation of continuing education at time of renewal.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be increased assurance that PTs and PTAs are meeting the continuing education requirements. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§341.1. Requirements for Renewal.

(a) Biennial renewal. Licensees are required to renew their licenses every two years by the end of the month in which they were originally licensed. A licensee may not provide physical therapy services without a current license or renewal certificate in hand. If a license expires after all required items are submitted, but before the licensee receives the renewal certificate, the licensee may not provide physical therapy services.

(b) General requirements. The renewal application is not complete until all required items are received by the board. The components required for license renewal are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE), as described in §341.2 of this title, concerning Continuing Education;

(2) the renewal fee, and any late fees which may be due; and

(3) a passing score on the jurisprudence examination.

(c) Notification of license expiration. The board will mail an application to each licensee at least 30 days prior to the license expiration date. The licensee bears the responsibility for ensuring that the license is renewed. Licensees should contact the board if they do not receive a renewal application 30 days prior to the expiration date.

(d) Late renewal. A renewal application is late if all required items are not postmarked prior to the expiration date of the license. Licensees who do not submit all required items prior to the expiration date are subject to late fees as described.

(1) If the license has been expired for 90 days or less, the late fee is one-half of the examination fee for the license.

(2) If the license has been expired for more than 90 days but less than one year, the late fee is equal to the examination fee for the license. Licensees who are more than 90 days late in renewing a license are not included in the audit, and must submit documentation of continuing education at time of renewal.

(3) If the license has been expired for one year or longer, the person may not renew the license. To obtain a new license, the applicant must take and pass the national examination again and comply with the requirements and procedures for obtaining an original license set by §329.1 of this title (relating to General Licensure Procedure).

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

Filed with the Office of the Secretary of State, on May 9, 2001.

TRD-200102610
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

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22 TAC §341.2

The Texas Board of Physical Therapy Examiners proposes an amendment to §341.2, concerning Continuing Education Requirements. The amendment establishes that licensees who are more than 90 days late in renewing a license are not included in the continuing education audit, and must submit documentation of continuing education at time of renewal.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be increased assurance that PTs and PTAs are meeting the continuing education requirements. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§341.2. Continuing Education Requirements

(a) All continuing education (CE) submitted to satisfy renewal requirements must be board-approved, as established in §341.3 of this title, concerning Qualifying Continuing Education.

(b) Physical therapists must complete a total of 30 hours of CE; Physical therapist assistants must complete a total of 20 hours of CE for each biennial renewal.

(c) CE taken to fulfill renewal requirements must be taken within the 24 months prior to the license expiration date.

(d) Effective January 1, 2001, all licensees must take two hours of board-approved courses in ethics and professional responsibility as part of their total CE requirement.

(e) The executive council will conduct an audit of a random sample of licensees at least quarterly to determine compliance with CE requirements. Failure to maintain accurate documentation, or failure to respond to a request to submit documentation for an audit within 30 days of the date on the request, may result in disciplinary action by the board. Licensees who are more than 90 days late in renewing a license are not included in the audit, and must submit documentation of continuing education at time of renewal. The board or its committees may request proof of CE claimed for renewal purposes at any time from any licensee.

(f) The licensee must retain original course completion documents or certificates for four years. The documentation for a course must include the name and license number of the licensee, the title, sponsor, date and location of the course, the number of CE units awarded, the signature of an authorized signer, and the course approval number.

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

Filed with the Office of the Secretary of State, on May 9, 2001.

TRD-200102612
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

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22 TAC §341.8

The Texas Board of Physical Therapy Examiners proposes amendments to §341.8, concerning Inactive status. These amendments establish the requirement that licensees complete and pass the jurisprudence exam when going inactive and renewing the inactive status, and that the continuing education required is subject to the Board's CE audit.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that licensees returning to active practice will be familiar with the Board's rules and will have continued to take continuing education courses on a regular basis. There will be no effect on small business, and no economic cost to persons having to comply is anticipated.

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

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

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

§341.8. Inactive Status.

(a) Inactive status indicates the voluntary termination of the right or privilege to practice physical therapy in Texas. The Board may allow a licensee who is not actively engaged in the practice of physical therapy in Texas to inactivate the license instead of renewing it at time of renewal. A licensee may remain on inactive status for no more than six consecutive years.

(b) Requirements for initiation of inactive status. The components required to put a license on inactive status are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE) for the current renewal period, as described in §341.2 of this title, concerning Continuing Education; [~~and~~]

(2) the inactive fee, and any late fees which may be due; and[~~.~~]

(3) a passing score on the jurisprudence exam.

(c) Requirements for renewal of inactive status. An inactive licensee must renew the inactive status every two years. The components required to maintain the inactive status are:

(1) a signed renewal application form, documenting completion of board-approved continuing education (CE) for the current renewal period, as described in §341.2 of this title, concerning Continuing Education; [~~and~~]

(2) the inactive renewal fee, and any late fees which may be due; and[~~.~~]

(3) a passing score on the jurisprudence exam.

(d) Requirements for reinstatement of active status. A licensee on inactive status may request a return to active status at any time. After the licensee has submitted a complete application for reinstatement, the board will send a renewal certificate for the remainder of the current renewal period to the licensee.

(1) The components required to return to active status are:

(A) a signed renewal application form, documenting completion of board-approved continuing education (CE) for the current renewal period, as described in §341.2 of this title, concerning Continuing Education;

(B) the renewal fee, and any late fees which may be due; and

(C) a passing score on the jurisprudence exam.

(2) The Board will allow the licensee to substitute one of the following actions for the continuing education requirements:

(A) re-take and pass the national licensure exam;

(B) attend a university review course pre-approved by the board; or

(C) complete an internship (equal to 150 hours of continuing education) pre-approved by the board.

(e) Licensees on inactive status are subject to the audit of continuing education as described in §341.2 of this title, concerning Continuing Education Requirements.

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

Filed with the Office of the Secretary of State, on May 9, 2001.

TRD-200102611
John P. Maline
Executive Director, Executive Council of Physical Therapy Examiners
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

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TITLE 25. HEALTH SERVICES

PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER D. EARLY CHILDHOOD INTERVENTION ADVISORY COMMITTEE

25 TAC §621.62

The Interagency Council on Early Childhood Intervention (ECI) proposes an amendment to §621.62, concerning the Early Childhood Intervention Advisory Committee.

The purpose of the proposal is to amend the composition of the Advisory Committee in order to allow the Advisory Committee to better represent the state agencies in Texas that provide services to children with developmental delays.

ECI is the lead agency for providing early childhood intervention services in Texas as required by federal law (Individuals with Disabilities Education Act (IDEA), 20 USC 1400). IDEA requires the lead agency to have a State Interagency Coordinating Council (ICC). In Texas, the State Interagency Coordinating Council is the Advisory Committee established in Texas Human Resources Code §73.004. The Committee must include representatives from a number of different agencies that provide services to children with disabilities, and is charged with advising and assisting the state ECI agency in carrying out agency duties.

Currently, the Texas Department of Human Services (TDHS) is designated in rule as a governor appointed member of the ECI Advisory Committee and has voting rights at meetings. The Texas Department of Protective and Regulatory Services (DPRS) is not a governor appointed Advisory Committee member and does not have voting rights on the Committee. Representatives from the two agencies and ECI have agreed that because of the nature of the programs the two agencies provide, these Advisory Committee positions should be amended to designate DPRS as an official Advisory Committee member and remove TDHS as a member.

This rule change will not preclude the Board from appointing members for non-voting ad hoc or ex officio membership.

The rotation schedule for Committee member reappointments is being revised to accurately reflect the number of Committee members and the dates their terms expire in accordance with previous rule changes which modified the total number of Committee members to 24. The new rotation schedule evenly divides into 24.

Donna Samuelson, Deputy Executive Director, ECI, has determined that there will be no fiscal implication for the state. There will be no fiscal implications for local government as a result of enforcing or administering the rules.

Ms. Samuelson also has determined that for each year the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be a state Advisory Committee that more accurately reflects the state agencies who serve children with developmental delays.

There will be no impact on local employment. There will be no adverse effect on small or micro-business. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Questions about the content of this proposal may be directed to Donna Samuelson at the Texas Interagency Council on Early Childhood Intervention at (512) 424-6754. Written comments on the proposal may be submitted to Donna Samuelson, Deputy Director, Texas Interagency Council on Early Childhood Intervention, 4900 North Lamar, Austin, Texas, 78751-2399, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Texas Human Resources Code, §73.004, Advisory Committee which authorizes the (ECI) Council to establish the size and composition of the committee by rule, consistent with federal regulations and state rules.

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

§621.62. Size, Composition, and Terms of Office.

(a) Size. The advisory committee shall consist of 24 members which the governor shall appoint.

(b) Composition. The advisory committee shall be composed as follows.

(1) Official members must include:

(A) at least seven parents, including minority parents of infants or toddlers with developmental disabilities or children with developmental disabilities aged 12 or younger, with knowledge of, or experience with, programs for infants and toddlers with developmental disabilities. At least one such member shall be a parent of an infant or toddler with a developmental disability or a child with a developmental disability aged six or younger, and no parent may be an employee of an early childhood intervention funded program;

(B) at least five public or private providers of early childhood intervention services, one of whom is an early childhood consultant and a provider of birth to three services in an educational service center;

(C) at least one representative from the Texas Legislature;

(D) at least one person involved in personnel preparation;

(E) one representative from each of the following agencies and public program: the Texas Department of Public Health; the Texas Department of Mental Health and Mental Retardation; the Texas Department of Protective and Regulatory Services; [~~Texas Department~~

~~of Human Services;~~] the Texas Education Agency; the Texas Department of Insurance; the Texas Workforce Commission and Head Start. The representative must have sufficient authority to engage in policy planning and implementation on behalf of his or her agency. The Texas Education Agency representative must be responsible for preschool services to children with developmental disabilities;

(F) a physician, preferably a pediatrician who deals with children with developmental disabilities;

(G) a public health professional who deals with children with developmental disabilities; and

(H) a professional advocate of the rights of young children with developmental disabilities.

(2) Ex officio members may be appointed by the Board to perform specific, time-limited tasks as needed. Voting status of ex officio members is determined by the Board.

(c) Terms of office. Official advisory committee members shall serve staggered [~~for~~] six-year terms of office, with the terms of eight [~~seven~~] members expiring [~~every two years except on the third two-year cycle when terms of eight members will expire. Terms will expire on~~] February 1 of each odd number year.

(d) Chairperson. The advisory committee shall appoint the chairperson of the advisory committee.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102656
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 424-6750

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 15. MEDICAID ELIGIBILITY

SUBCHAPTER F. BUDGETS AND PAYMENT PLANS

40 TAC §15.503

The Texas Department of Human Services (DHS) proposes to amend §15.503, concerning protection of spousal income and resources, in its Medicaid Eligibility chapter. The purpose of the amendment is to allow DHS to continue to process a Medicaid application in spousal cases when there is a possibility of abuse or neglect by the community spouse, rather than to deny the application. DHS will, in those cases, consider the client as an individual for eligibility and applied income purposes.

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the section.

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of adoption of the proposed rule will be the continued processing of Medicaid applications for affected clients, rather than denying them for failure to provide information. There will be no effect on small or micro businesses as a result of enforcing or administering the section, because the section applies only to the client's financial eligibility for Medicaid benefits, not to the operation of businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Judy Coker at (512) 438-3227 in DHS's Long Term Care Section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-101, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

§15.503. Protection of Spousal Income and Resources.

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

(f) If a community spouse refuses to cooperate in furnishing information to establish a spousal protected resource amount (PRA) at the beginning of a continuous period of institutionalization, the department does not complete the assessment and does not take further action. No benefits are authorized, so no penalty is imposed. If an assessment is completed in conjunction with an eligibility determination, and a community spouse refuses to furnish information, the department determines the living arrangement before institutionalization.

(1) If the couple was living in the same household, the department denies the application based on the couple's failure to furnish information. Living in the same household includes temporary separations.

(2) If the couple is not living in the same household, the department determines the purpose of separation, the length of separation, and resources or income commingled or managed jointly by one member of the couple or a third party.

(3) If the community spouse refuses to cooperate in providing information and circumstances indicate possible abuse or neglect by the community spouse, the department considers the client as an individual for eligibility and applied income purposes. This is true even if the spouses were living in the same household prior to the client's nursing facility entry or application for waiver services.

(g)-(k) (No change.)

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

Filed with the Office of the Secretary of State, on May 11, 2001.

TRD-200102643
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 438-3108

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CHAPTER 18. NURSING FACILITY ADMINISTRATORS

40 TAC §§18.1, 18.8, 18.9

The Texas Department of Human Services (DHS) proposes to amend §18.1, concerning introduction, §18.8, concerning provisional licensure, and §18.9, concerning licensure renewal and inactive status, in its Nursing Facility Administrators chapter. The purpose of the amendments is to further clarify the provisions and requirements of Texas Health and Safety Code, Chapter 242, Subchapter I; to give DHS the discretion to determine if a licensed administrator from out of state has sufficient education, training and experience, or a national certification that warrants issuance of a provisional license; and to further prevent administrators with proposed revocations against their licenses from escaping sanctions by allowing their licenses to expire and later retesting and complying with current licensure requirements in order to obtain a new license.

Eric M. Bost, commissioner, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of adoption of the proposed rule will be to ensure that nursing facility administrators licensed in the State of Texas have the necessary licensure qualifications to provide greater protection of the health and safety of residents and consumers of nursing facilities DHS regulates. There will be no adverse economic effect on small or micro businesses, because recognizing the experience, training and qualifications of out-of-state administrators who do not meet the educational requirements may increase the availability of licensed nursing facility administrators who want to practice in Texas. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Lynette Sanders at (512) 231-5800 in DHS's Credentialing Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-093, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The amendment is proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.001- 242.268.

§18.1. Introduction.

(a) (No change.)

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

(1)-(15) (No change.)

(16) Good standing -- The status of a nursing facility administrator who is in compliance with the statutory and licensure requirements for the practice of nursing facility administration in the state of Texas and/or licensing authority of another state. In addition, the terms of any adverse disciplinary action or settlement agreement imposed by DHS must be satisfactorily completed.

(17) [~~(16)~~] Internship -- The training period for an Administrator-In-Training gaining supervised practical experience.

(18) [~~(17)~~] License -- A nursing facility administrator license or a provisional nursing facility administrator license.

(19) [~~(18)~~] Licensee -- A person who is licensed under the Texas Health and Safety Code, Chapter 242, Subchapter I.

(20) [~~(19)~~] Misappropriation of resident property -- The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(21) [~~(20)~~] NAB -- National Association of Boards of Examiners for Nursing Home Administrators, Inc.

(22) [~~(21)~~] Neglect -- A deprivation of life's necessities of food, water, or shelter, or a failure of an individual to provide services, treatment, or care to a resident which causes or could cause mental or physical injury, or harm or death to the resident.

(23) [~~(22)~~] Nursing facility -- An institution or facility that is licensed as a nursing facility by the department under the Texas Health and Safety Code, Chapter 242.

(24) [~~(23)~~] Nursing facility administrator or administrator -- A person who engages in the practice of nursing facility administration without regard to whether the person has an ownership interest in the facility or whether the functions and duties are shared with any other person.

(25) [~~(24)~~] Party -- Each person, governmental agency, or officer or employee of a governmental agency named by the Administrative Law Judge as having a justifiable interest in the matter being considered, or any person, governmental agency, or officer or employee of a governmental agency meeting the requirements of a party prescribed by applicable law.

(26) [~~(25)~~] Person -- An individual, corporation, partnership, or other legal entity.

(27) [~~(26)~~] Practice of nursing facility administration -- The performance of the acts of administering, managing, supervising, or being in general administrative charge of a nursing facility.

(28) [~~(27)~~] Practicum -- A course of study designed for the preparation of nursing facility administrators that involves supervision by the college of the practical application of previously studied theory in a nursing facility setting.

(29) [~~(28)~~] Preceptor -- A licensed nursing facility administrator who meets the criteria in §18.6 of this title (relating to Administrators-in-Training).

(30) [~~(29)~~] Referral -- A finding of substandard quality of care in a nursing facility that requires Long Term Care-Regulatory to report an administrator to its licensing authority as mandated by the Code of Federal Regulations.

(31) [~~(30)~~] Substandard Quality of Care -- Any deficiency in Resident Behavior and Facility Practices, Quality of Life, or Quality of Care that constitutes: immediate jeopardy to resident health or safety; or, a pattern of widespread actual harm that is not immediate jeopardy; or, a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

(32) [~~(31)~~] Standard survey -- A periodic, resident-centered inspection that gathers information about the quality of service furnished in a facility to determine compliance with the requirements of participation.

(33) [~~(32)~~] Texas Open Meetings Act -- The Government Code, Chapter 551, Subchapters A-G.

(34) [~~(33)~~] Texas Open Records Act -- The Government Code, Chapter 552, Subchapters A-G.

(35) [~~(34)~~] Year -- A calendar year.

§18.8. Provisional Licensure.

(a) The Texas Department of Human Services (DHS) grants [~~shall grant~~] a provisional license to an individual who provides evidence of the following:

(1) current licensure or registration as a nursing facility administrator by another state or other jurisdiction that is in good standing; or current certification of qualification by any national organization; and

(2) a bachelor's degree in any subject from an accredited college approved by an accrediting association recognized by the Texas Higher Education Coordinating Board; or evidence satisfactory to DHS of having completed sufficient education, training and experience in nursing facility administration; and

(3)-(5) (No change.)

(b) DHS may recognize current licensure, registration or certificate issued by other state or national organizations if the system and standards of qualification and examination for a nursing home administrator license or certification were substantially equivalent to those required in this state at the time such other license or certificate was issued by such other state or national organization. [~~DHS may, at its discretion, waive the requirement in subsection (a)(5) of this section, if compliance places a hardship on an individual.~~]

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

§18.9. Licensure Renewal and Inactive Status.

(a)-(u) (No change.)

(v) A licensee who surrenders a license, or allows a license to expire, in lieu of a formal disciplinary action that proposes the imposition of a license revocation shall return the license certificate to DHS and shall be permanently barred from obtaining a license in Texas.

(w)-(x) (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 May 11, 2001.

TRD-200102644
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 438-3108

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PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 106. CONTRACT ADMINISTRATION

The Texas Rehabilitation Commission (TRC) proposes the repeal to Chapter 106, §§106.1-106.44, 106.50, and 106.55-106.60 and new §§106.1-106.3, 106.21, 106.31, 106.35, 106.36, 106.105, 106.301, 106.351, 106.353, 106.355, 106.357, 106.451, 106.453-106.455, 106.457, 106.459, 106.461, 106.463, 106.465, 106.467, 106.469, 106.471, 106.473, 106.475, 106.477, 106.479, 106.481, 106.483, 106.563, 106.565, 106.567, 106.569, 106.570, 106.571, 106.573, 106.575, 106.577, 106.579, and 106.581, concerning purchase of goods and services by TRC. The change is being proposed to bring TRC's purchasing rules into conformance with contracting policies of the Health and Human Services Commission.

Charles E. Harrison, Jr., Deputy Commissioner for Financial Services, has determined that for the first five-year period the sections are in effect, there will be no material fiscal implications for state or local government.

Mr. Harrison also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the agency's compliance with Chapter 111, Human Resources Code. There will be no material effect on small businesses. There is no material anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Roger Darley, Assistant General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

SUBCHAPTER A. ACQUISITION OF CLIENT GOODS AND SERVICES

40 TAC §§106.1 - 106.36

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

The repeals are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.1. Purpose.
§106.2. Specific State Contracting Law.
§106.3. Criteria for Determining When a Contract Is Required.
§106.4. Definitions.
§106.5. Principles of Contract Administration.
§106.6. Ethical Standards.
§106.7. Non-discrimination.
§106.8. Small Businesses and Businesses Owned by Minorities, Women, and Persons with Disabilities.
§106.9. Documented Rate-Setting Methodologies.
§106.10. General Requirements for Contractors.
§106.11. Purchases for Individual Clients.
§106.12. Solicitations for Express Contracts.
§106.13. Extent of Competition for Acquisition by Express Contracts.
§106.14. Cancellation or Suspension of Solicitation.
§106.15. Timeliness of Response.
§106.16. Modification or Withdrawals of Bids, Offers, and Proposals before Solicitation Closing Date.
§106.17. Confidentiality and Release of Information.
§106.18. Evaluation of Bids, Offers, and Proposals.
§106.19. Cost or Price Analysis.
§106.20. Express Contract Specifications.
§106.21. Duration of an Express Contract.
§106.22. Requirements for Express Contracts.
§106.23. Access to Contractor Facilities and Records.
§106.24. Contract Monitoring Principles.
§106.25. Risk Assessment.
§106.26. Monitoring Performance.
§106.27. Monitoring Financial Compliance.
§106.28. Corrective Action Plan.
§106.29. Independent Audits.
§106.30. Recoupment of Improper Payments.
§106.31. Settling Disagreements.
§106.32. Adverse Actions.
§106.33. Contract Termination.
§106.34. Protests.
§106.35. Appeals.
§106.36. Contract Review Committee.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

TRD-200102677
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 424-4050

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SUBCHAPTER B. ACQUISITION OF GOODS AND SERVICES FOR ADJUDICATION OF CLAIMS BY DISABILITY DETERMINATION SERVICES

40 TAC §106.37

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

The repeal is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.37. Adjudications by Disability Determination Services.

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

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Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
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For further information, please call: (512) 424-4050

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SUBCHAPTER C. ACQUISITION OF ADMINISTRATIVE GOODS AND SERVICES

40 TAC §§106.38 - 106.40

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

The repeals are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.38. Procurement Authority.
§106.39. Procurement Policies and Regulations.
§106.40. Compliance with Other State Laws.

This 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. DEBARMENT

40 TAC §§106.41 - 106.44

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

The repeals are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.41. Debarment and Suspension of Current and Potential Contractor's Rights.
§106.42. Causes for and Conditions of Debarment.
§106.43. Causes for and Conditions of Suspension.
§106.44. Proof Required for Debarment or Suspension.

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

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SUBCHAPTER E. RATES FOR MEDICAL SERVICES

40 TAC §106.50

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

The repeal is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.50. Schedule of Rates for Medical Services.

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

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SUBCHAPTER F. RESOLUTION OF CERTAIN CONTRACT CLAIMS AGAINST THE STATE-NEGOTIATION OF CLAIM

40 TAC §§106.55 - 106.60

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

The repeals are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.55. Claim for Breach of Contract; Notice.
§106.56. Negotiation.
§106.57. Partial Resolution of Claim.
§106.58. Payment of Claim from Appropriated Funds.
§106.59. Incomplete Resolution.
§106.60. Mediation.

This 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 106. PURCHASE OF GOODS AND SERVICES BY TEXAS REHABILITATION COMMISSION
SUBCHAPTER A. GENERAL

40 TAC §§106.1 - 106.3, 106.21, 106.31, 106.35, 106.36

The new sections are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.1. Purpose.

This chapter supplements the general procedures and criteria prescribed by Health and Human Services Commission in Title 1, Texas Administrative Code, Chapter 391, to govern the purchase of goods and services by purchasing entities that are efficient, economical and achieve health and human services procurement objectives.

§106.2. Scope.

(a) This chapter applies to the purchase of goods and services by the Texas Rehabilitation Commission, whether for administrative or client use or benefit. The provisions of this chapter govern to the extent

of any conflict with a procedure or requirement prescribed by another state agency other than:

(1) a procedure or requirement relating to historically underutilized businesses; and

(2) a procedure or requirement relating to the purchase of goods or services from persons with disabilities.

(b) This chapter does not apply to the following transactions:

(1) The lease, purchase, or lease-purchase of real property;

(2) The award of grants, except as specifically provided herein; or

(3) Interstate or international agreements executed in accordance with applicable law.

§106.3. Authority.
The Texas Rehabilitation Commission receives delegated purchasing authority for procuring administrative goods and services from Government Code, §2154.144. The legal authority for the Texas Rehabilitation Commission to enter into contracts is Title 7, §111.052, Human Resources Code. TRC will also comply with specific contracting procedures found in the Interagency Cooperation Act, Government Code §§771.001-771.010; Interlocal Cooperation Act (Government Code §§791.001, et seq.)

§106.21. Texas Rehabilitation Commission Procurement Objectives.
In addition to procurement objectives which are or may be prescribed by Health and Human Services Commission, the procedures and requirements of this chapter are established to accomplish the following objectives:

(1) Small Businesses and Businesses Owned by Minorities, Women, and Persons with Disabilities. It is the policy of TRC to ensure that small businesses and businesses that are at least 51% owned by minority group members, women, and persons with disabilities have equal opportunity to compete for and to be selected for the award of contracts. TRC will take all necessary affirmative steps to ensure that such businesses have an opportunity to obtain TRC business. In addition, TRC will assist its contractors to take such affirmative steps.

(2) Non-Discrimination. TRC does not discriminate on the basis of race, color, religion, sex, national origin, age, disability, or veteran status in the procurement of goods and services.

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

(1) Adverse action--Any action in which TRC:

(A) terminates or suspends a contract between a contractor and TRC before the contract's stated expiration date;

(B) denies payment in whole or part for any claim(s) arising under a contract when the contractor has filed the claim within the time limits allowed by the contract or by TRC rules;

(C) terminates or suspends payments in whole or part to a contractor;

(D) demands payment for contract or rule violations;

(E) directs one of its contractors to terminate or suspend a subcontract or payments to any subcontractor.

(2) Bid--An offer to contract with TRC submitted in response to a bid invitation issued by TRC.

(3) Buyer Support Services (BSS)--The Central Office unit with authority and responsibility for promulgating and maintaining TRC policy and procedures for grant and contract administration. The BSS is the Central Office single-point-of-contact for assisting TRC's customers to comply with these policies and procedures.

(4) Client choice--Individuals with disabilities have a right under the Rehabilitation Act to make informed choices from among alternative service providers.

(5) TRC--The Texas Rehabilitation Commission.

(6) TRC Commissioner--The Chief Administrative Officer of the Texas Rehabilitation Commission.

(7) Contractor records--All financial and programmatic records, supporting documents, papers, statistical data, or any other written or electronic materials that are pertinent to each specific contract instrument.

(8) Cost reimbursement contract--An express contractual relationship that requires payment to the contractor and all reasonable, allocable and allowable costs incurred during the performance of the contract.

(9) Delegation--The written authority of the TRC Commissioner pursuant to Title 7, Human Resources Code, §111.052, and Board Policies Manual to authorize employees serving in designated positions to enter into and sign express contracts.

(10) Enrollment--The contracting, on a competitive or noncompetitive basis, of vendors or suppliers that meet qualifications or criteria for participation specified by the purchasing entity and agree to provide the contracted goods and/or services in accordance with terms and conditions specified by the purchasing entity.

(11) Express contract--A written agreement for goods or services signed by TRC and a second party specifying the rights and obligations of each party and the terms and conditions that govern interactions between the parties.

(12) Fee for service--The amount that TRC pays for a "unit" of service.

(13) Immediate family--A spouse, child, parent, or sibling of a TRC employee.

(14) Impartial Hearing Officer (IHO)--A person appointed by the TRC Commissioner to conduct hearings on formal protests and appeals of grant, contract, or contract procurement matters. The IHO must be an impartial person with knowledge of vocational rehabilitation and procurement programs and regulations. An attorney or other staff member who has directly or indirectly participated in, or given advice on, issues that are the basis for a particular hearing cannot be the IHO in that hearing.

(15) Independent audit--An audit performed by a person independent of the organization in accordance with generally accepted auditing standards.

(16) Individualized Plan for Employment (IPE)--Plan of services documenting informed client choice from among alternative vocational goals, rehabilitation services, and service providers.

(17) Mediation--Includes face-to-face meetings and/or negotiations between the contractor and the appropriate Texas Rehabilitation Commission representative without the presence of a third party acting as mediator.

(18) Noncompetitive procurement--Procurement that promotes a sufficient pool of qualified service providers from which the client can make informed choices. Such open acquisition procurement methodologies include:

(A) use of only a purchase order;

(B) use of enrolled providers;

(C) use of providers responding to a noncompetitive request for offers; and/or

(D) use of sole source contracts, for the purchase of goods and/or services.

(19) Notice of Provider Enrollment (NPE)--Notice announcing the availability of a provider enrollment opportunity.

(20) Person--An individual, partnership, corporation, association, governmental subdivision, or a public or private organization that is not a state agency.

(21) Provider--An individual or business entity that supplies goods or services to a purchasing entity under an agreement or contract to provide such goods or services.

(22) Provider enrollment--A noncompetitive method for developing a pool of service providers who have met the service standards and provider qualifications made available by TRC.

(23) Purchase order--A written document which authorizes the purchase of goods and/or services, which establishes the terms and conditions of the purchase, which obligates TRC to pay for the goods and/or services upon receipt, and which is signed by a representative of TRC.

§106.35. Compliance with Federal Requirements.

The Disability Determination Services will comply with the laws, rules, regulations, and guidelines of the Social Security Administration.

§106.36. Compliance with State Requirements.

TRC will comply with other state requirements as follows:

(1) If the business relationship with the other party involves purchase of good or services and the purchase is for special or technical goods or services from another state agency, then the appropriate instrument to establish the relationship with the other party is an Interagency Cooperation Contract.

(2) If the business relationship with the other party involves purchase of goods or services from a local government then the appropriate instrument to establish the relationship with the other party is an Interlocal Cooperation 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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Sylvia F. Hardman
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Texas Rehabilitation Commission
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SUBCHAPTER D. PURCHASE OF GOODS AND SERVICES

40 TAC §106.105

The new section is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.105. Alternative Purchasing Methods - Schedule of Rates for Medical Services.

Pursuant to Human Resources Code, §111.055(a), the board adopts the following rules and standards governing the determination of rates TRC will pay for medical services.

(1) A proposed rate schedule for medical services will be developed and maintained by the TRC Deputy Commissioner for Administrative Services. The proposed rate schedule will be updated and submitted for board approval at least annually. The proposed rate schedule will include a comparison of the proposed rate schedule to other cost-based rates for medical services, including Medicaid and Medicare rates, and for any proposed rate that exceeds the Medicare or Medicaid rate, will document the reasons why the proposed rate ensures the best value in the use of dollars for clients.

(2) The current proposed rate schedule will be made available to members of the public upon request. Members of the public may submit written comments concerning the proposed rate schedule at any time to the TRC Deputy Commissioner for Administrative Services, 4900 North Lamar Boulevard, Austin, Texas 78751.

(3) Annually, the board shall adopt by rule a schedule of rates based upon the proposed rate schedule submitted by the TRC Deputy Commissioner for Administrative Services. The board shall hold a public hearing before adopting the rate schedule to allow interested persons to submit comments. In adopting the rate schedule, the board shall compare the proposed rate schedule to other cost-based rates for medical services, including Medicaid and Medicare rates, and for any rate adopted that exceeds the Medicare or Medicaid rate, document the reasons why the rate adopted ensures the bast value in the use of dollars for clients.

(4) The following standards will be used when determining the rates TRC will pay for medical services:

(A) Rates will be established based on Medicare and Medicaid schedules for current procedural terminology (CPT). Where Medicare and Medicaid schedules are not applicable, rates that represent best value will be established based upon factors that include reasonable and customary industry standards for each specific service.

(B) Rates will be established at a level adequate to insure availability of qualified providers, and in adequate numbers to provide assessment and treatment, and within a geographic distribution that mirrors client/claimant distribution.

(C) Exceptions to established rates can be made on a case by case basis by the TRC medical director.

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

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Texas Rehabilitation Commission
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SUBCHAPTER J. PROTEST PROCEDURES

40 TAC §106.301

The new section is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.301. Availability of Protest Procedures.

A potential contractor who has submitted a bid or proposal for a proposed contract may protest non-selection decisions based on alleged improprieties in the contract award process.

(1) A written protest must be received by the Director of BSS within 15 days of the protestor's receipt of notice of TRC decision being protested. Failure to comply with the foregoing time frame will result in the dismissal of the protest for want of jurisdiction. In order for the protest to be evaluated on its merits, it must state:

(A) the protestor's name and specific action the protestor is requesting be reconsidered;

(B) how the decision, action, or inaction by Texas Rehabilitation Commission (TRC) violated published TRC policy, or state or federal laws and regulations regarding procurement, or contract;

(C) the protestor's claim with specific supporting information (refer to pertinent parts of the original request for proposal, offer, bid, or the award documents);

(D) an explanation of the facts under disagreement; and

(E) the subsequent action the offeror is requesting.

(2) The Director of BSS limits the review of the protest to a desk review of the materials supplied by the protestor and TRC staff who made the decision.

(3) The Director of BSS sends the decision on the protest to the protestor within 30 days of receipt of the written request.

(4) A contract may be awarded even though there is a pending protest, if there is a bona fide emergency, or if an award is required by state or federal law to be completed by a particular date.

(5) TRC's decision on the protest is the final agency action.

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

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Texas Rehabilitation Commission
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SUBCHAPTER K. HISTORICALLY UNDERUTILIZED BUSINESSES

40 TAC §§106.351, 106.353, 106.355, 106.357

The new sections are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.351. Purpose.

The purpose of this subchapter is to establish the authority and responsibility to promote full and equal business opportunities for all businesses in state contracting in accordance with the goals specified in the State of Texas Disparity Study. It is the policy of the State of Texas and the Texas Rehabilitation Commission to encourage the use of historically underutilized businesses (HUBs) and to implement this policy through race, ethnic, and gender-neutral means.

§106.353. Applicability.

This subchapter applies to all contracts and purchase orders established under authority delegated to TRC by the General Services Commission, Title 10, Government Code, section 2151. It also applies to all bids, proposals, offers, or other applicable expressions of interest over $100,000 as defined in Texas Administrative Code, Title 1,Part 5, Chapter 111. Subchapter B, §111.14 and Texas Administrative Code Chapter 2161 Subchapter F relating to HUB subcontracting responsibilities.

§106.355. Definitions.

In this subchapter, the following definitions apply.

(1) Economically Disadvantage Person -- A person who is economically disadvantaged because of the person's identification as a member of a certain group, as defined in Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter B, Rule 111.12, and who has suffered the effects of discriminatory practices or other similar insidious circumstances over which the person has no control.

(2) Good Faith Effort (GFE) -- Evidence of certain criteria used by prime contractors to promote inclusion of HUBs in contracts over $100,000 or more as defined in TAC §111.13 and §111.14. When applied to agency GFE, the state auditor shall consider whether the agency; has adopted rules under §2161.003, Government Code; has used the General Services Commission (GSC) directory and other resources to identify HUBs that are able to contract with the agency; made good faith, timely efforts to contact identified HUBs regarding contracting opportunities; and conducted its procurement program in accordance with the good faith methodology set out in GSC rules.

(3) Historically Underutilized Business (HUB) -- A business entity that is a corporation, sole proprietorship, partnership, joint venture, etc. owned or operated by an economically disadvantaged person or persons as defined in Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter B, Rule 111.12 with its principal place of business in Texas.

(4) HUB Subcontracting Plan (HSP) -- a plan required to be submitted with bids, proposals, offers, or other applicable expressions of interest that determine or describe HUB subcontracting opportunities probable under the contract as defined in Texas Administrative Code, Title 1, Part 5, Chapter 111, Subchapter B, Rules 111.13 and 111.14.

§106.357. Adoption of Rules.

In accordance with Government Code §2161.003, TRC adopts the rules of the General Services Commission at Title 1, Part 5, Chapter 111, Subchapter B, §§111.11 through 111.28, Texas Administrative Code (relating to the HUB Program), which rules were promulgated by the General Services Commission pursuant to Government Code, §2161.002 .

This 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 M. MISCELLANEOUS REQUIREMENTS

40 TAC §§106.451, 106.453, 106.454

The new sections are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.451. Standards of Conduct for Procurement Personnel.

(a) This section states the ethical standards of conduction required of TRC employees, vendors, and potential vendors when involved in grants or contracts with TRC.

(b) An employee may not:

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

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

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

(4) knowingly disclose information for personal gain.

(c) A former employee may not represent or receive compensation from any person concerning any contractual matter in which the former employee participated during his or her employment with the state.

(d) A vendor or potential vendor may not offer, give, or agree to give any employee anything of value.

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

(f) If an actual violation of subsections (b)-(d) of this section occurs or is not disclosed and remedied, the employee in violation may be either reprimanded, suspended, or dismissed.

§106.453. Standards of Conduct for Contracted Vendors and Suppliers.

(a) A former employee may not represent or receive compensation from any person concerning any contractual matter in which the former employee participated during his or her employment with the state.

(b) A vendor or potential vendor may not offer, give, or agree to give any employee anything of value.

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

(d) If an actual violation of subsections (b)-(d) of this section occurs or is not disclosed and remedied, the vendor or potential vendor may be barred from receiving future grants or contracts and an existing grant or contract may be canceled.

§106.454. Purchases for Individual Clients.

Purchases of goods and/or services for individual clients must be consistent with the Individualized Plan for Employment (IPE) which is jointly developed by TRC Counselor and eligible client.

(1) The IPE includes, but is not limited to:

(A) goals and intermediate objectives for which the goods and services are necessary;

(B) estimated date of initiation of the service, and the estimated duration of the service;

(C) services and service providers chosen by the client from among alternatives presented by the TRC Counselor;

(D) participation by the client in the cost of the goods and services;

(E) terms and conditions applicable to the purchase of the goods and services;

(F) comparable services and benefits applicable to the services to be purchased.

(2) In developing an individual's IPE, TRC provides the individual, or assists the individual in acquiring, information necessary to make an informed choice from among alternative services and providers of services that are needed to achieve the goal of the IPE.

(3) In developing an IPE, and prior to purchasing any service for a client, TRC determines whether comparable services and benefits exist under any other program, and whether those services or benefits are available to the individual client. If comparable services or benefits exist and are available to the client within a reasonable period of time, TRC shall use those comparable services and/or benefits to meet, in whole or in part, the cost of services. If TRC and another resource are paying for a good or service for a client, the payment by the other resource must be applied first.

(4) TRC may establish a reasonable fee schedule for purchased client goods and services. These fee schedules are designed to ensure the lowest reasonable cost and best value.

(5) TRC issues purchase orders for all purchases of goods and services for individual clients. Purchase orders serve as prior written authorization of the purchase, establish the terms and conditions of the purchase, and obligate TRC to pay for the goods and/or services which are delivered by the provider and received by the client.

(6) TRC establishes and maintains policies for competitive purchasing of goods and services which exceed the unit dollar value specified.

This 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 N. CONTRACT ADMINISTRATION

40 TAC §§106.455, 106.457, 106.459, 106.461, 106.463, 106.465, 106.467, 106.469, 106.471 106.473, 106.475, 106.477, 106.479, 106.481, 106.483, 106.563 106.565, 106.567, 106.569

The new sections are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.455. Principles of Contract Administration.

(a) To provide a foundation for administering contracts funded in whole or part, by or through TRC, TRC must:

(1) consider the best interests of persons served, the public, and the State of Texas at all times;

(2) provide for a sufficient pool of qualified service providers and provide the client with information about service providers so that clients may make informed choices from among alternatives;

(3) use competitive procurement methodologies as the primary procurement methodology whenever possible, to secure best value and to provide an opportunity for all qualified organizations or persons to do business with TRC; and

(4) use available funds in the most efficient and effective manner in accordance with all applicable state and federal laws and regulations.

(b) Pursuant to the Uniform Grant and Contract Management Act of 1981 (Texas Government Code, Chapter 783), TRC is required to comply with the Uniform Grant and Contract Management Standards for State Agencies of the Governor's Office of Budget and Planning when administering contracts to state and local governments.

(c) To ensure that state and/or federal funds have been expended appropriately, TRC will require all contractors receiving grants or operating under cost-reimbursement contracts funded solely with non-federal funds, including for-profit contractors, to comply with OMB Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations.

§106.457. Criteria for Determining when contract is required.

(a) If the business relationship with the other party involves financial assistance and the other party is responsible for administering the program, then the appropriate instrument to establish the relationship with the other party is a contract.

(b) If the business relationship with the other party involves purchase of client goods or services and if both of the conditions listed in paragraphs (1) and (2) of this subsection are met, then the appropriate instrument to establish the relationship with the other party is a purchase order, and no additional express contract is required.

(1) The services are allowed by state or federal law.

(2) The services are available to the general public.

(c) If the business relationship with the other party involves purchase of client goods or services and one of the following conditions listed in paragraphs (1)-(6) of this subsection is met, then the appropriate instrument to establish the relationship with the other party is an express contract.

(1) A contract is required by state or federal law.

(2) Special or technical goods or services are to be provided by another state agency.

(3) The goods or services are provided according to TRC designated standards and criteria.

(4) The need exists to provide special protection to TRC or TRC clients.

(5) The need exists to clearly differentiate employee versus independent contractor status.

(6) Defined high risk factors, or other conditions, exist that would make the establishment of an express contract in the best interests of TRC.

§106.459. General Requirements for Contractors.

(a) A contractor providing goods or services to TRC must comply with all applicable federal or state laws, rules, regulations, and standards.

(b) TRC shall not contract or do business with contractors whose license, permit, or certificate has been revoked by another Health or Human Services, Public Safety, or Criminal Justice agency.

(c) A contractor providing goods or services to TRC must disclose to TRC if it is currently held in abeyance from or barred from the award of a federal or state contract.

(d) A contractor currently held in abeyance from or barred from the award of a federal or state contract may not contract or subcontract with TRC.

(e) If a contractor is or becomes delinquent in the payment of its Texas franchise tax, payment to the contractor may be withheld until such delinquency is remedied.

(f) A contractor providing goods or services to TRC clients must report abuse, neglect, and exploitation of TRC clients in compliance with federal and state law.

(g) A contractor providing goods or services to TRC clients must report to the appropriate state licensing agency any action that a professional, licensed or certified by the State of Texas and employed by the contractor, has committed that constitutes grounds for denial or revocation of the certification or licensure.

(h) Contractors must certify that they are not delinquent in child support payments as required by the Texas Family Code.

(i) All contracts for goods and services will also include the following provisions:

(1) Termination for cause and for mutual convenience of the contractor and TRC including the manner in which it will be implemented;

(2) Requirements and regulations pertaining to patent rights and copyrights with respect to any discovery, invention, or data which arises or is developed in the course of or under such a contract;

(3) Access by TRC, the federal government, and other state agencies or any of their duly authorized representatives to any documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions;

(4) Requirements for retention of records after the contract is completed and all pending matters are closed;

(5) Compliance with all applicable federal standards, orders, or requirements regarding environmental protection;

(6) Compliance with mandatory standards and policies relating to energy efficiency;

(7) Compliance with lobbying restrictions.

§106.461. Cancellation or Suspension of Solicitation.

TRC has the right to accept or reject all or any part of any bids, offers, or proposals submitted in response to a solicitation as specified in TRC policy. TRC may cancel or suspend a solicitation for any of the following reasons:

(1) Specifications and costs in the ITB, RFO, or RFP were inadequate, ambiguous, or otherwise deficient;

(2) Goods or services are no longer required;

(3) Bids, offers, or proposals received indicated that the services requested can be purchased by a different, less expensive method;

(4) All bids, offers, and proposals received are considered unreasonable;

(5) Staff has good reason to believe during the course of procurement that the bids, offers, or proposals are fraudulent or submitted in bad faith; or

(6) TRC determines that cancellation or suspension is in the State's best interest.

§106.463. Recoupment of Improper Payments.

(a) TRC recovers improper payments when it is determined that contractors have been overpaid.

(b) TRC notifies the contractor in writing of the payment discrepancy, the method of computing the reasonable dollar amount to be refunded, and any other actions TRC may take.

§106.465. Settling Disagreements.

(a) TRC will handle disagreements with the contractor using applicable TRC policies and procedures. TRC may withhold payments, discontinue referrals, and/or remove clients pending resolution of a disagreement.

(b) When a disagreement rises to the level of a dispute, it will be resolved in accordance with the section on Protests and Appeals.

§106.467. Adverse Actions.

(a) TRC may implement adverse actions based on nonperformance or noncompliance with the terms of the express contract or grant. These actions may include:

(1) Suspension of referrals;

(2) Withholding of payments;

(3) Disallowance of all or part of the cost of grants and cost reimbursement contracts only;

(4) Termination; and

(5) Other remedies allowed by state and federal laws and these rules.

(b) A contractor or grantee has the right to appeal any adverse action.

§106.469. Contract Termination.

(a) TRC may terminate a contract for the following reasons:

(1) Lack of funding;

(2) Mutual agreement;

(3) Convenience;

(4) Making a false certification that is a material breach of contract; and

(5) Other reasonable cause.

(b) The letter of notification will be sent by TRC to the contractor.

(c) When a contract is terminated, a review is conducted to determine any overpayment or underpayment. Settlement of claims under terminated contracts may be made by a negotiated agreement or a determination by TRC. The contractor and each subcontractor are responsible for the prompt settlement of the termination claims, including claims from employees, vendors, and subcontractors.

(d) When a grant or cost reimbursement contract is terminated, equipment and supplies purchased under the contract may be subject to disposition as determined by TRC in accordance with the terms of the contract.

§106.471. Access to Contractor Facilities and Records.

The following requirements will be included in each contract.

(1) Contractors must allow TRC and all appropriate federal and state agencies or their representatives access to contractor facilities to inspect, monitor, audit or, evaluate contractor records, and supporting documents pertaining to client goods or services provided. Contractors and subcontractors must make documents available at reasonable times and for reasonable periods.

(2) Contractors must keep financial and supporting documents, statistical records, and any other records pertinent to the client goods or services for which a claim or cost report is submitted to TRC or its agent. The records and documents must be kept for a period specified in the contract. If any litigation, claim, or audit involving these records begins before the specified time period expires, the contractor must keep the records and documents until all litigation, claims, or audit findings are resolved.

(3) If a contractor is terminating business operations, the contractor must ensure that:

(A) records are stored and accessible; and

(B) that someone is responsible for adequately maintaining the records.

§106.473. Independent Audits.

(a) Contractors receiving operating funds through grants, cost-reimbursement contracts, and other contracts identified by TRC are required to have an independent audit as specified in the contract terms. Copies of these independent audit reports shall be submitted to TRC

for review. Independent audit work papers may also be reviewed at the discretion of TRC.

(b) The contractors are audited for compliance with federal and state laws and regulations, TRC policy and standards, and the terms of the contract.

§106.475. Contract Monitoring Principles.

All purchases by TRC are subject to monitoring depending on the type of funding source and nature of contract. These may include:

(1) Verification of delivery of goods or services;

(2) Verification that the goods or services meet contract specifications;

(3) Verification that the payment was the correct amount for the goods or services received;

(4) Verification that the total of any third party payment and any TRC payment did not exceed the maximum contract rate;

(5) Analysis of aggregate purchases;

(6) Routine on-site performance and financial monitoring;

(7) Audit conducted by TRC;

(8) Independent audit when required by contract terms.

§106.477. Risk Assessment.

TRC risk assessment process targets its on-site monitoring and compliance audit resources. Risk assessment criteria are established in TRC policy.

§106.479. Monitoring Performance.

TRC will compare contractor performance to the goals, outcomes, measures, or standards established in the contract to assess the degree to which they are being met.

§106.481. Monitoring Financial Compliance.

(a) Financial monitoring is designed to ensure that:

(1) TRC received the goods or services paid for; and

(2) The total amount paid by TRC and any third party was not in excess of the contracted amount;

(3) The contractor maintains the financial records and internal controls necessary to adequately account for claims under the contract.

(b) TRC may use sampling methods in monitoring and auditing contracts.

(c) The contractor has the burden of proof in establishing entitlement to payments made under the contract.

§106.483. Corrective Action Plan.

The contractor will prepare and implement a corrective action plan in response to TRC findings of a deficiency. The corrective action plan must be negotiated to the satisfaction of TRC prior to implementation. TRC will subsequently monitor and document the contractor's compliance with the corrective action plan.

§106.563. Debarment and Suspension of Current and Potential Contractor Rights.

(a) Requirements in this section are applicable to all types of contracts with TRC.

(b) Termination of rights to continue an existing contract, to receive a new contract, to participate as a provider or manager, or to make a bid, offer, application, or proposal for a TRC contract. The debarment is for a specified time commensurate with the seriousness of the violation, the extent of the violation, prior impositions of sanctions or penalties, willingness to comply with program rules and directives, and other pertinent information. The maximum period of debarment is six years, unless a longer time is mandated by requirements other than those in this chapter.

(c) Temporary suspension of a contractor's or potential contractor's rights to conduct business with TRC. A suspension is in effect until an investigation, hearing, or trial is concluded and TRC can make a determination about:

(1) the contractor's future right to contract or subcontract; or

(2) a potential contractor's future right to have TRC consider its offer, bid, proposal, or application.

(d) For purposes of both debarment and suspension of contractual rights, TRC may impute the conduct of an individual, corporation, partnership, or other association to the contractor, potential contractor, or the responsible entity of the contractor or potential contractor with whom the individual, corporation, partnership, or other association is employed or otherwise associated. Even though the underlying conduct may have occurred while an individual, corporation, partnership, or other association was not associated with the contractor or potential contractor, suspension of contractual rights or debarment may be imposed. Remedial actions taken by the responsible officials of the contractor or potential contractor will be considered in determining whether either suspension of contractual rights or debarment is warranted.

§106.565. Causes for and Conditions of Debarment.

(a) TRC may remove contractual rights from an individual or legal entity for causes including, but not limited to, the following:

(1) being found guilty, pleading guilty, pleading nolo contendere, or receiving a deferred adjudication in a criminal court, relating to:

(A) obtaining, attempting to obtain, or performing a public or private contract or subcontract;

(B) embezzlement, theft, forgery, bribery, falsification or destruction of records, any form of fraud, receipt of stolen property, or any other offense indicating moral turpitude or a lack of business integrity or honesty;

(C) dangerous drugs, controlled substances, or other drug-related offense;

(D) federal antitrust statutes arising from the submission of bids or proposals;

(E) any physical or sexual abuse or neglect offense;

(2) being debarred from contracting by any unit of the federal government or any unit of a state government;

(3) violating TRC contract provisions including failing to perform according to the terms, conditions, and specifications or within the time limit(s) specified in TRC contract, including, but not limited to, the following:

(A) failing to abide by applicable federal and state statutes, such as those regarding persons with disabilities and those regarding civil rights;

(B) having a record of failure to perform or of unsatisfactory performance according to the terms of one or more contracts or subcontracts, if that failure or unsatisfactory performance has occurred

within five years preceding the determination to debar. Application of this subsection will be made only for actions occurring after the effective date of these rules. Failure to perform and unsatisfactory performance includes, but is not limited to, the following:

(i) failing to correct contract performance deficiencies after receiving written notice about them from TRC or its authorized agents;

(ii) failing to repay or make and follow through with arrangements satisfactory to TRC to repay identified overpayments or other erroneous payments, or assessed liquidated damages or penalties;

(iii) failing to meet standards that are required for licensure or certification, or that are required by state or federal law, TRC rules, or TRC policy concerning TRC contractors;

(iv) failing to execute amendments required by TRC;

(v) billing for services or merchandise not provided to the client by TRC;

(vi) submitting cost reports containing costs not associated with and/or not covered by the contract or TRC rules and instructions. Intent to increase individual or statewide rates or fees by submission of unallowable costs must be shown for a single cost report, but intent may be inferred when a pattern of submitting cost reports with unallowable costs is shown;

(vii) submitting a false report or misrepresentation which, if used, may increase individual or statewide rates or fees;

(viii) charging client or patient fees contrary to TRC rules or policy;

(ix) failing to notify and reimburse TRC or its agents for services TRC paid for when the contractor received reimbursement from a liable third party;

(x) failing to disclose or make available, upon demand, to TRC or its representatives (including appropriate federal and state agencies) any records the contractor is required to maintain;

(xi) failing to provide and maintain services within standards required by statute, regulation, or contract; or

(xii) violating the Human Resources Code provisions applicable to the contract or any rule or regulation issued under the Code;

(4) submitting an offer, bid, proposal, or application that contains a false statement or misrepresentation or omits pertinent facts or documents that are material to the procurement;

(5) engaging in any abusive or neglectful practice that results in or could result in death or injury to the clients served by the contractor; or

(6) knowingly and willfully using a debarred person or legal entity as an employee, independent contractor, or agent to perform a contract with TRC.

(b) Individuals, parts of entities, and entities that have been debarred may not:

(1) receive a contract;

(2) be allowed to retain a contract which has been awarded before debarment;

(3) bid or otherwise make offers to receive a contract or subcontract;

(4) participate in TRC programs which do not require the provider to sign a contract or agreement; or

(5) either personally or through a clinic, group, corporation, or other association bill to or receive payment from TRC for any services or supplies provided by the debarred entity on or after the effective date of the debarment. Additionally, TRC will not pay for any services ordered, prescribed, or delivered by the debarred entity for TRC recipients after the date of debarment. No costs associated with a debarred entity, including the salary, fringe, overhead, payments to, or any other costs associated with an employee, owner, officer, director, board member, independent contractor, manager, or agent who was debarred may be included in a TRC cost report or any other document which will be used to determine an individual payment rate, a statewide payment rate, or a fee.

(c) Debarment may be applied against an individual, an entire legal entity, or a specified part of a legal entity.

§106.567. Causes for and Conditions of Suspension.

(a) TRC may place a contractor's or potential contractor's contractual rights in suspension whenever TRC finds that there is a reasonable basis to believe that grounds for debarment exists. Suspension may be imposed immediately following TRC's notification to a contractor or potential contractor. In addition, suspension may be imposed on a potential contractor if he has an outstanding indictment or TRC has information about an offense that is grounds for indictment.

(b) Conditions of Suspension.

(1) TRC may withhold payments, in whole or in part, to the affected contractor during the period of suspension.

(2) TRC may refuse to accept a bid, offer, application, or proposal from, or to award a contract to, the affected potential contractor during the period of suspension.

(3) TRC may cease referrals or additional clients to the suspended entity.

(4) If TRC determines that the underlying reasons for suspension have been resolved in favor of the contractor, TRC must, if applicable:

(A) pay the withheld payments for any services that may have been provided during the suspension and which meet the terms of an existing contract; and

(B) resume contract payments.

(5) If TRC determines that underlying reasons for the suspension have not been resolved in favor of the contractor, TRC will institute debarment proceedings.

(6) Individuals and entities whose contractual rights have been placed in suspension may not:

(A) receive a contract; or

(B) submit an offer, bid, application, or proposal for a contract.

(c) A suspension may be applied against an individual, an entire legal entity, or a specified part of a legal entity.

§106.569. Proof Required for Debarment or Suspension.

(a) Causes identified in this title are established by proof of pleading guilty or nolo contendere, or of the issuance of a deferred adjudication of guilt. If an appeal results in a reversal, contractual rights must be restored upon written request, unless another cause for their removal exists.

(b) Causes identified in this title are based entirely upon the other state or federal agency's official notice that the contractor's or potential contractor's rights have been removed.

(c) The existence of all other causes for debarment or suspension must be established by a preponderance of the evidence.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

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Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 424-4050

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SUBCHAPTER O. APPEALS

40 TAC §§106.570, 106.571, 106.573, 106.575 106.577, 106.579, 106.581

The new sections are proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.570. Appeals.

(a) Appeals based upon final decision letter.

(1) General. After TRC has issued a final decision letter to the contractor or grantee implementing an adverse action taken by TRC pursuant to §106.467 of this title (relating to Adverse Actions), the contractor or grantee, referred to herein as appellant, has the right to appeal. Except as provided in subsection (b) of this section, a copy of the final decision letter must be included with the appeal, and the appeal must be received by TRC within 60 days after issuance of the final decision letter. Appeals and requests for reconsideration under this section must be sent to TRC by certified mail--return receipt requested.

(2) Procedures. Appeals must be in writing and submitted to the appropriate deputy commissioner. Written materials that the appellant wishes to have considered may be submitted with the appeal. The appeal should state whether the appellant requests a personal meeting to discuss the appeal, and if the appellant requests, a meeting will be scheduled with a representative of TRC. At the meeting, the appellant may be represented by a person of his or her selection, the appellant will be provided with an opportunity to present evidence and information to support his or her position, and the appellant and TRC may agree to employ a mediator at TRC's expense. A written decision will be provided to the appellant within 30 days after conclusion of the meeting, or if no meeting is held, within 45 days after TRC receives the appeal, unless the appropriate deputy commissioner extends the time.

(3) Record. The record of an appeal shall consist of a copy of the written appeal; a copy of the final decision letter described in paragraph (1) of this subsection, or if no final decision letter was issued, a copy of the appellant's request for final decision letter described in subsection (b) of this section; a copy of the written decision issued by TRC described in paragraph (2) of this subsection; and if applicable, a copy of any mediation agreement that was executed by TRC and the appellant.

(4) Request for reconsideration. After the decision on an appeal is issued, the appellant may submit in writing a request for reconsideration. Requests are to be directed to the Assistant Commissioner, Buyer Support Services, and must be received by TRC within 20 days after the decision on the appeal is issued. The request for reconsideration will be decided by or on behalf of the TRC Commissioner. The decision will be based on the record of the appeal described in paragraph (3) of this subsection, a summary prepared by TRC representative of the information provided by the appellant and the evidence accepted by TRC representative at the meeting described in paragraph (2) of this subsection, any written material submitted by the appellant along with his or her request for reconsideration, and TRC representative's response to the request for reconsideration.

(A) The request for reconsideration shall:

(i) specifically point out any errors in the record,

(ii) specify all relief requested, and

(iii) state all reasons why the relief should be granted.

(B) The TRC representative shall file his or her response to the request for reconsideration not later than 20 days after TRC's receipt of the request.

(C) TRC shall issue a decision on the request for reconsideration no later than 45 days after receipt of the request for reconsideration. The decision may affirm, reverse or modify the final decision letter. The decision on the request for reconsideration is the final decision of TRC. If TRC does not rule on the request for reconsideration within 45 days, the written decision on the appeal which is described in paragraph (2) of this subsection becomes the final decision of TRC. TRC and/or his or her designee may extend any time period by ten days upon written request of the appellant or TRC representative.

(b) Obtaining a final decision letter. If the contractor or grantee believes that an adverse action has been taken against him before a final decision letter has been issued, the contractor or grantee may contact the appropriate deputy commissioner in writing, describe the adverse action which has been taken, and request a final decision letter. Requests for a final decision letter must be submitted to TRC by certified mail--return receipt requested. If TRC does not issue a final decision letter within 30 days after receipt of the request by the deputy commissioner, the contractor or grantee may, at his or her option, appeal within 60 days of receipt of the request by the deputy commissioner. A copy of the request for a final decision letter, along with a U.S. Postal Service or equivalent notice showing receipt of the request by TRC, must be included with the appeal.

§106.571. Claim for Breach of Contract.

(a) In accordance with Government Code, Chapter 2260, Subchapter B, a contractor may make a claim against TRC for breach of a contract between TRC and the contractor. TRC may assert a counterclaim against the contractor.

(b) A contractor must provide written notice to TRC of a claim for breach of contract not later than the 180th day after the date of the event giving rise to the claim.

(c) The notice must state with particularity:

(1) the nature of the alleged breach;

(2) the amount the contractor seeks as damages; and

(3) the legal theory of recovery.

(d) TRC must assert, in a writing delivered to the contractor, any counterclaim not later than the 90th day after the date of notice under this subsection. If TRC does not comply with this subsection it waives the right to assert the counterclaim.

§106.573. Negotiation.

(a) The Associate Commissioner for buyer Support Services shall examine the claim and any counterclaim and negotiate with the contractor in an effort to resolve them. Except as provided by subsection (b) of this section, the negotiation must begin not later than the 60th day after the later of:

(1) the date of termination of the contract;

(2) the completion date in the original contract; or

(3) the date the claim is received.

(b) TRC is entitled to delay the beginning of negotiation until after the 180th day after the date of the event giving rise to the claim.

§106.575. Partial Resolution of Claim.

(a) If the negotiation under §106.573 of this title (relating to Negotiation) results in the resolution of some disputed issues by agreement or in a settlement, the parties shall reduce the agreement or settlement to writing and each party shall sign the agreement or settlement.

(b) A partial settlement or resolution of a claim does not waive a party's rights under this chapter as to the parts of the claim that are not resolved.

§106.577. Payment of Claim from Appropriated Funds.

TRC may pay a claim resolved in accordance with this subchapter only from money appropriated to it for payment of contract claims or for payment of the contract that is the subject of the claim. If money previously appropriated for payment of contract claims or payment of the contract is insufficient to pay the claim or settlement, the balance of the claim may be paid only from money appropriated by the legislature for payment of the claim.

§106.579. Incomplete Resolution.

If a claim is not entirely resolved under §106.573 of this title (relating to Negotiation) on or before the 270th day after the date the claim is filed with TRC, unless the parties agree in writing to an extension of time, the contractor may file a request for a hearing under Government Code, Chapter 2260, Subchapter C.

§106.581. Mediation.

(a) Before the 270th day after the date the claim is filed with TRC and before the expiration of any extension of time under §106.579 of this title (relating to Incomplete Resolution), the parties may agree to mediate the claim made under this subchapter.

(b) Participation in mediation shall be voluntary on the part of TRC and the contractor.

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

Filed with the Office of the Secretary of State, on May 14, 2001.

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Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
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For further information, please call: (512) 424-4050

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CHAPTER 106. PURCHASE OF GOODS AND SERVICES BY TEXAS REHABILITATION COMMISSION

SUBCHAPTER D. PURCHASE OF GOODS AND SERVICES

40 TAC §106.107

The Texas Rehabilitation Commission (TRC) proposes new §106.107, concerning purchase of goods and services by TRC. The change is being proposed to bring TRC's purchasing rules into conformance with contracting policies of the Health and Human Services Commission. The section adopts by reference a rate schedule.

Charles E. Harrison, Jr., Deputy Commissioner for Financial Services, has determined that for the first five-year period the section is in effect, there will be no material fiscal implications for state or local government.

Mr. Harrison also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the agency's compliance with Chapter 111, Human Resources Code. There will be no material effect on small businesses. There is no material anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Roger Darley, Assistant General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

A public hearing will be held prior to adoption of the rate schedule. The hearing will be on June 23, 2001 in the TRC Public Hearing Room, First Floor, 4900 North Lamar Blvd., Austin, Texas 78751. The hearing will be conducted in conjunction with the regular meeting of the TRC Board.

The new section is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

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

§106.107. Schedule of Rates.

Pursuant to Human Resources Code, §111.0552(b) and Texas Administrative Code Title 40, §106.105(3), the Board of the Texas Rehabilitation Commission adopts by reference the annual schedule rates the Commission will pay for medical services, to be effective September 3, 2001. The schedule of rates may be viewed or copies may be obtained by calling the Texas Rehabilitation Commission at (512-424-4019) or visiting the Texas Rehabilitation Commission at the Brown Heatly Building at 4900 North Lamar; Austin, Texas; 78751.

This 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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Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
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PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 159. ADMINISTRATIVE RULES AND PROCEDURES

SUBCHAPTER D. CONTRACT DISPUTE RESOLUTION

40 TAC §§159.55 - 159.83

The Texas Commission for the Blind proposes new §159.55-159.83, relating to procedures for the negotiation and mediation of certain breach of contract claims asserted by contractors against the Commission pursuant to Government Code, Chapter 2260. Section 2260.052(c) requires that units of state government with rulemaking authority adopt rules to establish negotiation and mediation provisions. These proposed rules have been modeled closely after model rules provided to state agencies by the Office of the Attorney General and the State Office of Administrative Hearings.

§159.55 states that the subchapter governs the negotiation and mediation of claims of breach of contract asserted by a contractor against the Commission. §159.56 explains the types of actions not covered by the subchapter. §159.57 defines terms as they relate to this subchapter. §159.58 provides that the procedures in the subchapter are prerequisites to filing suit under Civil Practice & Remedies Code, Chapter 107 and Government Code, Chapter 2260. §159.59 advises that the Commission has not waived sovereign immunity to suit or to liability. §159.60 sets out the requirements and procedures of the notice of claim of breach of contract that the contractor must assert. §159.61 sets out the requirements and procedures of the counterclaim that the unit of state government must assert. §159.62 covers the disclosure of information.

§§159.63-69 cover negotiation between parties, including a timetable as it relates to negotiations between the contractor and the Commission, how the parties may conduct the negotiation, the parties' settlement approval procedures, the requirements of any resulting settlement agreement, and how the costs of negotiations will be handled by the parties. In the event the breach of contract claim is not resolved in its entirety §159.69 specifies the process by which a contractor may seek resolution of the dispute by SOAH.

§§159.70-159.80 cover the option of mediation available to parties to resolve a breach of contract claim, including a timetable, a method for conducting mediation, qualifications and immunity of the mediator, and settlement procedures. §159.81 provides that if mediation does not resolve the dispute the contractor may request that the claim be referred to SOAH. §159.82 contains a discussion about other assisted negotiation processes open to the parties when a dispute arises.

Alvin Miller, Chief Financial Officer, has determined that there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the rules.

Mr. Miller has also determined that for each year of the first five years that the proposed rules are in effect, the benefit to the public will be the more timely and efficient resolution of contract disputes between contractors and the Commission. The legislature, by enacting Government Code Chapter 2260, has determined that such process, with the potential to recover monetary damages for proven contractual breaches, is of public benefit.

The proposed rules will have no adverse economic effect on small or large businesses and/or persons that contract with the state. In the past, sovereign immunity prevented breach of contract claims against the state and the only process available to the public for resolution of such a claim was to seek and obtain legislative consent to sue. Chapter 2260 and these proposed rules will provide a process by which claims for breach of contract and counterclaims can be asserted and resolved.

The negotiation provisions themselves will impose no economic cost to persons required to comply with the proposed rules because they do not require the use of any particular negotiation mode or method. The proposed rules require only that the parties negotiate to resolve their dispute, and the mode or method of negotiation can be as simple or as complex as the parties decide. The proposed rules specify that absent an agreement to the contrary, the parties are responsible for costs they individually incur in a negotiation or other alternative dispute resolution process.

Similarly, the mediation provisions themselves will impose no economic cost to persons required to comply with the proposed rules unless the parties choose to mediate. If the parties do so, the rules specify that, absent an agreement to the contrary, the parties will share the costs of the mediator and each will be responsible for whatever additional costs they decide to incur for items such as document reproduction, attorneys' fees, experts' fees and consultants' fees.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The rule is proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which authorizes the agency to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposed new rules also affect Texas Government Code, Chapter 2260.

§159.55. Purpose.

This purpose of this subchapter is to establish rules for the efficient resolution of contract disputes between contractors and the Commission pursuant to Government Code, Chapter 2260, when efforts to resolve a disagreement concerning the contract in the ordinary course of contract administration under less formal procedures specified in the parties' contract have not been successful.

§159.56. Applicability.

(a) This subchapter does not apply to an action by the Commission for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This subchapter does not apply to a contract action proposed or taken by the Commission for which a contractor receiving

Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Government Code, Chapter 2001.

(c) This subchapter does not apply to contracts:

(1) between the Commission and the federal government or its agencies, another state or another nation;

(2) between the Commission and one or more other units of state government;

(3) between the Commission and a local governmental body, or a political subdivision of another state;

(4) between a subcontractor and a contractor;

(5) subject to §201.112 of the Transportation Code;

(6) within the exclusive jurisdiction of state or local regulatory bodies;

(7) within the exclusive jurisdiction of federal courts or regulatory bodies; or

(8) that are solely and entirely funded by federal grant monies other than for a project defined in §159.57(13) of this title, relating to definitions.

§159.57. Definitions.

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

(1) Executive director--The chief administrative officer responsible for the day-to-day operations of the Texas Commission for the Blind.

(2) Claim--A demand for damages by the contractor based upon the Commission's alleged breach of the contract.

(3) Commission--Texas Commission for the Blind.

(4) Contract--A written contract between the Commission and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the Commission; or

(B) to perform a project as defined by Government Code, §2166.001.

(5) Contractor--An independent contractor who has entered into a contract directly with the Commission. The term does not include:

(A) the contractor's subcontractor, officer, employee, agent or other person furnishing goods or services to a contractor;

(B) an employee of the Commission; or

(C) a student at an institution of higher education.

(6) Counterclaim--A demand by the Commission based upon the contractor's claim.

(7) Day--A calendar day. If an act is required to occur on a day falling on a Saturday, Sunday, or holiday, the first working day that is not one of these days should be counted as the required day for purpose of this act.

(8) Event--An act or omission or a series of acts or omissions giving rise to a claim, including, by way of illustration, but not limited to:

(A) for goods or services:

(i) the failure of the Commission to timely pay for goods and services;

(ii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Commission for work not performed under the contract or in substantial compliance with the contract terms;

(iii) the suspension, cancellation, or termination of the contract;

(iv) final rejection of the goods or services tendered by the contractor, in whole or in part;

(v) repudiation of the entire contract prior to or at the outset of performance by the contractor;

(vi) withholding liquidated damages from final payment to the contractor.

(B) in the context of a project:

(i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;

(ii) the failure to make timely progress payments required by the contract;

(iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the Commission for work not performed under the contract or in substantial compliance with the contract terms;

(iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;

(v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;

(vi) suspension, cancellation or termination of the contract;

(vii) rejection by the Commission, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;

(viii) repudiation of the entire contract prior to or at the outset of performance by the contractor;

(ix) withholding liquidated damages from final payment to the contractor;

(x) refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time, or the scope of work.

(9) Goods--Supplies, materials or equipment.

(10) Mediation--A consensual process in which an impartial third party, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.

(11) Negotiation--A consensual bargaining process in which the parties attempt to resolve a claim and counterclaim.

(12) Parties--The commission and contractor that have entered into a contract in connection with which a claim of breach of contract has been filed under this subchapter.

(13) Project--As defined in Government Code §2166.001, a building construction project that is financed wholly or partly by a specific appropriation, bond issue or federal money, including the construction of the following:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation or repair of an existing building, structure, or appurtenant facility or utility

(14) Services--The furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of the commission.

§159.58. Prerequisites to Suit.

The procedures contained in this subchapter are exclusive and required prerequisites to suit under the Civil Practice & Remedies Code, Chapter 107, and the Government Code, Chapter 2260.

§159.59. Sovereign Immunity.

This subchapter does not waive the commission's sovereign immunity to suit or liability.

§159.60. Contractor Claim.

(a) A contractor asserting a claim of breach of contract under the Government Code, Chapter 2260, shall file notice of the claim as provided by this section.

(b) The notice of claim shall:

(1) be in writing and signed by the contractor or the contractor's authorized representative;

(2) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the officer of the Commission designated in the contract to receive a notice of claim of breach of contract under the Government Code, Chapter 2260; if no person is designated in the contract, the notice shall be delivered to the Commission's executive director, and

(3) state in detail:

(A) the nature of the alleged breach of contract, including the date of the event that the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(B) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(C) the legal theory of recovery, i.e., breach of contract, including the causal relationship between the alleged breach and the damages claimed.

(c) In addition to the mandatory contents of the notice of claim as required by subsection (b) of this section, the contractor may submit supporting documentation or other tangible evidence to facilitate the commission's evaluation of the contractor's claim.

(d) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

§159.61. Agency Counterclaim.

(a) If asserting a counterclaim under the Government Code, Chapter 2260, the Commission shall file notice of the counterclaim as provided by this section.

(b) The notice of counterclaim shall:

(1) be in writing;

(2) be delivered by hand, certified mail return receipt requested or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of claim of breach of contract; and

(3) state in detail:

(A) the nature of the counterclaim;

(B) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(C) the legal theory supporting the counterclaim.

(c) In addition to the mandatory contents of the notice of counterclaim required by subsection (b) of this section, the Commission may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the Commission's counterclaim.

(d) The notice of counterclaim shall be delivered to the contractor no later than 90 days after the Commission's receipt of the contractor's notice of claim.

(e) Nothing herein precludes the Commission from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

§159.62. Request for Voluntary Disclosure of Additional Information.

(a) Upon the filing of a claim or counterclaim, parties may request to review and copy information in the possession or custody or subject to the control of the other party that pertains to the contract claimed to have been breached, including, without limitation:

(1) accounting records;

(2) correspondence, including correspondence between the Commission and outside consultants it utilized in preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, materialmen, and vendors;

(3) schedules;

(4) the parties' internal memoranda;

(5) documents created by the contractor in preparing its offer to the Commission and documents created by the Commission in analyzing the offers it received in response to a solicitation.

(b) Subsection (a) of this section applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(c) The contractor and the Commission may seek additional information directly from third parties, including, without limitation, the Commission's third-party consultants and the contractor's subcontractors.

(d) Nothing in this section requires any party to disclose requested information or any matter that is privileged under Texas and federal laws.

(e) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

§159.63. Negotiation.

The parties shall negotiate in accordance with the timetable set forth in subsection (b) of this section to attempt to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

§159.64. Negotiation timetable.

(a) Following receipt of a contractor's notice of claim, the executive director or other designated representative shall review the contractor's claim(s) and the Commission's counterclaim(s), if any, and initiate negotiations with the contractor to attempt to resolve the claim(s) and counterclaim(s). Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or

(3) the date the Commission receives the contractor's notice of claim.

(b) Delays. The Commission may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when the Commission is ready to begin negotiations.

(c) Agreed schedule. The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the deadlines set forth in subsections (b) or (c) of this section, whichever is applicable.

(d) Completion of negotiations. Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this subchapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the Commission receives the contractor's notice of claim.

(e) Extensions. The parties may agree in writing to extend the time for negotiations on or before the 270th day after the Commission receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a date certain. The parties may enter into a series of written extension agreements that comply with the requirements of this section.

(f) Schedule for requesting contested case hearing. The contractor may request a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to §159.69 of this title (relating to Request for Contested Case Hearing) after the 270th day after the Commission receives the contractor's notice of claim, or the expiration of any extension agreed to under subsection (f) of this section.

(g) Schedule for agreement to mediate. The parties may agree to mediate the dispute at any time before the 270th day after the Commission receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §§159.70-159.80 of this chapter.

(h) Nothing in this section is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in subsections (b) and (c) of this section, or from continuing or resuming negotiations after the contractor requests a contested case hearing before SOAH.

§159.65. Conduct of Negotiation.

(a) A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method that permits the parties to identify their respective positions, discuss their respective differences, confer with their respective advisers, exchange offers of settlement, and settle.

(b) The parties may conduct negotiations with the assistance of one or more neutral third parties. If the parties choose to mediate their dispute, the mediation shall be conducted in accordance with §§159.70-159.80 of this title. Parties may choose an assisted negotiation process other than mediation, including without limitation, processes such as those described in §§159.82-159.83 of this title.

(c) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support their respective claims, defenses, counterclaims or positions.

(d) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the Public Information Act.

§159.66. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed prior to, or at the beginning of, negotiations. To the extent possible, the parties shall select negotiators who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§159.67. Settlement Agreement after Negotiation.

(a) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(b) To be enforceable, a settlement agreement must be in writing and signed by representatives of the contractor and the commission who have authority to bind each respective party.

(c) A partial settlement does not waive a parties' rights under the Government Code, Chapter 2260, as to the parts of the claims or counterclaims that are not resolved.

§159.68. Costs of Negotiation.

Unless the parties agree otherwise, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, the costs of attorney's fees, consultant's fees and expert's fees.

§159.69. Request for Contested Case Hearing.

(a) If a claim for breach of contract is not resolved in its entirety through negotiation, mediation or other assisted negotiation process in accordance with this chapter on or before the 270th day after the Commission receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to §159.65(f) of this title (relating to Negotiated Timetable), the contractor may file a request with the Commission for a contested case hearing before SOAH.

(b) A request for a contested case hearing shall state the legal and factual basis for the claim, and shall be delivered to the executive director or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to §159.65(f) of this title (relating to Negotiated Timetable).

(c) The Commission shall forward the contractor's request for contested case hearing to SOAH within a reasonable period of time, not to exceed thirty days after receipt of the request.

(d) The parties may agree to submit the case to SOAH before the 270th day after the notice of claim is received by the Commission if they have achieved a partial resolution of the claim or if an impasse

has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

§159.70. Option to Mediate.

(a) The contractor and Commission may agree to mediate the dispute at any time before the 270th day after the Commission receives a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.

(b) The mediation shall be governed by rules contained in this subchapter.

§159.71. Mediation Timetable.

A contractor and the Commission may mediate the dispute even after the case has been referred to SOAH for a contested case. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

§159.72. Request for Referral.

If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Commission. Nothing in these rules prohibits the contractor and the Commission from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

§159.73. Conduct of Mediation.

(a) A mediator may not impose his or her own judgment on the issues for that of the parties. The mediator must be acceptable to both parties.

(b) The mediation is subject to the provisions of the Governmental Dispute Resolution Act, Government Code, Chapter 2009.

(c) To facilitate a meaningful opportunity for settlement, the parties shall select, to the extent possible, representatives who are knowledgeable about the dispute, who are in a position to reach agreement, or who can credibly recommend approval of an agreement.

§159.74. Agreement to Mediate.

(a) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time they enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.

(b) Any agreement to mediate shall include consideration of the following factors:

(1) The source of the mediator. Potential sources of mediators include governmental officers or employees who are qualified as mediators under Section 154.052, Civil Practice and Remedies Code, private mediators, SOAH, the Center for Public Policy Dispute Resolution at The University of Texas School of Law, an alternative dispute resolution system created under Chapter 152, Civil Practice and Remedies Code, or another state or federal agency or through a pooling agreement with several state agencies. Before naming a mediator source in a contract, the parties should contact the mediator source to be sure that it is willing to serve in that capacity. In selecting a mediator, the parties should use the qualifications set forth in §159.75 of this title, pertaining to qualifications and immunity of mediator.

(2) The time period for the mediation. The parties should allow enough time in which to make arrangements with the mediator and attending parties to schedule the mediation, to attend and participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement. While this time frame can vary according to the needs and schedules of the mediator and parties, it is important that the parties allow adequate time for the process.

(3) The location of the mediation.

(4) Allocation of costs of the mediator.

(5) The identification of representatives who will attend the mediation on behalf of the parties, if possible, by name or position within the Commission or contracting entity.

(6) The settlement approval process in the event the parties reach agreement at the mediation.

§159.75. Qualifications and Immunity of the Mediator.

(a) The mediator shall possess the qualifications required under Civil Practice and Remedies Code, §154.052, be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, and have the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, if applicable.

(b) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.

(c) The parties should obtain from the prospective mediator the ethical standards that will govern the mediation.

§159.76. Confidentiality of Mediation and Final Settlement Agreement.

(a) A mediation conducted under this section is confidential in accordance with Government Code, §2009.054.

(b) The confidentiality of a final settlement agreement to which the Commission is a signatory that is reached as a result of the mediation is governed by Government Code, Chapter 552.

§159.77. Costs of Mediation.

Unless the contractor and Commission agree otherwise, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

§159.78. Settlement Approval Procedures.

The parties' settlement approval procedures shall be disclosed by the parties prior to the mediation. To the extent possible, the parties shall select representatives who are knowledgeable about the subject matter of the dispute, who are in a position to reach agreement, and who can credibly recommend approval of an agreement.

§159.79. Initial Settlement Agreement.

Any settlement agreement reach during the mediation shall be signed by the representatives of the contractor and the Commission, and shall describe any procedures required to be followed by the parties in connection with final approval of the agreement.

§159.80. Final Settlement Agreement.

(a) A final settlement agreement reached during or as a result of mediation that resolves an entire claim or any designated and severable portion of a claim shall be in writing and signed by representatives of the contractor and the Commission who have authority to bind each respective party.

(b) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(c) A partial settlement does not waive a contractor's rights under the Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

§159.81. Referral to the State Office of Administrative Hearings.

If mediation does not resolve all issues raised by the claim, the contractor may request that the claim be referred to SOAH by the Commission. Nothing in these rules prohibits the contractor and Commission from mediating their dispute after the case has been referred for contested case hearing, subject to the rules of SOAH.

§159.82. Other Assisted Negotiation Processes.

(a) Parties to a contract dispute under Government Code, Chapter 2260 may agree, either contractually or when a dispute arises, to use assisted negotiation (alternative dispute resolution) processes in addition to negotiation and mediation to resolve their dispute.

(b) The following factors may help parties decide whether one or more assisted negotiation processes could help resolve their dispute:

(1) The parties recognize the benefits of an agreed resolution of the dispute;

(2) The expense of proceeding to contested case hearing at SOAH is substantial and might outweigh any potential recovery;

(3) The parties want an expedited resolution;

(4) The ultimate outcome is uncertain;

(5) There exists factual or technical complexity or uncertainty that would benefit from expertise of a third-party expert for technical assistance or fact-finding;

(6) The parties are having substantial difficulty communicating effectively;

(7) A mediator third party could facilitate the parties' realistic evaluation of their respective cases;

(8) There is an ongoing relationship that exists between parties;

(9) The parties want to retain control over the outcome;

(10) There is a need to develop creative alternatives to resolve the dispute;

(11) There is a need for flexibility in shaping relief;

(12) The other side has an unrealistic view of the merits of their case;

(13) The parties (or aggrieved persons) need to hear an evaluation of the case from someone other than their lawyers.

§159.83. Methods of Other Assisted Negotiation and Mediation Processes.

Any of the following methods, or a combination of these methods, or any assisted negotiation process agreed to by the parties, may be used in seeking resolution of disputes or other controversy arising under Government Code, Chapter 2260. If the parties agree to use an assisted negotiation procedure, they shall agree in writing to a detailed description of the process prior to engaging in the process.

(1) Mediation, as set forth in this subchapter.

(2) Early evaluation by a third-party neutral, which is a confidential conference during which the parties and their counsel present the factual and legal bases of their claim and receive a nonbinding assessment by an experienced neutral with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute. After summary presentations, the third-party neutral identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible the likelihood of liability and the dollar range of damages that appear reasonable to him or her. This is a less complicated procedure than the mini-trial described in paragraph (a)(4) of this section. It may be appropriate for only some issues in dispute, such as where there are clear-cut differences over the appropriate amount of damages. This process may be helpful when:

(A) the parties agree that the dispute can be settled;

(B) the dispute involves specific legal issues;

(C) the parties disagree on the amount of damages;

(D) the opposition has an unrealistic view of the dispute; or

(E) the neutral is a recognized expert in the subject area or area of law involved.

(3) Neutral fact-finding by an expert, in which a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery in the dispute has been completed and the significance of particular technical or scientific issues is apparent. The parties may agree in writing that the fact-finding will be binding on them in later proceedings (and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing), or that it will be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

(A) Factual issues requiring expert testimony may be dispositive of liability or damage issues;

(B) The use of a neutral is cost effective;

(C) The neutral's findings could narrow factual issues for contested case hearing.

(4) Mini-trial, which is generally a summary proceeding before a representative of upper management from each party, with authority to settle, and a third-party neutral selected by agreement of the parties.

(A) A mini-trial is usually divided into three phases: a limited information exchange phase, the actual hearing, and post-hearing settlement discussions.

(B) No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.

(C) The information exchange stage should be brief but it must be sufficient for each party to understand and appreciate the key issues involved in the case. At a minimum, parties should exchange key exhibits, introductory statements, and a summary of witness's testimony.

(D) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that must be decided before the case can be resolved. The third-party neutral presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than 1-2 days.

(E) Settlement discussions, facilitated by the third-party neutral, take place after the hearing. The parties may ask the neutral to formally weigh up the evidence and arguments and give an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to resolve the dispute by other means.

(F) Mini-trials may be appropriate when:

(i) The dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathering;

(ii) The matter justifies the senior executive time required to complete the process;

(iii) The issues involved include highly technical mixed questions of law and fact;

(iv) The matter involves trade secrets or other confidential or proprietary information; or

(v) The parties seek to narrow the large number of issues in dispute.

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

Filed with the Office of the Secretary of State, on May 7, 2001.

TRD-200102571
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 377-0611

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CHAPTER 163. VOCATIONAL REHABILITATION PROGRAM

SUBCHAPTER E. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §163.61

The Texas Commission for the Blind proposes an amendment to §163.61, concerning the scope of Subchapter E, Consumer Participation in Cost of Services. The amendment exempts personal assistance services from consumer participation and modifies the language on exemption of reader and interpreter services. The amendments are required as a result of revised federal regulations.

Alvin Miller, Chief Financial Officer, has determined that there will be no foreseeable implications relating to cost or revenues of the state or local governments as a result of enforcing or administering the amended rule.

Mr. Miller has also determined that for each year of the first five years the rules are in effect the anticipated public benefits will be an increase in the services in which consumer participation is not required. There will be no economic cost to small businesses or individuals as a result of the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 377-0611, and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The rule is proposed under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which authorizes the agency to establish and maintain, by rule, guidelines for the delivery of services by the Commission consistent with state and federal law.

The proposal affects no other statutes.

§163.61. Scope of Subchapter.

(a) In addition to the exception noted in subsection (b) of this section, all [~~All~~] vocational rehabilitation services are subject to this subchapter except the following:

(1) assessment for determining eligibility and priority for services, except for vocational rehabilitation services other than those of a diagnostic nature provided under an extended evaluation;

(2) assessment for determining vocational rehabilitation needs;

(3) vocational rehabilitation counseling, guidance, and referral services by commission staff;

(4) employment assistance services by commission staff;

(5) training;

(6) vocational rehabilitation teacher services (including consumable supplies);

(7) any auxiliary aid or service (e.g., interpreter services, reader services) that an individual with a disability needs in order to participate in the VR program; or [~~reader and interpreter services;~~]

(8) orientation and mobility services;

(9) tuition and fees;

(10) assistive technology devices and other necessary equipment; [~~and~~]

(11) personal assistance services;

(12) [~~(11)~~] services paid for or reimbursed by a source other than the commission.

(b) Individuals receiving Social Security benefits under Titles II or XVI of the Social Security Act are exempt from this subsection.

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

Filed with the Office of the Secretary of State, on May 7, 2001.

TRD-200102572
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 377-0611

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §362.1, concerning Definitions. The amendment will delete definitions which have been moved to the Supervision Chapter, and add definitions for Non-Licensed Personnel, Occupational Therapy Practitioners, and delete a phrase in the Temporary License definition which is not consistent with the OT Practice Act.

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

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

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§362.1. Definitions.

The following words, terms, and phrases, when used in this part, shall have the following meaning, unless the context clearly indicates otherwise.

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

[~~(8) Close Personal Supervision--Implies direct, on-site contact whereby the supervising OTR, LOT, COTA or LOTA is able to respond immediately to the needs of the patient.~~]

(8) [~~(9)~~] Complete Application--Notarized application form with photograph, license fee, jurisprudence examination with at least 70% of questions answered correctly and all other required documents.

(9) [~~(10)~~] Complete Renewal--Contains renewal fee, renewal form with signed continuing education affidavit, home/work address(es) and phone number(s), and jurisprudence examination with at least 70% of questions answered correctly [~~and supervision log (if applicable)~~].

(10) [~~(11)~~] Consultation--The provision of occupational therapy expertise to an individual or institution. This service may be provided on a one time only basis or on an ongoing basis.

(11) [~~(12)~~] Continuing Education Committee--Reviews and makes recommendations to the board concerning continuing education requirements and special consideration requests.

[~~(13) Continuing Supervision, OT--Includes, at a minimum, the following:~~]

[~~(A) Frequent communication between the supervising OTR or LOT and the temporary licensee by telephone, written report or conference, including the review of progress of patients/clients assigned to the OT.~~]

[~~(B) Face-to-face encounters twice a month where the OTR or LOT directly observes the temporary licensee providing OT services to one or more patients/clients.~~]

[~~(14) Continuing Supervision, OTA--Includes, at a minimum, the following:~~]

[~~(A) Frequent communication between the supervising OTR or LOT and the temporary licensee by telephone, written report or conference, including the review of progress of patients/clients assigned to the OTA.~~]

[~~(B) Face-to-face encounters twice a month where the OTR or LOT directly observes the temporary licensee providing OT services to one or more patients/clients.~~]

[~~(C) Sixteen hours of supervision per month must be documented for a full-time OTA. A part-time OTA may prorate the documented supervision, but shall document no less than eight hours per month.~~]

(12) [~~(15)~~] Coordinator of Occupational Therapy Program--The employee of the Executive Council who carries out the functions of the Texas Board of Occupational Therapy Examiners.

(13) [~~(16)~~] Direct Service--Refers to the provision of occupational therapy services to individuals to develop, improve, and/or restore occupational functioning.

(14) [~~(17)~~] Endorsement--The process by which the board issues a license to a person currently licensed in another state, the District of Columbia, or territory of the United States that maintains professional standards considered by the board to be substantially equivalent to those set forth in the Act, and is apply for a Texas license for the first time.

(15) [~~(18)~~] Evaluation--Refers to a process of determining an individual's status for the purpose of determining the need for occupational therapy services or for implementing a treatment program.

(16) [~~(19)~~] Examination--The Examination as provided for in Section 17 of the Act. The current Examination is the initial certification Examination given by the National Board for Certification in Occupational Therapy (NBCOT).

(17) [~~(20)~~] Executive Council--The Executive Council of Physical Therapy and Occupational Therapy Examiners.

(18) [~~(21)~~] Executive Director--The employee of the Executive Council who functions as its agent. The Executive Council delegates implementation of certain functions to the Executive Director.

(19) [~~(22)~~] First Available Examination--Refers to the first scheduled Examination after successful completion of all educational requirements.

[~~(23) General Supervision--Includes, at a minimum, the following:~~]

[~~(A) Frequent communication between the supervising OTR or LOT and the regular or provisional COTA or LOTA by telephone, written report or conference, including the review of progress of patients/clients assigned to the COTA or LOTA.~~]

[~~(B) Eight hours of supervision per month must be documented for a full-time COTA or LOTA. Twenty-five percent of the required documented supervision time must consist of face-to-face encounters where the OTR or LOT directly observes the COTA or LOTA providing OT services to one or more patients/clients.~~]

[~~(C) A part-time COTA or LOTA may prorate the documented supervision.~~]

(20) [~~(24)~~] Health Care Condition--See Medical Condition

(21) [~~(25)~~] Investigation Committee--Reviews and makes recommendations to the board concerning complaints and disciplinary actions regarding licensees and facilities.

(22) [~~(26)~~] Investigator--The employee of the Executive Council who conducts all phases of an investigation into a complaint filed against a licensee, an applicant, or an entity regulated by the board.

(23) [~~(27)~~] Jurisprudence Examination--An examination covering information contained in the Texas Occupational Therapy Practice Act and Texas Board of Occupational Therapy Examiners rules. This test is an open book examination with multiple choice or true-false questions. [~~made up of multiple choice and/or true-false questions.~~] The passing score is 70%.

(24) [~~(28)~~] License--Document issued by the Texas Board of Occupational Therapy Examiners which authorizes the practice of occupational therapy in Texas.

(25) [~~(29)~~] Licensed Occupational Therapist (LOT)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapist in Texas.

(26) [~~(30)~~] Licensed Occupational Therapy Assistant (LOTA)--A person who holds a valid regular or provisional license to practice or represent self as an occupational therapy assistant in Texas and who is required to practice under the general supervision of an OTR or LOT.

(27) [~~(31)~~] Medical Condition--A condition of acute trauma, infection, disease process, psychiatric disorders, addictive disorders, or post surgical status. Synonymous with the term health care condition.

(28) [~~(32)~~] Monitored Services--The checking on the status/condition of students, patients, clients, equipment, programs, services, and staff in order to make appropriate adjustments and recommendations. Minimum contact for the purpose of monitoring will be one time a month.

(29) [~~(33)~~] NBCOT (formerly AOTCB)--National Board for Certification in Occupational Therapy (formerly American Occupational Therapy Certification Board).

(30) Non-licensed Personnel--OT Aide or OT Orderly or other person not licensed by this board who provides support services to occupational therapists and occupational therapy assistants, and whose activities require on-the-job training and close personal supervision.

(31) [~~(34)~~] Non-Medical Condition--A condition where the ability to perform occupational roles is impaired by developmental disabilities, learning disabilities, the aging process, sensory impairment, psychosocial dysfunction, or other such conditions which does not require the routine intervention of a physician.

(32) [~~(35)~~] Occupational Therapist (OT)--A person who holds a Temporary License to practice as an occupational therapist in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(33) [~~(36)~~] Occupational Therapist, Registered (OTR)--An alternate term for a Licensed Occupational Therapist. An individual who uses this term must hold a regular or provisional license to practice or represent self as an occupational therapist in Texas. An individual who uses this term is responsible for ensuring that he or she is otherwise qualified to use it.

(34) [~~(37)~~] Occupational Therapy--The use of purposeful activity or intervention to achieve functional outcomes. Achieving functional outcomes means to develop or facilitate restoration of the highest possible level of independence in interaction with the environment. Occupational Therapy provides services to individuals limited by physical injury or illness, a dysfunctional condition, cognitive impairment, psychosocial dysfunction, mental illness, a developmental or learning disability or an adverse environmental condition, whether due to trauma, illness or condition present at birth. Occupational therapy services include but are not limited to:

(A) The evaluation/assessment, treatment and education of or consultation with the individual, family or other persons;

(B) interventions directed toward developing, improving or restoring daily living skills, work readiness or work performance, play skills or leisure capacities;

(C) intervention methodologies to develop restore or maintain sensorimotor, oral-motor, perceptual or neuromuscular functioning; joint range of motion; emotional, motivational, cognitive or psychosocial components of performance.

(35) [~~(38)~~] Occupational Therapy Assistant (OTA)--A person who holds a Temporary License to practice as an occupational therapy assistant in the state of Texas, who is waiting to receive results of taking the first available Examination, and who is required to be under continuing supervision of an OTR or LOT.

(36) [~~(39)~~] Occupational Therapy Plan of Care--A written statement of the planned course of Occupational Therapy intervention for a patient/client. It must include goals, objectives and/or strategies, recommended frequency and duration, and may also include methodologies and/or recommended activities.

(37) Occupational Therapy Practitioners--Occupational Therapists and Occupational Therapy Assistants licensed by this board.

[~~(40) OT Aide or OT Orderly--A person who aids in the practice of occupational therapy and whose activities require on-the-job training and close personal supervision by an OTR, LOT, COTA or LOTA.~~]

(38) [~~(41)~~] Place(s) of Business--Any facility in which a licensee practices.

(39) [~~(42)~~] Practice--Providing occupational therapy as a clinician, practitioner, educator, or consultant. Only a person holding a license from TBOTE may practice occupational therapy in Texas.

(40) [~~(43)~~] Recognized Educational Institution--An educational institution offering a course of study in occupational therapy that has been accredited or approved by the American Occupational Therapy Association.

(41) [~~(44)~~] Regular License--A license issued by TBOTE to an applicant who has met the academic requirements and who has passed the Examination.

(42) [~~(45)~~] Rules--Refers to the TBOTE Rules.

(43) [~~(46)~~] Screening--A process or tool used to determine a potential need for occupational therapy interventions. This information may be compiled using observation, medical or other records, the interview process, self-reporting, and/or other documentation.

(44) Supervision--See Chapter 373 of this title (relating to Supervision).

(45) [~~(47)~~] Temporary License--A license issued by TBOTE to an applicant who meets all the qualifications for a license except taking the first available Examination after completion of all education requirements[~~; or a license issued to an applicant who has passed the Examination but has not been employed as an OTR, LOT, COTA or LOTA for five years or more from the receipt date of current, complete application for licensure with TBOTE~~].

This 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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John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
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For further information, please call: (512) 305-6900

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CHAPTER 364. REQUIREMENTS FOR LICENSURE

40 TAC §§364.1 - 364.4

The Texas Board of Occupational Therapy Examiners proposes amendments to §§364.1 - 364.4 concerning Requirements for Licensure. The amendments will delete sponsorship requirements for Provisional license, outline re-exam procedures, and more clearly defines limits on applications.

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

Mr. Maline also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be clarification of re-examination procedures, remove requirements for the Provision license and explain the time frames for applications. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed rules may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendments are proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the amended sections.

§364.1. Requirements for Licensure.

(a) - (h) (No change.)

(i) The first regular license is valid from the date of issuance until the last day of the applicant's next birth month. If the applicant's birth month is within 90 days after the license is issued, the license will be valid until the last day of the birth month in the following year. An initial regular license will be valid no less than 3 [~~4~~] months, no longer than 15 months.

§364.2. Initial License by Examination.

(a) An Applicant applying for license by examination must

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

(3) Application for license must be received no later than two years following date of exam.

(b) (No change.)

(c) An applicant who fails an examination may take additional examinations by sending in the appropriate fee with the board's re-exam form. [~~a second examination by submitting a new application and fee.~~]

[~~(1) An applicant who fails the second examination may take a third examination after a specific period of not longer than one year if the applicant meets the requirements prescribed for a previous examination.~~]

[~~(2) An applicant who fails the third examination may take an additional test at the board's discretion.~~]

(d) An application for license is valid for one year from the date it is received by the board. During that year, a re-exam fee may be paid to the board for each subsequent exam taken by the applicant. At the end of the year the application fee must be paid to continue the application process for the second year. The process will then continue under the terms of the original application.

§364.3. Temporary License.

(a) (No change.)

(b) An applicant who has not begun the process before the first available exam may not obtain a temporary license but may become licensed under §364.2 of this title (relating to Initial License by Examination).

(c) [~~(b)~~] To be issued a temporary license, the applicant must:

(1) meet all provision of §364.1 of this title (relating to Requirement for a License);

(2) meet all provisions of §364.2 of this title (relating to License by Examination);

(3) submit the Confirmation of Examination Registration and Eligibility to Examine form from NBCOT, which must be sent directly to the board by NBCOT;

(4) submit a signed Verification of Supervision form as provided by the board;

(5) send the board the application fee as set by the Executive Council.

(d) [~~(c)~~] If the applicant fails to take the first available examination, or fails to have the scores reported, the temporary license will be revoked.

(e) [~~(d)~~] If the applicant fails the examination, the temporary license is void and must be returned. No second temporary licenses are issued after failure of the examination.

§364.4. Licensure by Endorsement.

(a) (No change.)

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

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

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John Maline
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Texas Board of Occupational Therapy Examiners
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CHAPTER 367. CONTINUING EDUCATION

40 TAC §§367.1 - 367.3

The Texas Board of Occupational Therapy Examiners proposes an amendment to §367.1 and proposes new §367.2 and §367.3 concerning Continuing Education. The amendments and new rules will add addition means of obtaining continuing education, explain the requirement to new licensees, and add a requirement for those finishing this requirement later than 90 days after the license is due to be renewed. The amendment and new rules add the Type 1 and Type 2 continuing education requirements and a listing of not acceptable continuing education.

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

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

Comments on the proposed rules may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment and new rules are proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the proposal.

§367.1. Continuing Education.

(a) The Act[~~, §5(A),~~] mandates licensee participation in a continuing education program for license renewal. All continuing education must be directly relevant to the profession of occupational therapy. The licensee is solely responsible for keeping accurate documentation of all continuing education requirements. [~~The Executive Council staff will conduct, at least yearly, an audit of a randomly drawn sample of licensees to determine compliance with continuing education rules. Failure to maintain accurate documentation, or failure to respond to a request to submit documentation for an audit, may result in disciplinary action by the board. The audit results will be reported to the board.~~]

[~~(1) Licensees randomly selected for the audit must provide to TBOTE appropriate documentation within 30 days of notification.~~]

[~~(2) Continuing Education Documentation must be maintained for two years from the date of the last renewal for auditing purposes.~~]

(b) Continuing education documentation includes, but is not limited to, a final official transcript, AOTA self-study completion certificates, copies of official sign-in or attendance sheets, course certificates of attendance, certificates of completion, and official correspondence from the board approving requesting credits.

(c) The first regular license, which has a duration of less than 2 years, does not have a continuing education requirement.

(d) All licensees, except those addressed in subsection (b) of this section must complete 30 hours of continuing education every two years during the period of time the license is current in order to renew the license. Those renewing a license more than 90 days late must submit proof of continuing education for the renewal.

(1) General information hereafter referred to as Type 1 continuing education is relevant to the profession of occupational therapy. Examples include by are not limited to: supervision, education, documentation, quality improvement, administration, reimbursement and other OT related subjects.

(2) A minimum of 15 hours of continuing education must be in skills relevant to occupational therapy practice with patients or clients hereafter referred to as Type 2.

(A) Type 2 courses teach occupational therapy treatment and intervention with patients or clients.

(B) All continuing education hours may be in Type 2.

(e) Any continuing education submissions may be counted only one time.

[~~(b) Licensees must complete 30 hours of continuing education every two years. These requirements must be met before the month the license is expected to be renewed.~~]

[~~(c) A minimum of 15 hours of continuing education must be in skills relevant to occupational therapy practice with patients or clients. This requirement is effective beginning with licenses due for renewal in January 2000.~~]

[~~(d) Continuing education credit may be earned in the following manner:~~]

[~~(1) Attendance at workshops, refresher courses, in-services, professional conferences, seminars, or facility-based continuing education programs. Hour for hour credit on program content only. No maximum;~~]

[~~(2) Presentations by Licensee:~~]

[~~(A) Professional presentations, e.g., in-services, workshops, institutes (any presentation counted only one time). Hour for hour credit, 10 hours maximum;~~]

[~~(B) Community/service organization presentations (any presentation counted only one time). Hour for hour credit. Four hours maximum;~~]

[~~(3) Formal academic coursework:~~]

[~~(A) One or two credit hour classes 2 continuing education hours;~~]

[(B) Three or four credit hour classes 4 continuing education hours;]

[(4) AOTA Self-study Series: Hour for hour credit based on the number of hours awarded by AOTA for each course. (Any course can be counted only once per licensee.) No maximum;]

[(5) Development of publications, media materials or research/grant activities. A request to receive credit for this category must be submitted in writing to the Coordinator of Occupational Therapy no later than 60 days before the current license expiration date. The request must include a description of the activity/course, the sponsoring group, its direct relevance to the occupational therapy profession, and the number of hours to complete it. (Any publication, media materials, or research or grant activities can be counted only once per licensee). 10 hours;]

[(6) First Aid and cardiopulmonary resuscitation training, either initial instruction or refresher training, can only be submitted for continuing education once per licensee;]

[(7) Home study courses, Internet-based courses, and videotape instruction: A request to receive credit for this category must be submitted in writing to the Coordinator of Occupational Therapy no later than 60 days before the current license expiration date. The request must include the course title, the number of hours required for completion, the sponsoring group, and a description of its direct relevance to the occupational therapy profession. (Any course or videotape can be counted only once per licensee). No maximum;]

[(e) Any deviation from the above continuing education categories will be reviewed on a case by case basis by the Coordinator of Occupational Therapy or by the Continuing Education Committee. The request must include a description of the activity/course, sponsoring group, its direct relevance to the occupational therapy professional, and the number of hours to complete it. A request for special consideration must be submitted in writing a minimum of 60 days prior to expiration of the license.]

[(f) Continuing education documentation includes, but is not limited to, final official transcripts, AOTA self-study completion certificates, copies of official sign-in or attendance sheets, and official correspondence from the Executive Council or board approving requested credits.]

[(1) The continuing education record card (blue card) will no longer be accepted as proof of continuing education activities effective December 1, 2001.]

[(2) Documentation must identify the licensee by name and license number, and must include the date and title of the course, the signature of the authorized signer, and the number of CEUs or contact hours awarded for the course.]

§367.2. Categories of Continuing Education.

(a) Continuing education undertaken by a licensee for renewal shall be acceptable if it falls in one or more of the following categories.

(1) Formal academic courses related to occupational therapy. Completion of course work at or through an accredited college or university shall be counted as follows: three CE hours for each credit hour of a course with a grade of A, B, C, and/or P (Pass). Thus a three-credit course counts for 9 credit hours of continuing education. All college course work must comply with Type 1 and Type 2 as outlined in §367.1 of this title (relating to Continuing Education).

(2) In-service educational programs, training programs, institutes, seminars, workshops, facility based courses, and conferences in occupational therapy. Hour for hour credit on program content only, no maximum.

(3) Development of publication, media materials or research/grant activities per two year renewal period.

(A) Published scholarly work in a peer-review journal, 15 hours maximum.

(B) Secondary author (second or other author), 7 hours maximum.

(C) Published book or book chapter(s), 10 hours maximum.

(D) Second author, 6 hours maximum.

(E) Other publications such as newsletter and trade magazines, 2 hours maximum.

(F) Principle investigator or co-principle investigator in grant or research proposals accepted for consideration.

(4) Home study courses, Internet-based courses, and videotape instruction.

(A) Courses must fit the criteria for continuing education for Type 1 or Type 2.

(B) These courses must have a post-test and give a certificate of completion.

(C) Internet courses must reflect a pre-determined number of credit hours.

(5) Professional presentations by licensee

(A) Professional presentation, e.g. in-services, workshops, institutes: any presentations counted only one time. Hour for hour credit. 10 hour maximum.

(B) Community/Service organization presentation: any presentation counted once. Hour for hour credit. 10 hours maximum.

(6) Any deviation from the above continuing education categories will be reviewed on a case by case basis by the Coordinator of Occupational Therapy or by the Continuing Education Committee. A request for special consideration must be submitted in writing a minimum of 60 days prior to expiration of the license.

(b) Unacceptable Continuing Education Activities include but are not limited to

(1) Any non-instructional time frames such as breaks, meals, introductions, and pre/post testing.

(2) Business meetings

(3) Exhibit hall attendance

(4) Reading journals

(5) Courses such as grant writing, case management, massage therapy, general management and business, social work, defensive driving, water safety, team building, GRE, GMAT, MCAT preparation, cooking for health, weight management, women's health and stress management, reading techniques, geriatric anthology, general foreign languages.

§367.3. Continuing Education Audit.

(a) The board shall select for audit a random sample of licensees. The audit will cover a period for which the licensee has already completed the 30 hours required and has signed to that fact on the renewal form.

(b) Licensees randomly selected for the audit must provide to TBOTE appropriate documentation within 30 days of notification.

Documentation submitted must specify whether they are Type 1 or Type 2.

(c) Continuing education documentation must be maintained for two years from the date of the last renewal for auditing purposes, or a total of four years.

(1) The continuing education record card (blue card) will no longer be accepted as proof of continuing education activities, effective December 1, 2001.

(2) Documentation must identify the licensee by name and license number, and must include the date and title of the course, the signature of the authorized signer, and the number of CEUs or contact hours awarded for the course.

(d) Knowingly providing false information or failure to respond during the audit process or the renewal process is grounds for disciplinary action.

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

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CHAPTER 370. LICENSE RENEWAL

40 TAC §370.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §370.1 concerning License Renewal. The amendments add a requirement that those renewing their license more than 90 days late must submit proof of their continuing education with their renewal.

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

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of late renewal requirements. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§370.1. License Renewal.

(a) Licensees are required to renew their licenses every two years by the end of their birth month. A licensee may not provide occupational therapy services without a current license or renewal certificate in hand. If a license expires after all required items are submitted but before the licensee received the renewal certificate, the licensee may not provide occupational therapy services until the renewal certificate is in hand.

(1) General Requirements. The renewal application is not complete until the Board receives all required items. The components required for license renewal are:

(A) Signed renewal application form verifying completion of 30 hours of continuing education (see [~~SEE~~] Chapter 367 of this title (relating to Continuing Education));

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

(2) (No change.)

(3) Late Renewals. A renewal application is late if all required materials are not postmarked prior to the expiration date of the license. Licensees who do not complete the renewal process prior to the expiration date are subject to late fees as described.

(A) (No change.)

(B) If the license has been expired for more than 90 days, the late fee is equal to the examination fee for the license. Those renewing a license more than 90 days late must submit the documentation for the required continuing education with the renewal.

(C) If the license has been expired for one year or longer, the person may not renew the license. To obtain a new license, the applicant must retake and pass the national examination and comply with the requirements and procedure for obtaining an original license set by Chapter 364 of this title (relating to Requirements for Licensure).

(b) -(c) (No change.)

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

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CHAPTER 372. PROVISION OF SERVICES

40 TAC §372.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §372.1 concerning Provision of Services. The amendments are a reorganization of the chapter. It differentiates between medical and non-medical condition, screening, evaluation and plan of care.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there

will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of terms and clarification of roles. It also adds the ability to work in telehealth. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§372.1. Provision of Services.

(a) Medical Conditions

(1) Treatment for a medical condition by an occupational therapy practitioner requires a referral from a licensed referral source.

(2) The referral may be an oral or singed written order. If oral, it must be followed by a signed written order.

(3) If a written referral signed by the referral source is not received by the third treatment or within two weeks from the receipt of the oral referral, whichever is late, the therapist must have documented evidence of attempt(s) to contact the referral source for the written referral (e.g., registered letter, fax, certified letter, email, return receipt, etc.). The therapist must exercise professional judgement to determine cessation or continuation of treatment with a receipt of the written referral.

(b) Non-Medical Conditions

(1) Consultation, monitored services, and evaluation for need of services may be provided without a referral.

(2) Non-medical conditions do not require a referral. However, a referral must be requested at any time during the evaluation or treatment process when necessary to insure the safety and welfare of the consumer.

[(a) Referral. Occupational therapists may accept referrals from all qualified licensed health care professionals who within the scope of licensure are authorized to refer for healthcare services. This includes but is not limited to dentists, chiropractors, and podiatrists.]

[(1) Consultation, monitored services, screening, and evaluation for need of services may be provided without a referral.]

[(2) Occupational therapy for non-medical conditions (refer to §362.1 of this title (relating to Definitions)) does not require a referral. However, a referral must be requested at any time during the evaluation or treatment process when necessary to insure the safety and welfare of the consumer.]

[(3) The provision of direct treatment by an OTR, LOT, COTA or LOTA for medical conditions requires a referral. A referral may be an oral or written order to initiate services. If an oral referral is received, it must be followed by a written order signed by the referral source requesting the services.]

[(4) An oral referral for evaluation and/or treatment must be received and documented by a licensed health care provider.]

[(5) If a written referral is not received by the third treatment or within two weeks from receipt of the oral referral, whichever is later, the therapist must have documented evidence of attempt(s) to contact the referral source for a written referral (e.g., registered letter, fax, certified letter, e-mail, return receipt, etc.). The therapist must exercise professional judgment to determine cessation or continuation of treatment without receipt of the written referral.

[(b) A COTA or LOTA may assist in the provision of OT services as specified in §373.1(b) of this title (relating to Supervision).]

(c) Screening [and Evaluation]. A screening may be performed by an occupational therapist or an occupational therapy assistant.

[(1) Screening for occupational therapy services must be initiated and completed by a TBOTE licensee.]

[(2) Occupational therapy intervention may not be provided without an occupational therapy evaluation completed by an OTR or LOT.]

(d) Evaluation.

(1) Only an occupational therapist may perform the evaluation.

(2) An occupational therapy plan of care must be based on an occupational therapy evaluation.

(3) The occupational therapist must have face-to-face, real time interaction with the patient or client during the evaluation process.

(e) Plan of Care

(1) Only an occupational therapist may initiate, develop, modify or complete an occupational therapy plan of care.

(2) The occupational therapist and occupational therapy assistant may work jointly to revise the short-term goals, but the final determination resides with the occupational therapist.

(3) An occupational therapy plan of care may be integrated into an interdisciplinary plan of care, but the occupational therapy goals or objectives must be easily identifiable in the plan of care.

(4) Only occupational therapy practitioners licensed by the Texas Board of Occupational Therapy Examiners (TBOTE) may implement the plan of care.

(5) Only the occupational therapist or occupational therapist assistant may train non-licensed personnel or family members to carry out specific tasks that support the occupational therapy plan of care.

(6) The occupational therapist may delegate to an occupational therapy assistant the collection of data for the assessment. The occupational therapist is responsible for the accuracy of the data collected by the assistant.

(7) The occupational therapist is responsible for determining whether intervention is needed and if a referral is required for occupational therapy intervention.

(8) The occupational therapist or the occupational therapy assistant must have face-to-face, real time interaction with the patient or client during the intervention process.

(9) It is the occupational therapist's responsibility to ensure that all documentation which becomes part of the patient's/client's permanent record is approved and co-signed by the occupational therapist and signed on the bottom of each page.

~~[(d) Occupational Therapy Plan of Care Development.]~~

~~[(1) An occupational therapy plan of care must be based on an occupational therapy evaluation.]~~

~~[(2) The occupational therapy plan of care (refer to §362.1 of this title (relating to Definitions)) must be developed by an OTR or LOT.]~~

~~[(3) An occupational therapy plan of care may be integrated into an interdisciplinary plan of care, but occupational therapy goals or objectives must be easily identifiable in the plan of care.]~~

~~[(4) Only an OTR or LOT may change an occupational therapy plan of care.]~~

~~[(e) Occupational Therapy Plan of Care Implementation.]~~

~~[(1) Only licensed occupational therapy personnel may implement an occupational therapy plan of care.]~~

~~[(2) Only licensed occupational therapy personnel may train non-licensed individuals to carry out specific tasks that support the occupational therapy plan of care.]~~

(f) Discharge.

(1) Only an occupational therapist has the authority to discharge patients from occupational therapy services. The discharge is based on whether the patient or client has achieved predetermined goals, has achieved maximum benefit from occupational therapy services; or when other circumstances warrant discontinuation of occupational therapy services.

(2) The occupational therapist is responsible for the content and validity of the discharge summary and must sign the discharge summary.

~~[(1) An OTR or LOT has authority to discharge patients from occupational therapy services.]~~

~~[(2) The OTR or LOT shall discharge a patient or client when the patient or client has achieved predetermined goals; has achieved maximum benefit from OT services; or when other circumstances warrant discontinuation of occupational therapy services.]~~

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

Filed with the Office of the Secretary of State, on May 10, 2001.

TRD-200102636
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

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CHAPTER 373. SUPERVISION

40 TAC §§373.1 - 373.3

The Texas Board of Occupational Therapy Examiners proposes amendment to §373.1 and new §373.2 and §373.3 concerning Supervision. The amendment and new rules will differentiate between supervision for occupational therapy assistants, temporary licensees and non-licensed personnel.

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

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

Comments on the proposed rules may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment and new rules are proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the proposal.

§373.1. Supervision of Non-Licensed Personnel.

(a) Licensed occupational therapist are fully responsible for the planning and delivery of occupational therapy services. They may use non-licensed personnel to extend their services; however, the non-licensed personnel must be under the supervision of the licensed occupational therapist or licensed occupational therapy assistant.

(b) Close Personnel Supervision implies direct, on-site contact whereby the supervising occupational therapy licensee is able to respond immediately to the needs of the patient. This type of supervision is required for non-licensed personnel providing support services to the occupational therapist and occupational therapy assistant.

(c) When occupational therapy licensees delegate occupational therapy tasks to non-licensed personnel, the licensee is responsible for ensuring that this person is adequately trained in the tasks delegated.

(d) The licensee proving the treatment must interact with the patient regarding the patient's condition, progress, and/or achievement of goals during each treatment session.

(e) Delegation of tasks to non-licensed personnel includes but is not limited to:

(1) routine department maintenance;

(2) transportation of patients/clients;

(3) preparation or set up of treatment equipment and work area;

(4) assisting patients/clients with their personal needs during treatment;

(5) assisting in the construction of adaptive/assistive equipment and splints. The licensee must be on-site and attending for any initial applications to the patient;

(6) carrying out a predetermined segment or task in the patient's care for which the patient has demonstrated some previous performance ability in executing the task;

(f) The non-licensed personnel may not:

(1) perform occupational therapy evaluative procedures

(2) initiate, plan, adjust, or modify occupational therapy procedures.

(3) act on behalf of the occupational therapist in any matter relating to occupational therapy which requires decision making or professional judgements.

[(a) Occupational Therapists, Registered or Licensed Occupational Therapists (OTRs or LOTs) are fully responsible for the planning and delivery of occupational therapy services.]

[(1) The supervising OTR or LOT is responsible for providing the supervision necessary to protect the health and welfare of the consumer receiving OT services from a COTA, LOTA, temporary licensee or OT Aide or Orderly.]

[(2) OTRs or LOTs must ensure that tasks appropriate for a COTA, LOTA or temporary licensee are not delegated to persons without current licenses.]

[(3) The COTA, LOTA or temporary licensee is responsible for the execution of his or her professional duties.]

[(b) Supervision of a COTA or an LOTA.]

[(1) The OTR or LOT shall delegate responsibilities to the COTA or LOTA that are within the scope of his or her training.]

[(2) A COTA or LOTA shall provide occupational therapy services only under the general supervision of a licensed OTR or LOT. (See Chapter 362 of this title (relating to Definitions)).]

[(A) General supervision (See Chapter 362 of this title (relating to Definitions)) of COTAs or LOTAs must be documented on an "Occupational Therapy Supervision Log" prescribed by the board. COTAs and LOTAs employed part time or with more than one employer shall prorate the required documented supervision.]

[(i) The "Occupational Therapy Supervision Log" must be kept by the COTA or LOTA and a copy of this form must be maintained by each employer.]

[(ii) The "Occupational Therapy Supervision Log" must be submitted to TBOTE with the COTA's or LOTA's renewal application.]

[(B) The supervising OTR or LOT need not be physically present or on the premises at all times.]

[(3) Except where otherwise restricted by rule, the supervising OTR or LOT may only delegate tasks to a COTA or LOTA that the OTR or LOT and COTA or LOTA agree are within the competency level of that COTA or LOTA.]

[(A) A COTA or LOTA may initiate and perform the screening process and collect information for the OTR's or LOT's review. The OTR or LOT is responsible for determining if intervention is needed and if a referral is required for evaluation and/or occupational therapy intervention.]

[(B) An OTR or LOT is responsible for the patient's evaluation/assessment. The supervising OTR or LOT may delegate to a COTA or LOTA the collection of data or information for the evaluation.]

[(i) The OTR or LOT is responsible for the accuracy of evaluative information collected by the COTA or LOTA.]

[(ii) The OTR or LOT must have face-to-face interaction with the patient or client during the evaluation process.]

[(C) Only an OTR or LOT may develop or modify an Occupational Therapy plan of care (refer to §362.1 of this title (relating to Definitions)).]

[(D) The OTR or LOT is responsible for the content and validity of the discharge summary and must sign the discharge summary.]

[(4) It is the responsibility of the OTR or LOT and the COTA or LOTA to ensure that all documentation prepared by the COTA or LOTA which becomes part of the patient's/client's permanent record is approved and co-signed by the supervising OTR or LOT. Occupational Therapy notes must be initialed by the OTR or LOT and signed at the bottom of each page.]

[(5) These rules shall not preclude the COTA or LOTA from responding to emergency situations in the patient's condition, which require immediate action.]

[(c) Supervision of an OT Aide or OT Orderly.]

[(1) When an OTR, LOT, COTA and/or LOTA delegates OT tasks to an aide or orderly, the OTR, LOT, COTA and/or LOTA is responsible for the aide's actions during patient contact on the delegated tasks. The licensee is responsible for ensuring that the aide is adequately trained in the tasks delegated.]

[(2) The OTR, LOT, COTA or LOTA must interact with the patient regarding the patient's condition, progress and/or achievement of goals during each treatment session.]

[(3) An OTR, LOT, COTA and/or LOTA using OT Aide or OT Orderly personnel to assist with the provision of occupational therapy services must provide close personal supervision in order to protect the health and welfare of the consumer. (See Chapter 362 of this title (relating to Definitions)).]

[(4) Delegation of tasks to OT Aides or OT Orderlies.]

[(A) The primary function of an OT Aide or OT Orderly functioning in an occupational therapy setting is to perform designated routine tasks related to the operation of an occupational therapy service. An OTR, LOT, COTA and/or LOTA may delegate to an OT Aide or OT Orderly only specific tasks which are not evaluative or recommending in nature, and only after insuring that the OT Aide or OT Orderly has been properly trained for the performance of the tasks. Such tasks include, but are not limited to:]

[(i) routine department maintenance;]

[(ii) transportation of patients/clients;]

[(iii) preparation or setting up of treatment equipment and work area;]

[(iv) assisting patients/clients with their personal needs during treatment;]

[(v) assisting in the construction of adaptive equipment and splints;]

[(vi) clerical, secretarial, administrative activities;]

[(vii) carrying out a predetermined segment or task in the patient's care.]

[(B) The OTR, LOT, COTA and/or LOTA shall not delegate to an OT Aide or OT Orderly:]

~~*[(i)* performance of occupational therapy evaluative procedures;]~~

~~*[(ii)* initiation, planning, adjustment, modification, or performance of occupational therapy procedures requiring the skills or judgment of an OTR, LOT, COTA or LOTA;]~~

~~*[(iii)* making occupational therapy entries directly in patients' or clients' official records;]~~

~~*[(iv)* acting on behalf of the occupational therapist in any matter related to occupational therapy which requires decision making or professional judgment.]~~

~~[(d) Supervision of an occupational therapist or an occupational therapy assistant with a temporary license.]~~

~~[(1) A person issued a temporary occupational therapy license must practice occupational therapy under the continuing supervision of an OTR or LOT. (See Chapter 362 of this title (relating to Definitions)).]~~

~~[(2) A minimum of 16 hours of supervision per month for full time OTAs must be documented on an "Occupational Therapy Supervision Log" prescribed by the board. OTAs employed part time or with more than one employer shall prorate the required documented supervision. If the OTA is employed less than 20 hours per week, a minimum of eight hours of supervision is required per month.]~~

~~[(A) The "Occupational Therapy Supervision Log" must be kept by the OTA and a copy of this form must be maintained by each employer.]~~

~~[(B) The "Occupational Therapy Supervision Log" must be submitted to TBOTE with the COTA's first renewal application after regular licensure.]~~

~~[(3) The temporary licensee must certify to the board the name, license number, and address of his or her supervisor on a form provided by the board during the application process.]~~

~~[(4) The temporary licensee must notify the board within 15 days of a change in the OTR or LOT supervisor.]~~

~~[(5) The temporary licensee shall not supervise an occupational therapy student, a COTA or LOTA, an occupational therapy assistant or an OT Aide or OT Orderly.]~~

~~[(6) All documentation completed by an individual holding a temporary license which becomes part of the patient's/client's permanent file must be approved and co-signed by the supervising OTR or LOT. Occupational Therapy notes must be initialed by the OTR or LOT and signed at the bottom of each page.]~~

~~[(e) Supervision of Provisional Licensees.]~~

~~[(1) OTRs and LOTs with provisional licenses are excluded from supervision requirements.]~~

~~[(2) COTAs and LOTAs with provisional licenses will require general supervision by a licensed OTR or LOT.]~~

§373.2. Supervision of a Temporary Licensee.

(a) Supervision of an occupational therapist with a temporary license includes:

(1) frequent communication between the supervising occupational therapist and the temporary licensee by telephone, written report or conference, including the review of progress of patients/clients assigned, plus

(2) encounters twice a month where the occupational therapist directly observes the temporary licensee providing services to one or more patients/clients with face-to-face, real time interaction.

(b) Supervision of an occupational therapy assistant with a temporary license includes;

(1) sixteen hours of supervision a month of which at least twelve hours are through telephone, written report or conference, including the renew of progress of patients/clients assigned; plus

(2) four or more hours of supervision a month which are face-to-face, real time supervision with the temporary licensee providing services to one or more patients/clients.

(c) Temporary licensees may not supervise anyone.

(d) All documentation completed by an individual holding a temporary license which becomes part of the patient's/client's permanent file, must be approved and co-signed by the supervising occupational therapist.

(e) A temporary licensee works under the supervision of a regular licensed occupational therapist, whole name and license number are on file on the board's "Supervision of a Temporary Licensee" form.

(f) A temporary licensee does not become a regular licensee with those privileges until the regular license is in hand.

§373.3. Supervision of a Licensed Occupational Therapy Assistant.

(a) Supervision per month of eight hours includes:

(1) A minimum of six hours a month of frequent communication with the supervising occupational therapist(s) and the occupational therapy assistant by telephone, written report, email, conference etc., including review of progress of patient's/client's assigned.

(2) A minimum of two hours of supervision a month of face-to-face, real time interaction observing the occupational therapy assistant providing services with patients/clients.

(b) Part-time licensees may pro-rate these hours, but shall document no less than four hours of supervision per month, one hours of which includes face-to-face, real time interaction observing the occupational therapy assistant providing services with patients/clients.

(c) Occupational Therapy Assistants with more than one employer must have a supervisor at each job.

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

Filed with the Office of the Secretary of State, on May 10, 2001.

TRD-200102638
John Maline
Executive Director
Texas Department of Occupational Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

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CHAPTER 374. DISCIPLINARY ACTIONS/DETRIMENTAL PRACTICE/COMPLAINT PROCESS/CODE OF ETHICS

40 TAC §§374.1 - 374.3

The Texas Board of Occupational Therapy Examiners proposes amendments to §§374.1 - 374.3 concerning Disciplinary Actions/Detrimental Practice/Complaint Process/Code of Ethics. The amendments will reorganize the chapter and correct the Practice Act references.

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

Mr. Maline also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be clarification procedures and more current references in the Act. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed rules may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendments are proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the amended sections.

§374.1. Disciplinary Actions.

(a) The board, in accordance with the Administrative Procedure Act, may deny, revoke, suspend, or refuse to renew or issue a license, or may reprimand or impose probationary conditions, if the licensee or applicant for licensure has been found in violation of the rules or the Act. The board will adhere to procedures for such action as stated in the Act, §454.301 and §454.304 [~~§30 and §31~~].

~~[(b) The Act, §30(b)(6), states "practiced occupational therapy in a manner detrimental to the public health and welfare"; which is defined but not limited to the following:]~~

~~[(1) impersonating another person holding an occupational therapy license or allowing another person to use his or her license;]~~

~~[(2) using occupational therapy techniques or modalities for purposes not consistent with the development of occupational therapy as a profession, as a science, or as a means for promoting the public health and welfare;]~~

~~[(3) failing to report or otherwise concealing information related to violations of the Act, or rules and regulations pursuant to the Act, which could therefore result in harm to the public health and welfare or damage the reputation of the profession;]~~

~~[(4) intentionally making or filing a false or misleading report, or failing to file a report when it is required by law or third person, or intentionally obstructing or attempting to obstruct another person from filing such a report;]~~

~~[(5) intentionally harassing, abusing, or intimidating a patient either physically or verbally;]~~

~~[(6) intentionally or knowingly offering to pay or agreeing to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for receiving or soliciting patients or patronage, regardless of source of reimbursement, unless said business arrangement or payments practice is acceptable under the Texas Health and Safety Code, §161.091-161.094, the Social Security Act, §1128B, 42 United States Code 1320a-7b, or the Social Security Act, §1877, 42 United States Code 1395nn or its regulations;]~~

~~[(7) recommending or prescribing therapeutic devices or modalities sold by a third person for the purpose or with the result of receiving a fee or other consideration from the third person;]~~

~~[(8) breaching the confidentiality of the patient/therapist relationship;]~~

~~[(9) failing to obtain informed consent prior to engaging in scientific research involving patients, or otherwise violating ethical principles of research as defined by the TBOTE Code of Ethics, §374.3 of this title (relating to Code of Ethics), or other occupational therapy standards;]~~

~~[(10) practicing occupational therapy after the expiration of a temporary, provisional, or regular license;]~~

~~[(11) violation of §373.1 of this title (relating to Supervision);]~~

~~[(12) advertising in a manner which is false, misleading, or deceptive;]~~

~~[(13) failing to register an occupational therapy facility which is not exempt or failing to renew the registration of an occupational therapy facility which is not exempt; or]~~

~~[(14) practicing in an unregistered occupational therapy facility which is not exempt.]~~

(b) [~~(c)~~] The board recognizes four levels of disciplinary action for its licensees.

(1) Level I: Order and/or Letter of Reprimand or Other Appropriate Disciplinary Action (including but not limited to community service hours)[~~--The first step in the disciplinary action process.~~]

(2) Level II: Probation--The licensee may continue to practice while on probation. The board orders the probationary status which may include but is not limited to restrictions on practice and continued monitoring by the board during the specified time period.

(3) Level III: Suspension--A specified period of time that the licensee may not practice as an occupational therapist or occupational therapy assistant. Upon the successful completion of the suspension period, the license will be reinstated upon the licensee successfully meeting all requirements.

(4) Level IV: Revocation--A determination [~~specified period of time~~] that the licensee may not practice as an occupational therapist or occupational therapy assistant. Upon passage of 180 days, from the date the revocation order becomes final, the former [~~successful completion of the revocation period, the~~] licensee may petition the board for re-issuance of a license [~~reinstatement (forms provided by the board)~~]. The former licensee may be required to re-take the Examination.

(c) [~~(d)~~] Licensees and facilities which provide occupational therapy services are responsible for understanding and complying with Chapter 454 of the Occupational Code [~~knowledge of Texas Civil Statutes, Article 8851~~] (the Occupational Therapy Practice Act), and the Texas Board of Occupational Therapy Examiners' rules.

(d) [~~(e)~~] Final disciplinary actions taken by the board will be routinely published as to the names and offenses of the licensees or facilities.

(e) [~~(f)~~] A licensee who is ordered by the board to perform certain act(s) will be monitored by the board to ensure that the required act(s) are completed per the order of the board.

§374.2. Detrimental Practice [~~Complaints~~].

[~~(a)~~] The Act, §454.301(a)(6) states "practiced occupational therapy in a manner detrimental to the public health and welfare"; which is defined but not limited to the following: [~~§5C, authorizes the board to investigate complaints.~~]

(1) impersonating another person holding an occupational therapy license or allowing another person to use his or her license;

(2) using occupational therapy techniques or modalities for purposes not consistent with the development of occupational therapy as a profession, as a science, or as a means for promoting the public health and welfare;

(3) failing to report or otherwise concealing information related to violations of the Act, or rules and regulations pursuant to the Act, which could therefore result in harm to the public health and welfare or damage the reputation of the profession;

(4) intentionally making or filing a false or misleading report, or failing to file a report when it is required by law or third person, or intentionally obstructing or attempting to obstruct another person from filing such a report;

(5) intentionally harassing, abusing, or intimidating a patient either physically or verbally;

(6) intentionally or knowingly offering to pay or agreeing to accept any remuneration directly or indirectly, overtly or covertly, in cash or in kind, to or from any person, firm, association of persons, partnership, or corporation for receiving or soliciting patients or patronage, regardless of source of reimbursement, unless said business arrangement or payments practice is acceptable under the Texas Health and Safety Code, §§161.091-161.094, the Social Security Act, §1128B, 42 United States Code 1320a-7b, or the Social Security Act, §1877, 42 United States Code 1395nn or its regulations;

(7) recommending or prescribing therapeutic devices or modalities sold by a third person for the purpose or with the result of receiving a fee or other consideration from the third person;

(8) breaching the confidentiality of the patient/therapist relationship;

(9) failing to obtain informed consent prior to engaging in scientific research involving patients, or otherwise violating ethical principles of research as defined by the TBOTE Code of Ethics, §374.4 of this title (relating to Code of Ethics), or other occupational therapy standards;

(10) practicing occupational therapy after the expiration of a temporary, provisional, or regular license;

(11) violation of Chapter 373 of this title (relating to Supervision);

(12) advertising in a manner which is false, misleading, or deceptive;

(13) failing to register an occupational therapy facility which is not exempt or failing to renew the registration of an occupational therapy facility which is not exempt; or

(14) practicing in an unregistered occupational therapy facility which is not exempt.

[~~(b) Filing and receipt of complaints.~~]

[~~(1) Complaints may be received in writing. Complainants shall be invited to explain their allegations. The staff will provide reasonable assistance to a person who wishes to file a complaint. Anonymous complaints will be accepted, but it is understood that the lack of a witness or the ability to secure additional information from the anonymous complainant may result in the board's inability to secure sufficient evidence to pursue action against the alleged violator.~~]

[~~(2) When a complaint is received, the board shall notify the parties to the complaint of the status of the complaint, unless the notice would jeopardize an undercover investigation. The board shall notify the parties to the complaint at least as frequently as quarterly until there is final disposition of the complaint, in accordance with the Act, §5B.~~]

[~~(3) Not later than the tenth calendar day after a complaint is received, the staff shall place a timeline for completion of the investigation in the file and notify all parties to the complaint. Any change in the timeline must be noted in the file and all parties notified of the change not later than seven calendar days after the change was made. For purposes of this rule, completion of an investigation in a disciplinary matter occurs when:~~]

[~~(A) staff determines there is insufficient evidence to demonstrate a violation of the Act, board rules, or a board order; or~~]

[~~(B) staff determines that there is sufficient evidence to demonstrate a violation of the Act, board rules, or a board order and drafts proposed formal charges.~~]

[~~(4) The staff shall provide summary data of complaints extending beyond the complaint timeline to the coordinator and the executive director who will then notify the board at a regularly scheduled meeting.~~]

[~~(5) The board shall keep an information file on each complaint submitted to the board. The file will be kept current and include a record of all persons contacted in relation to the complaint, notes about the findings throughout the complaint process, and other relevant information.~~]

[~~(6) The Investigation Committee may determine when and if a private investigator is needed for processing of a complaint.~~]

[~~(7) Complaints shall be assigned a priority status in the following categories:~~]

[~~(A) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving actual deception, fraud, or injury to clients or the public or a high probability of immediate deception, fraud, or injury to clients or the public.~~]

[~~(B) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving a high probability of potential deception, fraud, or injury to clients or the public.~~]

[~~(C) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving a potential for deception, fraud, or injury to clients or the public.~~]

[~~(D) All other complaints.~~]

[~~(c) The Executive Director and the Investigation Committee will take appropriate action to investigate the complaint or take other appropriate action.~~]

[~~(1) The Investigation Committee will hold meetings, at least quarterly, to review complaints, to determine if there is sufficient~~

evidence to substantiate the allegations, to hold informal conferences, to identify appropriate discipline for violations, and to make recommendations for disciplinary action to the board.]

[(2) The Investigation Committee reviews the evidence that has been submitted and gathered by the investigator and, typically, makes one of the following determinations:]

[(A) The scope of the complaint is beyond the authority of the board and possibly may be handled by another entity. The committee may refer the complainant to an appropriate entity.]

[(B) There is insufficient evidence to substantiate that a violation of the Act or rules has occurred, thus closing the investigation.]

[(C) Evidence indicates a possible violation did occur and further investigation is needed.]

[(D) Evidence indicates a violation did occur and disciplinary action is not warranted.]

[(E) Evidence indicates a violation did occur and disciplinary action is warranted.]

[(d) Preliminary notice.]

[(1) Prior to commencing disciplinary proceedings, the staff shall serve the respondent with written notice in accordance with the Texas Government Code, §2001.54(c).]

[(2) Such notice shall contain a statement of the facts or conduct alleged to warrant an adverse action. The notice shall invite the respondent to show compliance with all requirements of the law for retention of the license.]

[(3) The respondent shall have not less than ten calendar days to respond in writing.]

[(e) Agreed orders.]

[(1) An agreed order is a legal document and the formal means by which a respondent accepts the disciplinary action imposed by the board. To be a valid document it must be approved by the board and signed by both the respondent and the chair of the board.]

[(2) An agreed order may be negotiated with any person under the jurisdiction of the board, the terms of which shall be approved by the Investigation Committee.]

[(3) The agreed order will be sent to the respondent by certified mail. To accept the agreed order, the respondent must sign it in the presence of a notary and return it to the board within ten calendar days after receipt. Inaction by the respondent constitutes rejection. If the respondent rejects the proposed settlement, the matter shall be referred to the Investigation Committee for appropriate action.]

[(4) The agreed order with the notarized signature of the respondent will be presented to the board. The proposed agreed order shall have no effect until such time as the board may, at a scheduled meeting, take action approving the agreed order. The agreed order will include a provision requiring the respondent reimburse the board for all investigative expenses.]

[(5) The respondent shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the respondent is voluntary.]

[(6) Consideration by the board will include the following:]

[(A) Any board member who participated in the investigation of the complaint or formulation of the proposed agreed order may not vote on the agreed order.]

[(B) The respondent's identity will not be made available to the board until after the board has reviewed and made a decision on the agreed order.]

[(C) Upon an affirmative majority vote, the board shall authorize the agreed order, and the chair of the board will sign it. The board-approved agreed order will be provided to the respondent. A copy of the order will then be placed in the licensee's permanent file.]

[(D) If the board does not approve the agreed order, the matter will be referred to the Investigation Committee or the executive director for other appropriate action. The respondent and the complainant shall be so informed.]

[(f) Dismissal of complaints.]

[(1) Complaints may be dismissed for the following reasons:]

[(A) No evidence available.]

[(B) Insufficient evidence.]

[(C) Other reasons which the Investigation Committee believe are justification for dismissal.]

[(2) Upon the decision of the Investigation Committee to dismiss a complaint, the person who filed the complaint is provided a letter explaining why the complaint has been dismissed.]

[(3) On a quarterly basis, the board is provided with a list of the complaints that were dismissed and the reasons for the dismissals.]

[(4) At least annually the board will advise the Executive Council of complaints which have been disposed.]

[(g) Informal conference.]

[(1) At any time after the filing of a complaint, an informal conference may be held prior to the contested case hearing for one or more of the following purposes:]

[(A) Clarifying the issues;]

[(B) Considering proposed admissions or stipulations of fact;]

[(C) Reviewing the procedure to govern the contested case hearing;]

[(D) Exchanging witness lists and agreeing to limit the number of witnesses; and/or]

[(E) Doing any act that may simplify the proceedings, and dispose of matters in controversy, including settlement of issues in dispute and preparation of an agreed order for presentation to the board as provided herein.]

[(2) A respondent may request an informal settlement conference; however, the decision to hold a conference shall be made by the executive director or the Investigation Committee.]

[(3) Participation in an informal conference shall not be mandatory for the licensee or applicant, nor is it a prerequisite to a formal hearing.]

[(4) The executive director shall decide upon the time, date, and place of the settlement conference and provide written notice to the respondent of the same. Notice shall be provided no less than ten calendar days prior to the date of the conference by certified mail, return receipt requested to the last known address of the respondent. The ten days shall begin on the date of certified mailing. The respondent may waive the ten-day notice requirement.]

[(A) The notice shall inform the respondent of the following:]

[(i) the nature of the alleged violation;]

[(ii) that the respondent may be represented by legal counsel;]

[(iii) that the respondent may offer the testimony of witnesses and present other evidence as may be appropriate;]

[(iv) that a board member may be present;]

[(v) that a representative of the Office of the Attorney General will be present;]

[(vi) that the respondent's attendance and participation is voluntary;]

[(vii) that the complainant and any client involved in the alleged violations may be present; and]

[(viii) that the settlement conference shall be canceled if the respondent notifies the executive director that he or she will not attend.]

[(B) A copy of the board's rules concerning informal disposition shall be enclosed with the notice of the settlement conference.]

[(5) The notice of the settlement conference shall be sent by certified mail, return receipt requested, to the complainant's last known address. The complainant shall be informed that he or she may appear and testify or may submit a written statement for consideration at the settlement conference. The complainant shall be notified if the conference is canceled.]

[(6) Participants in the informal conference may include a board member, agency staff, the complainant, the respondent, attorneys representing any of the participants, and any other persons determined by the Investigation Committee or the executive director to be necessary for proper conduct of the conference. All other persons may be excluded.]

[(7) The settlement conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.]

[(8) The respondent, the respondent's attorney, a board member, and board staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.]

[(9) An attorney from the Office of the Attorney General shall attend each settlement conference. The board member or executive director may call upon the attorney at any time for assistance in the settlement conference.]

[(10) The respondent shall be afforded the opportunity to make statements on his or her own behalf.]

[(11) Access to the board's investigative file may be prohibited or limited in accordance with the Administrative Procedures Act (APA), Chapter 2001, Texas Government Code, and the Open Records Act, Chapter 552, Texas Government Code.]

[(12) No formal recording of the settlement conference shall be made.]

[(13) At the conclusion of the settlement conference, the board member or the executive director may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Occupational Therapy Practice Act. The board member or the executive director may also conclude that the board lacks jurisdiction, that a violation of the Act or this chapter has not been established, order that the investigation be closed, or refer the matter for further investigation.]

[(h) The board follows the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001, for resolution of complaints as a contested case. A copy of the APA procedures may be obtained from the board.]

[(i) Should the recommendation for an informal disposition not be accepted by the respondent, the complaint shall be referred back to the Investigation Committee for appropriate action. The committee shall determine if the case should be referred to the State Office of Administrative Hearings (SOAH) or dismissed for insufficient evidence or other reasons justifying a dismissal.]

[(j) If the Investigation Committee determines that a violation has occurred and the respondent is not under the jurisdiction of the board, the committee has the option of referring the case to the appropriate authority: district attorney, county attorney, etc.]

§§374.3. Complaint Process [Code of Ethics].

(a) The Act, Subchapters G and H, authorizes the board to investigate complaints.

(b) Filing and receipt of complaints.

(1) Complaints may be received in writing. Complainants shall be invited to explain their allegations. The staff will provide reasonable assistance to a person who wishes to file a complaint. Anonymous complaints will be accepted, but it is understood that the lack of a witness or the ability to secure additional information from the anonymous complainant may result in the board's inability to secure sufficient evidence to pursue action against the alleged violator.

(2) When a complaint is received, the board shall notify the parties to the complaint of the status of the complaint, unless the notice would jeopardize an undercover investigation. The board shall notify the parties to the complaint at least as frequently as quarterly until there is final disposition of the complaint, in accordance with the Act, §454.152.

(3) Not later than the tenth calendar day after a complaint is received, the staff shall place a timeline for completion of the investigation in the file and notify all parties to the complaint. Any change in the timeline must be noted in the file and all parties notified of the change not later than seven calendar days after the change was made. For purposes of this rule, completion of an investigation in a disciplinary matter occurs when:

(A) staff determines there is insufficient evidence to demonstrate a violation of the Act, board rules, or a board order; or

(B) staff determines that there is sufficient evidence to demonstrate a violation of the Act, board rules, or a board order and drafts proposed formal charges.

(4) The staff shall provide summary data of complaints extending beyond the complaint timeline to the coordinator and the executive director who will then notify the board at a regularly scheduled meeting.

(5) The board shall keep an information file on each complaint submitted to the board. The file will be kept current and include a record of all persons contacted in relation to the complaint, notes about the findings throughout the complaint process, and other relevant information.

(6) The Investigation Committee may determine when and if a private investigator is needed for processing of a complaint.

(7) Complaints shall be assigned a priority status in the following categories:

(A) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving actual deception, fraud, or injury to clients or the public or a high probability of immediate deception, fraud, or injury to clients or the public.

(B) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving a high probability of potential deception, fraud, or injury to clients or the public.

(C) Those indicating that credible evidence exists showing a violation of the Occupational Therapy Practice Act involving a potential for deception, fraud, or injury to clients or the public.

(D) All other complaints.

(c) The Executive Director and the Investigation Committee will take appropriate action to investigate the complaint or take other appropriate action.

(1) The Investigation Committee will hold meetings, at least quarterly, to review complaints, to determine if there is sufficient evidence to substantiate the allegations, to hold informal conferences, to identify appropriate discipline for violations, and to make recommendations for disciplinary action to the board.

(2) The Investigation Committee reviews the evidence that has been submitted and gathered by the investigator and, typically makes one of the following determinations:

(A) The scope of the complaint is beyond the authority of the board and possibly may be handled by another entity. The committee may refer the complainant to an appropriate entity.

(B) There is insufficient evidence to substantiate that a violation of the Act or rules has occurred, thus closing the investigation.

(C) Evidence indicates a possible violation did occur and further investigation is needed.

(D) Evidence indicates a violation did occur and disciplinary action is not warranted.

(E) Evidence indicates a violation did occur and disciplinary action is warranted.

(d) Preliminary notice.

(1) Prior to commencing disciplinary proceedings, the staff shall serve the respondent with written notice in accordance with the Texas Government Code, §2001.54(c).

(2) Such notice shall contain a statement of the facts or conduct alleged to warrant an adverse action. The notice shall invite the respondent to show compliance with all requirements of the law for retention of the license.

(3) The respondent shall have not less than ten calendar days to respond in writing.

(e) Agreed orders.

(1) An agreed order is a legal document and the formal means by which a respondent accepts the disciplinary action imposed by the board. To be a valid document it must be approved by the board and signed by both the respondent and the chair of the board.

(2) An agreed order may be negotiated with any person under the jurisdiction of the board, the terms of which shall be approved by the Investigation Committee.

(3) The agreed order will be sent to the respondent by certified mail. To accept the agreed order, the respondent must sign it in the presence of a notary and return it to the board within ten calendar days after receipt. Inaction by the respondent constitutes rejection. If the respondent rejects the proposed settlement, the matter shall be referred to the Investigation Committee for appropriate action.

(4) The agreed order with the notarized signature of the respondent will be presented to the board. The proposed agreed order shall have no effect until such time as the board may, at a scheduled meeting, take action approving the agreed order. The agreed order will include a provision requiring the respondent reimburse the board for all investigative expenses.

(5) The respondent shall be notified of the date, time, and place of the board meeting at which the proposed agreed order will be considered. Attendance by the respondent is voluntary.

(6) Consideration by the board will include the following:

(A) Any board member who participated in the investigation of the complaint or formulation of the proposed agreed order may not vote on the agreed order.

(B) The respondent's identity will not be made available to the board until after the board has reviewed and made a decision on the agreed order.

(C) Upon an affirmative majority vote, the board shall authorize the agreed order, and the chair of the board will sign it. The board-approved agreed order will be provided to the respondent. A copy of the order will then be placed in the licensee's permanent file.

(D) If the board does not approve the agreed order, the matter will be referred to the Investigation Committee or the Executive Director for other appropriate action. The respondent and the complainant shall be so informed.

(f) Dismissal of complaints.

(1) Complaints may be dismissed for the following reasons:

(A) No evidence available.

(B) Insufficient evidence.

(C) Other reasons which the Investigation Committee believes are justification for dismissal.

(2) Upon the decision of the Investigation Committee to dismiss a complaint, the person who filed the complaint is provided a letter explaining why the complaint has been dismissed.

(3) On a quarterly basis, the board is provided with a list of the complaints that were dismissed and the reasons for the dismissals.

(4) At least annually the board will advise the Executive Council of complaints which have been disposed.

(g) Informal conference.

(1) At any time after the filing of a complaint, an informal conference may be held prior to the contested case hearing for one or more of the following purposes:

(A) Clarifying the issues;

(B) Considering proposed admissions or stipulations of fact;

(C) Reviewing the procedure to govern the contested case hearing;

(D) Exchanging witness lists and agreeing to limit the number of witnesses; and/or

(E) Doing any act that may simplify the proceedings, and dispose of matters in controversy, including settlement of issues in dispute and preparation of an agreed order for presentation to the board as provided herein.

(2) A respondent may request an informal settlement conference; however, the decision to hold a conference shall be made by the Executive Director or the Investigation Committee.

(3) Participation in an informal conference shall not be mandatory for the licensee or applicant, nor is it a prerequisite to a formal hearing.

(4) The Executive Director shall decide upon the time, date, and place of the settlement conference and provide written notice to the respondent of the same. Notice shall be provided no less than ten calendar days prior to the date of the conference by certified mail, return receipt requested to the last known address of the respondent. The ten days shall begin on the date of certified mailing. The respondent may waive the ten-day notice requirement.

(A) The notice shall inform the respondent of the following:

(i) the nature of the alleged violation;

(ii) that the respondent may be represented by legal counsel;

(iii) that the respondent may offer the testimony of witnesses and present other evidence as may be appropriate;

(iv) that a board member may be present;

(v) that a representative of the Office of the Attorney General will be present;

(vi) that the respondent's attendance and participation is voluntary;

(vii) that the complainant and any client involved in the alleged violations may be present; and

(viii) that the settlement conference shall be canceled if the respondent notifies the Executive Director that he or she will not attend.

(B) A copy of the board's rules concerning informal disposition shall be enclosed with the notice of the settlement conference.

(5) The notice of the settlement conference shall be sent by certified mail, return receipt requested, to the complainant's last known address. The complainant shall be informed that he or she may appear and testify or may submit a written statement for consideration at the settlement conference. The complainant shall be notified if the conference is canceled.

(6) Participants in the informal conference may include a board member, agency staff, the complainant, the respondent, attorneys representing any of the participants, and any other persons determined by the Investigation Committee or the Executive Director to be necessary for proper conduct of the conference. All other persons may be excluded.

(7) The settlement conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(8) The respondent, the respondent's attorney, a board member, and board staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(9) An attorney from the Office of the Attorney General shall attend each settlement conference. The board member or Executive Director may call upon the attorney at any time for assistance in the settlement conference.

(10) The respondent shall be afforded the opportunity to make statements on his or her own behalf.

(11) Access to the board's investigative file may be prohibited or limited in accordance with the Administrative Procedures Act (APA), Chapter 2001, Texas Government Code, and the Open Records Act, Chapter 552, Texas Government Code.

(12) No formal recording of the settlement conference shall be made.

(13) At the conclusion of the settlement conference, the board member or the Executive Director may make recommendations for informal disposition of the complaint or contested case. The recommendations may include any disciplinary action authorized by the Occupational Therapy Practice Act. The board member or the Executive Director may also conclude that the board lacks jurisdiction, that a violation of the Act or this chapter has not been established, order that the investigation be closed, or refer the matter for further investigation.

(h) The board follows the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001, for resolution of complaints as a contested case. A copy of the APA procedures may be obtained from the board.

(i) Should the recommendation for an informal disposition not be accepted by the respondent, the complaint shall be referred back to the Investigation Committee for appropriate action. The committee shall determine if the case should be referred to the State Office of Administrative Hearings (SOAH) or dismissed for insufficient evidence or other reasons justifying a dismissal.

(j) If the Investigation Committee determines that a violation has occurred and the respondent is not under the jurisdiction of the board, the committee has the option of referring the case to the appropriate authority: district attorney, county attorney, etc.

~~[(a) The Texas Board of Occupational Therapy Examiners Code of Ethics is a public statement of the values and principles used in promoting and maintaining high standards of behavior in occupational therapy within the state of Texas. The Code of Ethics is a set of principles that applies to occupational therapy personnel. ("Personnel" in this section are defined as those individuals licensed by this board or applicants for licensure with this board.)]~~

~~[(b) Any action that is in violation of the spirit and purpose of this Code shall be considered unethical. To ensure compliance with the Code, enforcement procedures are established by the board and enforced by the Investigation Committee and investigative staff. Submission of an application to, or acceptance of a license from, this board commits these individuals to adherence to the Code of Ethics and its enforcement procedures.]~~

~~[(c) Principle 1. Occupational therapy personnel shall demonstrate a concern for the well being of the recipients of their services (beneficence).]~~

~~[(1) Occupational therapy personnel shall provide services in an equitable manner for all individuals.]~~

[(2) Occupational therapy personnel shall maintain relationships that do not exploit the recipient of services sexually, physically, emotionally, financially, socially or in any other manner. Occupational therapy personnel shall avoid those relationships or activities that interfere with professional judgment and objectivity.]

[(3) Occupational therapy personnel shall take all reasonable precautions to avoid harm to the recipient of services or to his or her property.]

[(4) Occupational therapy personnel shall strive to ensure that fees are fair, reasonable, and commensurate with the service performed.]

[(d) Principle 2. Occupational therapy personnel shall respect the rights of the recipients of their services (e.g., autonomy, privacy, confidentiality).]

[(1) Occupational therapy personnel shall collaborate with service recipients or their surrogate(s) in determining goals and priorities throughout the intervention process.]

[(2) Occupational therapy personnel shall inform the service recipients of the nature, risks, and potential outcomes of any occupational therapy interventions.]

[(3) Occupational therapy personnel shall obtain informed consent from subjects involved in research activities indicating they have been advised of the potential risks and outcomes.]

[(4) Occupational therapy personnel shall respect the individual's right to refuse professional services or involvement in research or educational activities.]

[(5) Occupational therapy personnel shall protect the confidential nature of information gained from educational, practice, research, and investigational activities.]

[(e) Principal 3. Occupational therapy personnel shall achieve high standards of competence (duties).]

[(1) Occupational therapy personnel shall hold the appropriate national and state credentials for providing services.]

[(2) Occupational therapy personnel shall take responsibility for maintaining competence by participating in professional development and educational activities.]

[(3) Occupational therapy personnel shall perform their duties on the basis of accurate and current information.]

[(4) Occupational therapy personnel shall protect service recipients by ensuring that duties assumed by or assigned to other occupational therapy personnel or non-licensed individuals are commensurate with their qualifications and experience.]

[(5) Occupational therapy personnel shall provide appropriate supervision to individuals for whom the practitioners have supervisory responsibility.]

[(6) Occupational therapy personnel shall refer recipients to other service providers or consult with other service providers when additional knowledge and expertise are required.]

[(f) Principle 4. Occupational therapy personnel shall comply with the rules and laws of the state of Texas guiding the profession of occupational therapy (justice).]

[(1) Occupational therapy personnel shall understand and abide by applicable board rules.]

[(2) Occupational therapy personnel shall inform employers, employees, and colleagues about those laws and board rules that apply to the profession of occupational therapy.]

[(3) Occupational therapy personnel shall require those they supervise in occupational therapy related activities to adhere to the Code of Ethics.]

[(4) Occupational therapy personnel shall accurately record and report all information related to professional activities.]

[(g) Principle 5. Occupational therapy personnel shall provide accurate information about occupational therapy services (veracity).]

[(1) Occupational therapy personnel shall accurately represent their qualification, education, experience, training, and competence.]

[(2) Occupational therapy personnel shall disclose any affiliations that may pose a conflict of interest.]

[(3) Occupational therapy personnel shall refrain from using or participating in the use of any form of communication that contains false, fraudulent, deceptive, or unfair statements or claims.]

[(h) Principle 6. Occupational therapy personnel shall treat colleagues and other professionals with fairness, discretion, and integrity (fidelity, veracity).]

[(1) Occupational therapy personnel shall safeguard confidential information about colleagues and staff.]

[(2) Occupational therapy personnel shall accurately represent the qualifications, views, contributions, and finding of colleagues.]

[(3) Occupational therapy personnel shall report any breaches of the Code of Ethics to the board.]

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

Filed with the Office of the Secretary of State, on May 10, 2001.

TRD-200102639
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: June 24, 2001
For further information, please call: (512) 305-6900

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 22. EXAMINING BOARDS

PART 20. TEXAS COMMISSION ON PRIVATE SECURITY

CHAPTER 446. SCHOOLS/INSTRUCTORS/TRAINING

22 TAC §446.25

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed repeal of §446.25 submitted by the Texas Commission on Private Security has been automatically withdrawn. The proposed repeal appeared in the November 10, 2000 issue of the *Texas Register* (25 TexReg 11236).

Filed with the Office of the Secretary of State on May 11, 2001.

TRD-200102648

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 372. PROVISION OF SERVICES

40 TAC §372.1

The Texas Board of Occupational Therapy Examiners has withdrawn from consideration a proposed amendment to §372.1 which appeared in the February 23, 2001 issue of the *Texas Register* (26 TexReg 1687).

Filed with the Office of the Secretary of State on May 10, 2001.

TRD-200102635
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: May 10, 2001
For further information, please call: (512) 305-6900

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CHAPTER 373. SUPERVISION OF NON-LICENSED PERSONNEL

40 TAC §§373.1 - 373.3

The Texas Board of Occupational Therapy Examiners has withdrawn from consideration a proposed amendment to §373.1 and proposed new §373.2 and §373.3 which appeared in the February 23, 2001 issue of the *Texas Register* (26 TexReg 1689).

Filed with the Office of the Secretary of State on May 10, 2001.

TRD-200102637
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: May 10, 2001
For further information, please call: (512) 305-6900

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 12. WEIGHTS AND MEASURES
SUBCHAPTER C. PACKAGES AND PRICE VERIFICATION

4 TAC §12.21

The Texas Department of Agriculture (the department) adopts an amendment to §12.21, concerning the examination procedure for price verification in the department's weights and measures program, without changes to the proposal published in the April 6, 2001, issue of the *Texas Register* (26 TexReg 2585).

This amendment deletes the statement declaring that the department adopts by reference NIST Handbook 130 relating to "Examination Procedure for Price Verification." The adoption will make the rule consistent with the department's intent to no longer implement the price verification procedures as outlined in NIST Handbook 130.

No comments were received regarding adoption of the amendment.

The amendment to §12.21 is adopted under the Texas Agriculture Code (the Code) §12.016, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the execution of applicable laws relating to agriculture, §13.002, which authorizes the department to supervise all weights and measures sold or offered for sale in this state; and §13.021, which authorizes the department to adopt rules for the purpose of bringing about uniformity between the standards established under the Texas Agriculture Code and the standards established by federal law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 14, 2001.

TRD-200102698

Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: June 3, 2001
Proposal publication date: April 6, 2001
For further information, please call: (512) 463-4075

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 1. PRACTICE AND PROCEDURE
SUBCHAPTER A. DEFINITIONS AND GENERAL PROVISIONS

16 TAC §1.10

The Railroad Commission of Texas adopts new §1.10, concerning commissioner conduct, with changes to the proposal published in the February 23, 2001, issue of the *Texas Register* (26 TexReg 1622). The new section is intended to promote public confidence in the integrity and impartiality of the commission and is to be construed and applied to that end. A commissioner should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards of conduct so that the integrity and independence of the commission is preserved. A commissioner shall avoid impropriety and the appearance of impropriety in all activities; be knowledgeable of, and comply with, the law; and neither allow any relationship to influence commission business, quasi-judicial conduct or judgment nor lend the prestige of public office to advance the private interests of the commissioner or others. Further, a commissioner shall not convey, or permit others to convey, the impression that any person is in a special position to influence the commissioner.

Subsection (a) of the new rule sets forth the standards applicable to commissioners in contested cases. The rule would require that a commissioner, when considering contested case issues, not allow any relationship, personal or pecuniary, to influence decisions or policies. In addition, a commissioner should not convey, or permit others to convey, the impression that any person is in a special position to influence commission decisions.

Under the new rule, a commissioner would recuse himself or herself from a contested case issue any time his or her impartiality

might reasonably be questioned, including but not limited to, any time he or she, or anyone within the third degree of kinship by affinity or consanguinity with the commissioner is a party to the proceeding; is acting as counsel to a party; or has a financial or any other interest in the matter in controversy that could be substantially affected by the outcome of the proceeding. Should the commissioner choose not to recuse himself or herself, the commissioner would place in the record, and in the *Texas Register* , a written explanation of any potential conflict and a reasoned justification for not complying with the recusal standards. A commissioner who believes another commissioner has violated this section would raise the issue in a posted meeting at the first opportunity.

As proposed, subsection (b) was intended to provide interpretation and guidance in applying the provisions of subsection (a). Paragraphs (1)-(3) of subsection (b) were modeled on Texas Rules of Civil Procedure, Rule 18b, and were intended only as a reference for commissioners acting in their quasi-judicial capacity as decision-makers in contested cases. The text of paragraph (4) of subsection (b) was taken directly from Texas Government Code, Chapter 573, and was included simply for convenience and ease of reference.

The commission received no comments from associations or groups, but did receive one comment from Commissioner Charles R. Matthews, who opposes adoption of the rule.

Commissioner Matthews' comments address the constitutional and statutory foundations for agency rulemaking, generally, and for the Railroad Commission, specifically. Although the comments refer to the constitutional provision (Texas Constitution, Article XVI, §30) and a portion of the statutory provision (Texas Civil Statutes, Article 6447) pertaining to the creation of the Railroad Commission, significantly the comments omit reference to that portion of Article 6447 which provides, in pertinent part, that "[t]he Commissioners . . . may make all rules necessary for their government and proceedings." This is a specific grant of legislative authority for the commission to adopt new §1.10 as a part of "their government."

Commissioner Matthews' comments argue further that, even if the commission had constitutional or statutory authority to promulgate a rule relating to the recusal of commissioners in a contested case, it could not promulgate new §1.10 because it is inconsistent with other state law, specifically Texas Government Code, Chapter 572, and goes far beyond the specific provisions applicable to commissioners under that chapter.

In response, the commission acknowledges that in the event of a conflict between an applicable statute and an applicable rule, the statutory provision will control. In addition, the commission re-states here what was stated during the February 6, 2001, open meeting deliberations when new §1.10 was proposed: the provisions of this rule are not binding on a commissioner. They are offered as guidance to commissioners, whose constitutional and statutory duties necessarily combine the legislative and the judicial functions. And they are offered as a rule so that members of the public will know the standards of ethical conduct to which the commissioners, individually and voluntarily, hold themselves.

The commission has made changes to new §1.10, as adopted. The commission has removed the detailed wording of paragraphs (1)-(4) of subsection (b), and instead, in paragraphs (1) and (2) refers to the sources for the guidance, Rule 18b, Texas Rules of Civil Procedure, and Texas Government Code, Chapter 573, that was included in the proposal.

The commission adopts the section under Texas Civil Statutes, Article 6447, which gives the Railroad Commissioners authority to make all rules necessary for their government and proceedings, and under Texas Government Code, §2001.004, which, among other things, requires the commission to make available for public inspection all written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions. The commission elects to make this policy statement through the proposal and adoption of a procedural rule.

Texas Civil Statutes, Article 6447, and Texas Government Code, §2001.004, are affected by the new section.

Issued in Austin, Texas, on May 8, 2001.

§1.10. Commissioner Conduct.

(a) Participation in Contested Cases.

(1) When considering contested case issues, a Railroad Commissioner shall not allow any relationship, personal or pecuniary, to influence decisions or policies, and shall not convey, or permit others to convey, the impression that any person is in a special position to influence commission decisions.

(2) A commissioner will recuse himself or herself from a contested case issue any time his or her impartiality might reasonably be questioned, including but not limited to, any time he or she, or anyone within the third degree of kinship by affinity or consanguinity with the commissioner:

(A) is a party to the proceeding;

(B) is acting as counsel to a party; or

(C) has a financial or other interest in the matter in controversy that could be substantially affected by the outcome of the proceeding.

(3) A commissioner otherwise subject to the provisions of paragraph (2) of this subsection who elects not to recuse himself or herself will place in the record, and in the *Texas Register* , a written explanation of any potential conflict and a reasoned justification for not complying with paragraph (2) of this subsection.

(4) A commissioner who believes another commissioner has violated this section shall raise the issue in a posted meeting at the first opportunity.

(b) Interpretation guidance. The following commentary is to assist in the application of this section.

(1) In considering whether to recuse himself or herself from deliberation or decision in any particular contested case, a commissioner should consult Rule 18b, Texas Rules of Civil Procedure, which pertains to judges. Reference to this rule is appropriate for a commissioner acting in a quasi-judicial capacity.

(2) In subsection (a) of this section, the degree of relationship should be computed according to Texas Government Code, Chapter 573.

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 May 8, 2001.

TRD-200102584

Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: May 28, 2001
Proposal publication date: February 23, 2001
For further information, please call: (512) 475-1295

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CHAPTER 7. GAS UTILITIES DIVISION
SUBCHAPTER B. SUBSTANTIVE RULES

16 TAC §7.60

The Railroad Commission of Texas adopts new §7.60, relating to suspension of gas utility service during winter months, with changes to the proposal published in the March 9, 2001, issue of the *Texas Register* (26 TexReg 1929). The basis for new §7.60 is emergency rule §7.60 adopted by the Commission in the November 28, 2000 issue of the *Texas Register* (25 TexReg 12274). The Commission had received a petition for rulemaking filed by Consumers Union, the American Association of Retired Persons, the Texas Ratepayers' Organization to Save Energy, and the Texas Legal Services Center, requesting the Commission to adopt a rule addressing this situation. The Commission determined that an emergency rule was necessary because of the extreme weather conditions present at that time in many areas of Texas and because of the dramatic increases in the cost of natural gas.

The Commission found that adopting §7.60 on an emergency basis was necessary because heating costs would be higher during the winter season due to a combination of higher than normal gas costs and colder than average temperatures. The Commission projected that natural gas prices, which averaged $3.07 per Mcf for Texas residential customers during the 1999-2000 heating season, to more than double for the same period in 2000-2001. Commission data showed that even during relatively mild winter heating seasons, residential natural gas consumption is at its highest during those months, averaging 10 Mcf per month compared to five Mcf on an annual basis. In addition, the National Oceanic and Atmospheric Administration (NOAA) data for the week ending November 18, 2000, showed that weather in Texas, measured by heating-degree days, had so far this heating season been 67% colder than normal. The Commission found that residential natural gas consumption would be higher than average and that the average winter residential gas bill would be more than 50% higher under this combination of factors.

Further, the Commission found that the weather is inherently unpredictable and variable across the different regions in Texas. For example, extreme weather conditions can exist in the panhandle while coastal areas are unaffected. Customers in one area of the state could already be adversely impacted by the weather conditions that would invoke the emergency rule by the time the conditions were known with certainty at the Commission's Austin headquarters.

The Commission also found that, in times of higher energy costs, consumers may restrict their consumption of natural gas for residential heating to levels that could be detrimental to their well-being. The Texas Department of Health recognizes the dangers of cold weather and was, at the time the Commission adopted emergency §7.60, developing educational material on hypothermia (severe or prolonged loss of body heat because of cold environments). In 1999, at least 21 people died in Texas from hypothermia; of those 21, at least 17 (81%) were age 60 or older and many of them died unexpectedly in their own homes. Without adequate heat, many people, especially the elderly, are in danger long before the temperature drops to freezing. Hypothermia is a below-normal body temperature, typically 96 degree Fahrenheit or lower, and can threaten the health of older people in cool indoor temperatures as high as 60 degrees Fahrenheit. In Texas, it is uncommon for temperatures to drop to freezing for 24 hours or more. It is not, however, uncommon for temperatures to be below 60 degrees for extended periods of time.

The Commission found that having emergency §7.60 in place before the onset of the combination of extreme weather conditions and higher gas prices would provide appropriate assurance to residential consumers that, during periods of extreme cold, their residential natural gas service would not be disconnected because of delinquent bills. Thus, the emergency would likely prevent unnecessary suffering and, perhaps, irremediable harm. Therefore, the Commission found that an imminent peril to the public health, safety, and welfare existed, necessitating the adoption of emergency §7.60.

At the time the Commission adopted the emergency rule, the Commission indicated that it would request informal comments from the industry and the public regarding rule language to be proposed and adopted on a permanent basis. Using the emergency rule as the "draft" of the proposed permanent rule, the Commission posted the draft rule text on the Commission's web site so that commenters could respond on a web-based form, by electronic mail, or by regular mail. The Commission received six comments suggesting the changes, some of which were incorporated into the proposal that was published on March 9, 2001.

The Commission proposed new §7.60 to prohibit disconnection of service to residential customers in certain instances and to encourage utilities and master meter operators to offer deferred payment plans and level or average payment plans to customers to help prevent service disconnection during severe weather events. The Commission's experience indicates that utilities have in the past voluntarily suspended service disconnections during extreme weather conditions, and that all utilities have in place some form (formal or informal) of deferred payment plan for customers who are unable to remain current on gas bills. The new rule will establish a consistent threshold to prohibit disconnection of delinquent customers for all jurisdictional utilities and master meter operators.

New §7.60 applies to gas utilities and to owners, operators, and managers of master meter systems within the original jurisdiction of the Railroad Commission, including environs customers and special rate customers in unincorporated areas. The rule defines all such gas utilities and owners, operators and managers of master meter systems as "providers."

Subsection (b)(1) prohibits providers from disconnecting a customer on a day when the previous day's temperature at the approved National Weather Station for the county where the customer takes service fell below 32 degrees Fahrenheit and the National Weather Service predicts that the temperature in that county is likely to fall below that level during the next 24 hours. Subsection (b)(2) prohibits providers from disconnecting service to a delinquent residential customer for a billing period in which the provider receives a written pledge, letter of intent, purchase order or other notification from the energy assistance provider

that it is forwarding sufficient payment to continue service. Finally, subsection (b)(3) prohibits providers from disconnecting service to a delinquent residential customer on a day or on a day immediately preceding a day when personnel or agents of the provider are not available for the purpose of receiving payment or making collections and reconnecting service.

To address delinquent bills, subsection (c) encourages providers to offer customers a deferred payment plan as set forth in the Commission's existing quality of service rule §7.45(D). New §7.60(c)(1) and (2) also encourage providers to offer a level or average payment plan consistent with the standards set forth in the rule.

Subsection (c)(3) states that if a customer does not fulfill the terms and obligations of a level or average payment plan, a provider that is a gas utility shall have the right to disconnect service to that customer pursuant to Commission rule §7.45(4), unless disconnection would be prohibited under §7.60(b). A provider that is a gas utility may require a deposit from all customers entering into level or average payment plans pursuant to the requirements of §7.45(5). The gas utility would be required to pay interest on the deposit and may retain the deposit for the duration of the level or average payment plan.

Subsection (d) sets forth the procedures by which providers must give notice of this rule to the social services agencies that distribute funds from the Low Income Home Energy Assistance Program or provide financial assistance to low income customers, and to residential customers and any customers who are owners, operators or managers of master metered systems.

The Commission received comments from four groups, Consumers Union, American Association of Retired Persons, Texas Ratepayers Organization to Save Energy, and Texas Legal Services Center, which filed jointly as "Consumer Groups," and from one gas utility. The commenters generally either supported or did not oppose the adoption of the proposed new rule, but all offered suggestions for changes to the rule.

As proposed, subsection (b) stated that except where there is a known dangerous condition or a use of natural gas service in a manner that is dangerous or unreasonably interferes with service to others, a provider shall not disconnect natural gas service. A comment from a gas utility requested the addition of "is unauthorized" as an exception to the prohibited disconnection to address the situation in which an individual may tamper with gas utility facilities in order to obtain gas without requesting service from the utility provider (and thus without paying for it). The Commission finds that the suggested language is too broad; further, this situation is provided for in §7.45, relating to Quality of Service.

As proposed, subsection (b)(1) stated a delinquent residential customer could not be disconnected on a day when the previous day's temperature in the county where the customer takes service fell below 32 degrees Fahrenheit and the National Weather Service predicts that the temperature in that county will fall below that level during the next 24 hours. One comment suggested that language be added to specify the previous day's temperature at the approved National Weather Station for the county where the customer takes service. The Commission agrees with and has made this clarifying change.

Consumer Groups objected to the 32 degree threshold and offered detailed information regarding health risks associated with temperatures below 65 degrees, not just at freezing and below. The Commission finds that this temperature threshold is more consistent with Public Utility Commission rules for electric utilities and rules of surrounding states. In addition the Commission recognizes the potential for small utilities to be severely affected by the higher threshold of 40 degrees because of revenue shortfalls as a result of higher uncollectibles. Consumer Groups stated their disbelief that the proposed 32 degree threshold balances the needs of both consumers and service providers, stating, "it puts the cash flow concerns of service providers before the health and safety needs of consumers." The Commission acknowledges these concerns, but must also recognize that the gas utility industry is much more diverse in terms of size and cash flow than electric utilities. Based on Commission records for calendar year 1999, the largest total income for a gas utility, $603,096,000, was 13,402 times greater than the smallest total income for a gas utility, $45,000; and the largest net income for a gas utility, $32,940,000, was more than 4,392 times greater than the smallest net income for a gas utility, ($7,500). In addition, this rule applies to providers that are not utilities, master meter operators. These providers can have very small operations, *e.g.*, an apartment building with four units. In that situation, one tenant's failure to pay could indeed jeopardize the ability of the master meter operator to continue to pay for supplies to provide service to the other tenants. Finally, the Commission recognizes that while natural gas providers should take every reasonable step to avoid disconnecting residential customers not only during the coldest weather but any time during the heating season, the natural gas providers are not the only source of financial assistance for customers unable to pay for service.

Proposed subsection (b)(2) referred to a delinquent residential customer for a billing period in which the provider receives a pledge, letter of intent, purchase order, or other notification from an energy assistance provider that it is forwarding sufficient payment to continue service. A comment suggested including the word "written" before the word "notification" to eliminate possible confusion regarding notification. In addition, the change would provide clarity to the Commission's stated intent concerning energy assistance providers. On the other hand, Consumer Groups objected to the requirement that the notice be in writing for two reasons: first, because written notification, in and of itself, does not eliminate the potential for false or unauthorized notifications, and second, because that will tie up scarce resources and unnecessarily hamper assistance providers. The Commission still believes that written notification will eliminate the possibility of receiving calls from individuals who are not authorized to give such notice, and notes that written notification does not necessarily mean a letter sent through the United States mail. Written notification can also include e-mail (which can be printed out and included in a customer's file) and facsimile transmission from the assistance provider. The Commission agrees with the requirement for written notification and has made this change in subsection (b)(2).

Proposed subsection (c)(1) and (2) referred to a level payment plan allowing the residential customer to pay one-twelfth of that customer's estimated annual consumption at the appropriate customer class rates each month. One comment proposed that the word "consumption" be changed to "charges" because consumption is only one part of a total bill, and cannot be used to determine accurately the previous amounts payable to a provider. The Commission agrees with this wording change.

Proposed subsection (d) required providers to give a copy of this rule to social services agencies and customers each October. One comment proposed that language be added allowing the utilities and owners, operators, and managers of mobile home

parks or apartment houses who purchase natural gas through a master meter for delivery to a dwelling unit in a mobile home park or apartment house be allowed to give notice beginning in the September or October billing period, because billing cycles span more than one month, and this would allow adequate time for the information to be mailed. The Commission agrees that this is a better approach, and has made the changes throughout the text in subsection (d).

Consumer Groups commented that natural gas providers should be required, rather than encouraged, to offer deferred payment plans because a deferred payment plan allows the customer that is already at risk of having service disconnected to pay an outstanding bill in installments beyond the due date of the next bill and allows the customer's gas service to continue. This differs from a level or average payment plan that simply allows a customer to better plan their utility payments. The Commission agrees that this suggestion has merit, but because the requirements of a deferred payment plan are already included in a different Commission rule, §7.45, relating to quality of service, the Commission believes that addressing this issue in a separate rulemaking is preferable. Revisions to §7.45 are currently being developed and will be published for comment in the near future.

The Commission adopts the new section under Texas Utilities Code, §§102.001 and 104.251, which give the Railroad Commission exclusive original jurisdiction over the rates and services of a gas utility distributing natural gas or synthetic natural gas in areas outside a municipality and a gas utility that transmits, transports, delivers, or sells natural gas or synthetic natural gas to a gas utility that distributes the gas to the public, and require gas utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable; and Texas Utilities Code, §§124.001 and 124.002, which give the Commission jurisdiction over master meter operators and require the Commission to adopt rules requiring master meter operators to allocate fairly the cost of the gas consumption of each dwelling unit.

The Texas Utilities Code, §§104.251, 124.001, and 124.002, are affected by the new section.

Issued in Austin, Texas, on May 8, 2001.

§7.60. Suspension of Gas Utility Service Disconnection During Winter Months.

(a) Applicability and scope. This rule applies to gas utilities, as defined in Texas Utilities Code, §§101.003(7) and 121.001, and to owners, operators, and managers of mobile home parks or apartment houses who purchase natural gas through a master meter for delivery to a dwelling unit in a mobile home park or apartment house, pursuant to Texas Utilities Code, §§124.001-124.002, within the jurisdiction of the Railroad Commission pursuant to Texas Utilities Code, §102.001. For purposes of this section, all such gas utilities and owners, operators and managers of master meter systems shall be referred to as "providers." Providers shall comply with the following service standards. A gas distribution utility shall file amended service rules incorporating these standards with the Railroad Commission in the manner prescribed by law.

(b) Disconnection prohibited. Except where there is a known dangerous condition or a use of natural gas service in a manner that is dangerous or unreasonably interferes with service to others, a provider shall not disconnect natural gas service to:

(1) a delinquent residential customer on a day when the previous day's temperature at the approved National Weather Station for the county where the customer takes service fell below 32 degrees Fahrenheit and the National Weather Service predicts that the temperature in that county will fall below that level during the next 24 hours;

(2) a delinquent residential customer for a billing period in which the provider receives a written pledge, letter of intent, purchase order, or other written notification from an energy assistance provider that it is forwarding sufficient payment to continue service; or

(3) a delinquent residential customer on a day, or on a day immediately preceding a day, when personnel or agents of the provider are not available for the purpose of receiving payment or making collections and reconnecting service.

(c) Payment plans. Providers are encouraged to offer a deferred payment plan for any delinquent bill of a residential customer rendered or past due as set forth in paragraph (2)(D), concerning Deferred Payment Plans, of §7.45 of this title (relating to Quality of Service) and a level or average payment plan to all customers. Any level or average payment plan shall use one of the following methods:

(1) A level payment plan shall allow residential customers to pay one-twelfth of that customer's estimated annual charges at the appropriate customer class rates each month, with provisions for annual adjustments as may be determined based on actual gas use.

(2) An average payment plan shall allow residential customers to pay one-twelfth of the sum of the customer's current month's charges plus the previous 11 months charges (or, for a new customer, an estimate) at the appropriate customer class rates each month, plus a portion of any unbilled balance.

(3) If a customer does not fulfill the terms and obligations of a level or average payment plan, a provider that is a gas utility shall have the right to disconnect service to that customer pursuant to paragraph (4), concerning Discontinuance of Service, of §7.45 of this title (relating to Quality of Service), unless disconnection is prohibited under subsection (b) of this section.

(4) A provider that is a gas utility may require a deposit from all customers entering into level or average payment plans pursuant to the requirements of paragraph (5), concerning Applicant Deposit, of §7.45 of this title (relating to Quality of Service). The gas utility shall include the amount already deposited by the customer in calculating a deposit required under this paragraph. The gas utility shall pay interest on the deposit and may retain the deposit for the duration of the level or average payment plan.

(d) Notice. Beginning in the September or October billing periods utilities and owners, operators, or managers of master metered systems shall give notice as follows:

(1) utilities shall provide a copy of this rule to the social services agencies that distribute funds from the Low Income Home Energy Assistance Program within its service area;

(2) utilities shall provide a copy of this rule to any other social service agency of which the provider is aware that provides financial assistance to low income customers in its service area;

(3) utilities shall provide a copy of this rule to all residential customers of the utility and customers who are owners, operators, or managers of master metered systems; and

(4) owners, operators, or managers of master metered systems shall provide a copy of this rule to all of their customers.

(e) In addition to the minimum standards specified in this section, providers may adopt additional or alternative requirements if the provider files a tariff with the Commission pursuant to §7.44 of this title (relating to Filing of Tariffs). The Commission shall review the

tariff to ensure that at least the minimum standards of this section are met.

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 May 8, 2001.

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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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CHAPTER 9. LIQUEFIED PETROLEUM GAS DIVISION

SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §§9.2, 9.3, 9.8, 9.10, 9.51 - 9.54

The Railroad Commission of Texas adopts amendments to §§9.2, 9.3, 9.8, 9.10, 9.51, 9.52, 9.53, and new §9.54, relating to Definitions; LP-Gas Report Forms; Application for a New Certificate; Rules Examination; General Requirements for Training and Continuing Education; Training and Continuing Education Courses; Continuing Education Credit for Previous Courses; and Commission-Approved Outside Instructors, without changes to the versions published in the March 23, 2001, issue of the *Texas Register* (26 TexReg 2263).

The main purpose of this rulemaking is the adoption of new §9.54, which establishes requirements for individuals who wish to be approved as outside instructors to offer training or continuing education courses approved by the Commission for Commission training or continuing education credit. The Commission has determined that outside instructor applicants must hold a current Railroad Commission Category E LP-gas certification, because this certification authorizes the widest number of LP-gas activities and the Commission believes that outside instructors should be broadly knowledgeable and experienced in LP-gas activities. The outside instructor application includes a $300 registration fee which covers the applicable subject-matter course examinations, the train-the- trainer course, and administrative review of curriculum, credentials, and any other investigation or review that may be necessary.

The Commission also adopts amendments to §§9.2, 9.3, 9.8, 9.10, 9.51, 9.52, and 9.53, to clarify certain issues related to training and continuing education. In §§9.2, 9.3, and 9.51(g), the title of the Pipeline and LP-Gas Safety Section is being changed to the LP-Gas Safety Section due to a recent reorganization in the Commission's Gas Services Division. The amendments to §9.8 add new subsection (b) to address requirements for an employee who wants to pursue a management- level certificate. The examination fee language in §9.10(a)(3)(D) is amended to clarify that the certification examination fee is not included in the Category E or I course fee as stated in §9.51(f)(2)(A). In §9.52, language is added to subsection (a) to clearly specify that certain new employees must attend at least eight hours of training. The table in §9.52(g) is revised to clarify the dates of previous and new Commission courses, to clarify the class hours for the train-the-trainer course, and to add a new National Propane Gas Association Certified Employee Training Program (CETP) course for large industrial/commercial installations. Reference to the new CETP course is also added to §9.53(3).

The Commission received two comments, both from the Texas Propane Gas Association (TPGA). TPGA generally favored the proposed amendments and the new rule, but offered some suggestions.

TPGA expressed concern that new §9.54 would allow non- Railroad Commission trainers to provide continuing education using curricula other than those developed by the Commission. The comment expressed support for "state-sanctioned" curricula and instructors. The Commission responds that all outside instructor applicants and instructional materials must be reviewed and approved by the Commission prior to any approval being issued. Therefore, any approved outside instructors and curriculum materials will in fact be "state-sanctioned."

TPGA's comment specifically supports the Commission's language in new §9.54 requiring Commission staff to review any outside curricula and requiring outside instructor applicants to pass any subject-matter examinations with a score of at least 85 percent.

TPGA recommended that the Commission should develop, and require approved outside instructors to complete, courses that address any substantial changes that might be made to Commission LP-gas rules, including the adoption by reference of a new edition of NFPA 54 or NFPA 58. The Commission agrees that such refresher courses would be desirable, but chooses not to implement this requirement at this time. Since this provision was not included in the proposed rule published in the *Texas Register* for public comment and would add another requirement for outside instructors, to accept TPGA's recommendation at this time would require republishing the rule for another comment period. Nevertheless, the Commission will continue to review the new training and continuing education rules as implementation proceeds, and if necessary will consider including this recommendation in a future rulemaking.

TPGA supported the $100 charge for the Commission to review any substantial changes to already-approved outside course curricula and recommended that the Commission also charge $100 per course for the initial review of the curricula. The Commission responds that the $300 fee for initial review of an application is reasonable, considering that three Commission employees will review an outside instructor applicant's credentials and evaluate proposed instructional materials for equivalency with materials developed by the Commission, an effort that will take some time to accomplish and that TPGA, earlier in its comments, had supported.

In a follow-up comment, TPGA also requested that five years' experience teaching LP-gas related classes in Texas and/or 15 years' LP-gas regulatory experience be considered adequate to approve an outside instructor applicant. TPGA commented that as Commission employees retire or are reassigned, they may wish to become outside instructors.

The Commission has made no change in the rule in response to this comment. Section 9.54(b)(4), as recommended by the

Commission's LPG Training Task Force, requires an outside instructor to have experience during at least three of the four years prior to the date of filing the application, in both teaching LP-gas classes and in performing or supervising LP-gas activities. The Commission finds it is reasonable to require outside instructors to be experienced in both teaching and in performing or supervising LP-gas activities. In addition, the Commission finds the three-year minimum requirement for teaching experience to be reasonable and adequate and chooses not to increase the requirement to five years. Regarding TPGA's contention that 15 years of LP-gas regulatory experience is adequate qualification for approval as an outside instructor, the Commission notes that regulatory experience takes many forms and may involve neither teaching nor direct experience in performing or supervising LP-gas activities. Thus, a person with extensive regulatory experience may or may not possess the technical expertise to be approved as an outside instructor. Nevertheless, the Commission notes that under the rule as proposed, any outside instructor applicant, including a former Commission employee, who meets all the requirements of §9.54, including the requirements related to teaching and performing or supervising LP-gas activities, can be approved to offer classes for Commission training or continuing education credit.

The new section and amendments are adopted under the Texas Natural Resources Code, §113.051, which authorizes the commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and §113.052, which authorizes the commission to adopt by reference the published codes of nationally recognized societies, including the National Fire Protection Association.

The Texas Natural Resources Code, §§113.051 and 113.052, are affected by the adopted new section and amendments.

Issued in Austin, Texas, on May 8, 2001.

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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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

The Public Utility Commission of Texas (commission) adopts an amendment to §25.214, relating to Terms and Conditions of Retail Distribution Service Provided by Investor Owned Transmission and Distribution Utilities with changes to the proposed text as published in the March 23, 2001 *Texas Register* (26 TexReg 2271). The amendment is necessary to promote consistency between the delivery service agreement form (Tariff for Retail Delivery Service, Appendix A, Section II) and section 4.11.1 of the Tariff for Retail Delivery Service. This amendment was adopted under Project Number 22187.

The commission received timely filed comments on the proposed amendment from TXU Energy Services Company (TXU) and from a conglomerate of the following investor owned utilities: Reliant Energy, Texas-New Mexico Power Company, AEP Central Power & Light Company, AEP Southwestern Electric Power Company, AEP West Texas Utilities Company, TXU Electric Company (as future transmission and distribution utility), Entergy Gulf States Utilities, and Southwestern Public Service Company (collectively, IOUs).

All of the comments received were in response to the Tariff for Retail Delivery Service (pro- forma tariff or tariff) adopted by reference in subsection (d) of the proposed rule. As a result of changes to the pro-forma tariff, the commission modifies subsection (d) to reflect the new effective date of the revised pro-forma tariff.

TXU REP stated that this rulemaking should be limited to the specific purpose stated in the *Texas Register* notice, i.e., revising the delivery service agreement to correct a mistake that was made in failing to conform it to the tariff language approved by the commission on December 13, 2000, and that this rulemaking should not be used to reconsider the merits of expanding a REP's options in the handling of outage calls. TXU REP stated that it fully agrees with the current proposal and that the commission should act expeditiously on this matter.

The IOUs proposed that the reference to "service requests" in the title of tariff section 4.11 be changed to refer to requests for "Discretionary Services other than Construction Services." They stated that the term "Discretionary Services" more precisely identifies the types of services to which the section applies and reinforces the distinction that the tariff as a whole seeks to make between Delivery System Services, Discretionary Services and Construction Services. Further, the IOUs proposed that the three options in tariff section 4.11.1 should apply separately to outage reporting and requests for Discretionary Services, i.e., a Competitive Retailer should be allowed to choose one of the three options for outage reporting and a different one of the three options for requesting Discretionary Services. They stated that this would provide flexibility for Competitive Retailers and was suggested by several parties during recent implementation workshops dealing with outages. They suggested model language to achieve the two proposals in their comments.

The commission believes that the IOUs' first proposal entails a language change to tariff section 4.11.1 that falls outside the scope of this rulemaking. Although the IOUs' proposal might serve to emphasize the desired distinction between the noted

three types of services, this rulemaking was initiated for a simpler purpose of conforming the language/options of the tariff's delivery service agreement form to the language/options previously adopted in tariff section 4.11.1. Other parties were not invited to comment on broader changes to the tariff, and REPs might not have understood that broader changes would be considered. Therefore, the commission declines to adopt this proposed change. However, the IOUs' second proposed change does not materially alter the language/options initially adopted in tariff section 4.11.1 and merely provides greater flexibility to competitive retailers within the framework of the three options already adopted. In this case, all of the investor-owned utilities have suggested a change that would give the REPs greater flexibility. Therefore, the commission adopts the IOUs' second proposed change and appropriately amends the tariff.

All comments, including any not specifically referenced herein, were fully considered by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also adopts this rule pursuant to PURA §39.203, which grants the commission authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice, and comparable rates for open access for all retail electric utilities offering customer choice.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.104, and 39.203.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of retail delivery service, including delivery service to a retail customer at transmission voltage, provided by a transmission and distribution utility (TDU). A TDU shall provide retail delivery service in accordance with the terms and conditions set forth in this section to those retail customers participating in the pilot project pursuant to PURA §39.104 on and after June 1, 2001, and to all retail customers on and after January 1, 2002. By clearly stating these terms and conditions, this section seeks to facilitate competition in the sale of electricity to retail customers and to ensure reliability of the delivery systems, customer safeguards, and services.

(b) Application. This section, which includes the pro-forma tariff set forth in subsection (d) of this section, governs the terms and conditions of retail delivery service by all transmission and distribution utilities in Texas. The terms and conditions contained herein do not apply to the provision of transmission service by non-ERCOT utilities to retail customers.

(c) Tariff. Each TDU in Texas shall file with the Public Utility Commission of Texas (commission) a tariff to govern its retail delivery service using the pro-forma tariff in subsection (d) of this section. TDUs may add to or modify only Chapters 2 and 6 of the tariff, reflecting individual utility characteristics and rates, in accordance with commission rules and procedures to change a tariff. Chapters 1, 3, 4, and 5 of the pro- forma tariff shall be used exactly as written; these chapters can be changed only through the rulemaking process. If any provision in Chapter 2 or 6 conflicts with another provision of Chapters 1, 3, 4 and 5, the provision found in Chapters 1, 3, 4 and 5 shall apply, unless otherwise specified in Chapters 1, 3, 4 and 5.

(d) Pro-forma Retail Delivery Tariff. The commission adopts by reference the form "Tariff for Retail Delivery Service," effective date of May 8, 2001. This form is available in the commission's Central Records division and on the commission's website at www.puc.state.tx.us.

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 May 11, 2001.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER BB. COMMISSIONER'S RULES ON REPORTING REQUIREMENTS

19 TAC §61.1025

The Texas Education Agency (TEA) adopts new §61.1025, concerning Public Education Information Management System (PEIMS) data standards without changes to the proposed text as published in the March 23, 2001, issue of the *Texas Register* (26 TexReg 2272) and will not be republished. Texas Education Code (TEC), §42.006, authorizes the commissioner of education, in reviewing and revising the PEIMS, to develop rules to ensure that the PEIMS meets the requirements specified in TEC, §42.006(c)(1)-(3).

The adopted new section references the standards by which school districts and charter schools are to submit required information. The adopted new section specifies that the standards are published annually in an official TEA publication. The official publication is the *PEIMS Data Standards*. The adopted new section also delineates the procedures for adding, deleting, or modifying data elements.

No comments were received regarding adoption of the new section.

The new section is adopted under the Texas Education Code (TEC), §42.006, which authorizes the commissioner of education, in reviewing and revising the Public Education Information Management System (PEIMS), to develop rules to ensure that the PEIMS meets the requirements specified in TEC, §42.006(c)(1)-(3).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200102629

Criss Cloudt
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CHAPTER 97. PLANNING AND ACCREDITATION
SUBCHAPTER AA. ACCOUNTABILITY RATINGS AND ACKNOWLEDGMENTS

19 TAC §97.1002

The Texas Education Agency (TEA) adopts an amendment to §97.1002, concerning school district accountability ratings and acknowledgments without changes to the proposed text as published in the April 6, 2001, issue of the *Texas Register* (26 TexReg 2615) and will not be republished. The section adopts by reference the most current version of Part 1 of the annual accountability manual, which specifies the indicators, standards, and procedures used by the commissioner of education to determine standard accountability ratings and to determine acknowledgment on additional indicators for Texas public school districts and campuses, as authorized by Texas Education Code (TEC), §§39.051(c)-(e), 39.073, 39.074(a)-(b), and 39.075. Part 1 of the annual accountability manual also specifies procedures for submitting an appeal and system safeguard analyses used to assess the integrity of the accountability system. The intention is to annually update the section to refer to the most recently published accountability manual.

The adopted amendment updates the section to adopt by reference *Part 1* of the *2001 Accountability Manual* , dated April 2001, for school year 2000-2001. The accountability system evolves from year to year so the criteria and standards for rating and acknowledging schools in 2001 differ to some degree over those applied in 2000. The biggest differences related to ratings is making the dropout rate standard for the *Recognized* and *Acceptable* / *Academically Acceptable* ratings more rigorous and changing minimum size criteria to include more students in the ratings evaluations. For acknowledgments, the attendance rate is now an Additional Indicator and the standard to be acknowledged for participation in the State Board of Education's Recommended High School Program has been raised to 35 percent of reported graduates. This year, ratings and acknowledgments are scheduled to be released on August 16, 2001.

Given the statewide application of the accountability rating process and the existence of sufficient statutory authority for the commissioner of education to adopt by reference *Part 1* of the *2001 Accountability Manual* , legal counsel with the TEA recommended that the procedures for issuing regular accountability ratings for public school districts and campuses be adopted as part of the *Texas Administrative Code* .

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Education Code, §§39.051(c)-(e), 39.073, 39.074(a)-(b), and 39.075, which authorizes the commissioner of education to specify the indicators, standards, and procedures used to determine standard accountability ratings and to determine acknowledgment on additional indicators.

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 May 10, 2001.

TRD-200102630
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Effective date: May 30, 2001
Proposal publication date: April 6, 2001
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 73. LICENSES AND RENEWALS

22 TAC §73.2, §73.4

The Texas Board of Chiropractic Examiners adopts amendments to §73.2 and §73.4, relating to renewal of license and inactive status, without changes to the proposed text, as published in the February 23, 2001, issue of the *Texas Register* (26 TexReg 1649). The text of the rule as amended will not be republished. The purpose of these amendments is to clarify that the Chiropractic Act, Occupations Code, §201.311(a), and board rules, §73.2 and §73.4, require a licensee who desires to be placed on inactive status to apply for such status each year at the time of license renewal. Section 201.311(a) requires a licensee to apply for inactive status on or before the expiration date of the license. Under the Act and board rules, every licensee must renew his or her license each year, whether the licensee is on active or inactive status. To remain on inactive status, an inactive licensee must re-apply each year at renewal. Failure to re-apply for inactive status subjects an inactive licensee to the same late fee penalties and consequences to which late renewal by an active licensee is subject. While the board believes that the Act and its rules are clear as to the above-listed requirements, it has received at least one inquiry by an attorney who argues that an inactive licensee does not have to re-apply each year. This rulemaking attempts to end any doubt about the requirements for inactive status.

No comments were received concerning the proposed amendment.

The amendments are adopted under the Occupations Code §201.152, which the board interprets as authorizing it to adopt rules necessary for the performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Chiropractic Act, and §201.311, which the board interprets as requiring it to adopt rules providing for inactive status.

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 May 14, 2001.

TRD-200102657
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Effective date: June 3, 2001
Proposal publication date: February 23, 2001
For further information, please call: (512) 305-6709

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CHAPTER 80. MISCELLANEOUS

22 TAC §80.3

The Texas Board of Chiropractic Examiners adopts an amendment to §80.3(e), relating to the fee for chiropractic records, without changes to the proposed text as published in the March 30, 2001, issue of the *Texas Register* (26 TexReg 2475). The text of the rule as amended will not be republished. The amendments revise the Board's recently adopted maximum rates for copies of chiropractic records to conform to the rates established for health care information in the Health and Safety Code §241.154, thus, providing a more consistent rate for copies of health care records.

No comments were received concerning the proposed amendment.

The amendment is adopted under Occupations Code, §201.152, which the board interprets as authorizing it to adopt rules necessary for performance of its duties, the regulation of the practice of chiropractic, and the enforcement of the Chiropractic Act, and §210.405 which sets out statutory responsibilities and requirements for release of patient records, and which the board interprets as one of the provisions it is charged with enforcing.

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 May 14, 2001.

TRD-200102658
Gary K. Cain, Ed.D.
Executive Director
Texas Board of Chiropractic Examiners
Effective date: June 3, 2001
Proposal publication date: March 30, 2001
For further information, please call: (512) 305-6709

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PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 235. LICENSING

SUBCHAPTER D. ISSUANCE OF LICENSES

22 TAC §235.46

The Board of Vocational Nurse Examiners adopts the amendment of §235.46 relating to Notification of Name or Address without changes to the proposed text as published in the April 6, 2001, issue of the *Texas Register* (26 TexReg 2620).

The amendment addresses required documents for a name change. The amendment also has new language relating to address changes to comply with compact rules.

No comments were received relative to the adoption of this rule.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 9, 2001.

TRD-200102614
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: May 29, 2001
Proposal publication date: April 6, 2001
For further information, please call: (512) 305-7653

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CHAPTER 239. CONTESTED CASE PROCEDURE

SUBCHAPTER D. INFORMAL DISPOSITIONS

22 TAC §239.51

The Board of Vocational Nurse Examiners adopts amendment of §239.51 relating to Agreed Orders without changes to the proposed text as published in the April 6, 2001, issue of the *Texas Register* (26 TexReg 2621).

The amendment of this rule will allow the business of the Board to continue, especially the Informal Hearings, in the temporary absence of an Executive Director.

No comments were received relative to the adoption of this rule.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, §302.151(b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

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

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 May 9, 2001.

TRD-200102615
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: May 29, 2001
Proposal publication date: April 6, 2001
For further information, please call: (512) 305-7653

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PART 28. EXECUTIVE COUNCIL OF PHYSICAL THERAPY AND OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 651. FEES

22 TAC §651.1

The Executive Council of Physical Therapy and Occupational Therapy Examiners adopts the amendments to §651.1, without changes to the proposed test as published in the February 23, 2001, issue of the *Texas Register* (26 TexReg 1651) and will not be republished.

This section is being amended to add a re-exam fee, change in inactive fee, and add language for changeable fees.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Executive Council of Physical Therapy and Occupational Therapy Act, Title 23, Subchapter H, Chapter 452, Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 452, Occupational Code is affected by this amended section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 10, 2001.

TRD-200102640

John P. Maline

Executive Director

Executive Council of Physical Therapy and Occupational Therapy Examiners

Effective date: September 1, 2001

Proposal publication date: February 23, 2001

For further information, please call: (512) 305-6900

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CHAPTER 651. FEES

The Executive Council of Physical Therapy and Occupational Therapy Examiners adopts the repeal of §651.2, Physical Therapy Board Fees, and adopts new §651.2, Physical Therapy Board Fees, without changes to the proposed text as published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11842). The repealed and new sections are adopted without changes and will not be republished.

The repeal of the section and the adoption of the new section will bring PT and OT administrative procedures into alignment, to establish fees for services provided, and to include fee information.

The new section adds late renewal and restoration fees for licensees and facilities as set out in the PT Board rules, changes the fee to go inactive, and establishes a renewal fee for an inactive license.

No comments were received regarding adoption of the repeal or new section.

22 TAC §651.2

The section is repealed under Title 3, Subtitle H, Chapter 452 of the Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

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 May 8, 2001.

TRD-200102595

John P. Maline

Executive Director

Executive Council of Physical Therapy and Occupational Therapy Examiners

Effective date: May 28, 2001

Proposal publication date: December 1, 2000

For further information, please call: (512) 305-6900

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22 TAC §651.2

The new section is adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 452, Occupations Code, which provides the Executive Council of Physical Therapy and Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

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 May 8, 2001.

TRD-200102596

John P. Maline

Executive Director

Executive Council of Physical Therapy and Occupational Therapy Examiners

Effective date: May 28, 2001

Proposal publication date: December 1, 2000

For further information, please call: (512) 305-6900

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 122. FEDERAL OPERATING PERMITS

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the *amendments* to §122.10, General Definitions; §122.120, Applicability; §122.130, Initial Application Due Dates; §122.131, Phased Permit Detail; §122.132, Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits;

§122.134, Complete Application; §122.136, Application Deficiencies; §122.139, Application Review Schedule; §122.140, Representations in Application; §122.142, Permit Content Requirements; §122.143, General Terms and Conditions; §122.145, Reporting Terms and Conditions; §122.146, Compliance Certification Terms and Conditions; §122.210, General Requirements for Revisions; §122.211, Administrative Permit Revisions; §122.212, Applications for Administrative Permit Revisions; §122.213, Procedures for Administrative Permit Revisions; §122.216, Applications for Minor Permit Revisions; §122.217, Procedures for Minor Permit Revisions; §122.221, Procedures for Significant Permit Revisions; §122.231, Permit Reopenings; §122.320, Public Notice; §122.330, Affected State Review; §122.340, Notice and Comment Hearing; §122.350, EPA Review; §122.360, Public Petition; §122.608, Procedures for Incorporating Periodic Monitoring Requirements; §122.706, Applications for Compliance Assurance Monitoring; and §122.708, Procedures for Incorporating Compliance Assurance Monitoring Requirements. The commission *repeals* §122.215, Minor Permit Revisions; and §122.219, Significant Permit Revisions. The commission also adopts *new* §122.215, Minor Permit Revisions; §122.218, Minor Permit Revision Procedures for Permit Revisions Involving the Use of Economic Incentives, Marketable Permits, and Emissions Trading; §122.219, Significant Permit Revisions; and §122.222, Operational Flexibility and Off-Permit Changes. Sections 122.215 - 122.218 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas state implementation plan (SIP).

Sections 122.10, 122.120, 122.132, 122.136, 122.140, 122.142, 122.143, 122.145, 122.146, 122.210, 122.211, 122.213, 122.215 - 122.219, 122.222, 122.231, 122.350, and 122.608 are adopted *with changes* to the proposed text as published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 890). Sections 122.130, 122.131, 122.134, 122.139, 122.212, 122.221, 122.320, 122.330, 122.340, 122.360, 122.706, 122.708, and the repeals of §122.215 and 122.219 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full federal operating permit (FOP) program approval must be submitted to the EPA no later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all interim approvals of operating permit programs (65 Federal Register (FR) 32035). The State of Texas FOP program is an interim-approved program subject to the EPA's notice. The commission adopts this rulemaking to resolve inconsistencies which exist between Chapter 122, Federal Operating Permits, and Title 40 Code of Federal Regulations (CFR) Part 70 (Part 70), State Operating Permit Programs, so that the EPA may grant full program approval to the commission's operating permit program. The commission plans to submit program revisions to the EPA on or before June 1, 2001.

The 1990 Federal Clean Air Act Amendments (FCAA), Title V, Permits, directed the EPA to establish the minimum requirements for a state operating permit program. On July 21, 1992, the EPA promulgated Part 70 to comply with this directive. States were required to submit operating permit programs meeting the requirements of Part 70 to the EPA. On August 23, 1993, the commission adopted Chapter 122 to implement the FOP program and submitted its proposed operating permit program (which included Chapter 122) to the EPA on September 17, 1993, and in two supplemental submittals on October 28, 1993, and November 12, 1993. On June 7, 1995, the EPA published notice of its proposal to grant source category-limited interim approval to the State of Texas (60 FR 30037). On June 25, 1996, the EPA promulgated interim approval of the State operating permit program for a period of two years, beginning on July 25, 1996 (61 FR 32693). Interim program approval provided the commission with the authority to implement the operating permit program in Texas for two years without the imposition of an EPA-promulgated, administered, and enforced program under 40 CFR Part 71 (Part 71), Federal Operating Permit Programs. To obtain full program approval, the commission must submit a program to the EPA that corrects inconsistencies between the interim program and Part 70.

Title V does not allow for extensions of interim programs; however, the EPA has extended interim programs three times. These extensions were intended to allow states to simultaneously develop a full program submittal that would correct any interim inconsistencies and meet the requirements of a revised Part 70. On August 29, 1997, the EPA automatically extended all interim approvals of operating permit programs until October 1, 1998 (62 FR 45732). On July 27, 1998, the EPA published a direct final rule that extended interim approval expiration dates until June 1, 2000. On February 14, 2000, the EPA published another direct final interim program extension which would have allowed all interim programs to expire on June 1, 2002 (65 FR 7290). However, on March 29, 2000, the EPA published a withdrawal of the February 14, 2000 extension based on an adverse comment that the extension was contrary to the express provisions of the FCAA (65 FR 16523). Subsequently, on May 22, 2000, the EPA published notice that all states with interim approval would have until June 1, 2001 to submit a program for full program approval and that the EPA would take action on those submittals by December 1, 2001 (65 FR 32035). If the EPA is unable to approve a state's program by December 1, 2001, Part 71 is automatically effective in that state, and Part 71 sources that have not received a FOP would have up to one-year to submit permit applications under Part 71.

The EPA has proposed revisions to Part 70, some of which have not been promulgated. However, some provisions of Chapter 122 were amended in October 1997 to take advantage of flexibility offered by proposed revisions to Part 70. The October 1997 revisions to Chapter 122 were submitted to the EPA for approval in June 1998. The EPA has not yet acted on the June 1998 submittal and the commission understands that the EPA will not act separately on that submittal from this adoption.

In the June 25, 1996 notice, the EPA indicated that in an action on a state's submittal for full approval, it will use the criteria in the final Part 70 regulation (61 FR 32693). The existing July 21, 1992 regulation, as amended, is the final Part 70 regulation at this time. The commission adopts this rulemaking to make Chapter 122 consistent with this version of Part 70 and to address the inconsistencies identified in the June 25, 1996 notice.

RESOLUTION OF INCONSISTENCIES BETWEEN CHAPTER 122 AND PART 70

In the June 7, 1995 notice, the EPA identified various inconsistencies between Chapter 122 and Part 70 (60 FR 30037). The EPA's June 25, 1996 notice states that the inconsistencies specifically identified in the June 7, 1995 notice must be remedied before the EPA grants full approval to Texas' operating permit program (61 FR 32698). Also, the EPA provided the commission a draft document which summarizes the inconsistencies

identified in the 1995 and 1996 notices. That document is available from the commission upon request.

On January 26, 2001, the commission's proposal to address deficiencies in the FOP program identified by the EPA was published in the *Texas Register*. The proposal listed the specific deficiencies and the commission's proposed solution. That list of deficiencies will not be republished but can be found in the January 26, 2001 issue of the *Texas Register* (26 TexReg 890). The commission incorporates this list and the discussion of the deficiencies by reference. A copy of the proposal will be included in the FOP program submittal package that will be sent to the EPA. Changes in the proposed rule language made for this adoption will be identified in the SECTION BY SECTION DISCUSSION.

SECTION BY SECTION DISCUSSION

Subchapter A - Definitions

The commission adopts amendments to §122.10. The reference to the title of Chapter 101 is corrected. The commission amends §122.10(1), the definition of air pollutant, to respond to the inconsistency with Part 70 identified by the EPA in the June 7, 1995 notice. The commission amends §122.10(1)(F) to specify that any pollutant subject to a requirement established under FCAA, §112(r) is an air pollutant under Chapter 122. The existing regulation does not identify these pollutants as "air pollutants." The commission also amends §122.10(1)(F)(i) and (ii). Section 122.10(1)(F)(i) specifies that the definition of air pollutant includes any pollutant subject to requirements under FCAA, §112(j) and also specifies the date pollutants under FCAA, §112(j) shall be considered to be regulated if the EPA fails to promulgate a standard by the date established pursuant to FCAA, §112(e). Section 122.10(1)(F)(ii) specifies that the term air pollutant also includes any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to the FCAA, §112(g)(2) requirement. The amendments are consistent with the definition of regulated air pollutant in 40 CFR §70.2.

The commission amends §122.10(2), the definition of applicable requirement, to include Chapter 101, Subchapter H, Emissions Banking and Trading. Because Subchapter H provides an alternative means of compliance with applicable requirements, the commission believes Subchapter H is also an applicable requirement. The commission also deleted the Chapter 119 reference in the definition of applicable requirement, since the regulation has been repealed. The definition of applicable requirement includes all of the requirements under 30 TAC Chapter 106, Subchapter A, General Requirements or 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification and any term or condition of any preconstruction permit, in response to the inconsistency with Part 70, identified by the EPA in the June 7, 1995 notice, as previously mentioned. The EPA specified that Chapter 122 was inconsistent with Part 70 because the definition of applicable requirement excluded certain minor new source review (NSR) authorizations as applicable requirements (60 FR 30039). In a draft document which summarizes the inconsistencies between Chapter 122 and Part 70 identified in the 1995 and 1996 notices, the EPA identified an inconsistency in the definition of applicable requirement that it overlooked in its original review of the source category- limited interim program. Since the definition of applicable requirement did not include Chapter 116, the EPA stated that the definition failed to include SIP requirements for prevention of significant deterioration (PSD) and nonattainment permitting. The revised definition addresses the issue. In response to comment and for consistency with 40 CFR §70.2, the definition now includes requirements that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective dates. The commission also deletes §122.10(2)(K), since no concept of federal only enforceability exists in Part 70. The commission is also correcting capitalization errors and is making other formatting corrections in the definition.

The commission, in response to a comment, adds language to §122.10(7), the definition of deviation, to clarify that deviations and compliance certifications are not limited to information obtained through required monitoring. Similar language is added to §122.146(4).

In response to comments on concurrent public notice and EPA review periods, the commission amends §122.10(9), the definition of draft permit, to specify that the draft permit may be the same document as the proposed permit. The new definition allows the executive director to implement more efficient permitting procedures for initial issuances, significant revisions, reopenings, or renewals that do not receive public comments. However, the EPA review period would occur after the public notice period when comments are received. This will give the EPA the opportunity to consider any public comments received and any other changes to the permit. Further, the commission is adopting changes from the proposed language in §122.350(b)(1) to specify that public notice and EPA review may run concurrently and, if appropriate, the executive director may extend the EPA review period.

The commission adopts §122.10(11), the definition of "FCAA, §502(b)(10) changes." This definition clarifies the types of changes to a permit that qualify as operational flexibility and do not require a permit revision.

The commission amends §122.10(23), renumbered as §122.10(24), the definition of preconstruction authorization. The amended definition includes any authorization to construct or modify an existing facility or facilities under Chapter 106, Permits by Rule and Chapter 116. This amendment addresses the Part 70 inconsistency identified by the EPA in the June 7, 1995 notice concerning the identification of minor NSR as an applicable requirement. The commission also deletes the language relating to the delegation of FCAA, §112(g) and (j) to the commission as part of the definition of preconstruction authorization. This deletion addresses the issue that the EPA has raised on the validity of the federal only enforceability designation. In Chapter 122, applicable requirements were designated as federally enforceable only when they were promulgated, but not yet adopted by and delegated to the commission. The commission deleted the federally enforceable only designation, making this clarification to the definition of preconstruction authorization necessary.

The commission amends the definition of site in §122.10(29), renumbered as §122.10(30), to clarify that if research and development facilities have the same two-digit standard industrial classification (SIC) code as a collocated manufacturing facility, they will be included with the collocated facility for operating permit applicability and permitting purposes.

In addition to these changes, the defined terms in Chapter 122, Subchapter A are renumbered.

Subchapter B - Permit Requirements

The commission adopts amended §122.120 to clarify which sites are required to obtain a permit. New §122.120(b) clarifies the

applicability of a site to Chapter 122 by further identifying what types of sites are not subject to Chapter 122. In response to comments, the commission amends §122.120(b) to refer to the criteria for sites that are not subject to Chapter 122, as opposed to the owner or operator for those sites. This will eliminate confusion for owners and operators of both sites that are subject to the program and sites that are not. Section 122.120(b)(1) clarifies that a permit is not required for non-major sites that the EPA has exempted from the obligation to obtain a permit. Section 122.120(b)(2) states that non-major sites that are eligible for an EPA deferral are not required to obtain a permit. Also, the commission amends the newly designated §122.120(a) by adding the phrase "except as identified in subsection (b)" to further clarify that the sites in §122.120(a) are subject to Chapter 122 and those sites identified in §122.120(b) are not. The commission also amends newly designated §122.120(a)(4) to require that sites that are non-major which are no longer eligible for an EPA deferral are required to obtain a permit.

The commission adopts amended §122.130 to delete a reference to the interim and full operating permit programs. The interim program refers to the permitting of those sources for which the commission was granted source category-limited interim approval on June 25, 1996. All other sources permitted under Chapter 122 are considered as permitted under the full operating permit program. Since the commission is seeking full program approval from the EPA, the references to the interim and full operating permit programs are unnecessary. The amendments to this section include the entire deletion of subsection (a), including the types of sources required to obtain a permit during the interim program and the dates by which to apply. The commission deletes §122.130(b)(2), which designated the primary SIC groups that should have applied for a permit by July of 1998. The commission also deletes §122.130(b) and §122.139(1) and amends §122.130(b)(1) and (3), and (c); §122.132(c); §122.134(c); and §122.139(2); to delete references to the interim and full operating permit programs and application due dates, and the references to the deleted §122.130(a) and (b)(2). Section 122.130(c) specifies the requirements for sites that become subject to the program after the effective date of the interim or full program. Because the commission is deleting the references to the interim or full program, it is also amending this subsection by using the date February 1, 1998, which is the due date for abbreviated applications for sources subject to the full program. Because of the deletions, §122.130 and §122.139 have been renumbered.

The commission adopts amended §122.131 to add a new subsection (g) to clarify that a site may not qualify for the phased permit detail process if the commission receives its application after July 22, 2000. The commission will, however, honor applications previously submitted in accordance with the phased permit detail process. The commission will discontinue the option because the process is overly resource intensive.

The commission adopts amended §122.132(e)(4)(B) to specify that the determination of compliance status will be based on, at a minimum, but not limited to, compliance methods specified in the applicable requirements. The commission adopts amended §122.132(e)(4)(C)(iii) to specify that compliance schedules shall be supplemental to and not sanction noncompliance with applicable requirements.

The commission adopts new §122.132(e)(10), (e)(11), and (g). New §122.132(e)(10) requires that fugitive emissions be included in permit applications and permits in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source. In response to negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, new §122.132(e)(11) requires any application for which the executive director has not authorized initiation of public notice by the effective date of this rule to include preconstruction authorizations that are applicable to emission units at the site. New subsection (g) clarifies that applicants are not required to submit information for facilities that are identified as de minimis under §116.119, De Minimis Facilities or Sources, unless these facilities are subject to an applicable requirement. The facilities or sources addressed by §116.119 are not required to obtain an NSR authorization before construction. Since they are not required to obtain a preconstruction authorization, the commission will not require these facilities or sources to be identified in an operating permit application. The concept of de minimis facilities or sources is also consistent with 40 CFR §70.5(c), which allows state programs to develop a list of insignificant activities which do not need to be included in permit applications. In addition, the commission deletes references to sources or facilities from §122.132(g) and §122.146(5)(E). The rule now indicates that information on facilities that are identified as de minimis under §116.119 is not required to be included in applications or the annual compliance certification provided the facility has no other applicable requirement. This amendment is necessary because some sources or facilities identified as de minimis under §116.119 may have applicable requirements other than Chapter 116 and, therefore, will need to include those sources in applications and the annual compliance certification.

The commission adopts amended §122.136. The adopted language requires an applicant to submit any necessary information to address applicable requirements or state-only requirements after a complete application is filed until the point that the draft permit is released. This is consistent with 40 CFR §70.5(b). The previous requirement stated that, if a site becomes subject to additional applicable requirements or state-only requirements after an application is submitted, an applicant must submit information to address those requirements within 60 days after becoming subject to the new requirements. This amendment will require applicants to keep permit applications up to date with new requirements, but does not require them to update the application once public notice is published. If a site becomes subject to new requirements after notice has been published, the executive director will make a determination to request additional information for the existing permitting action or require the permit holder to revise the permit after it is issued. However, the site will still need to be in compliance with the new requirements. In response to comments, the commission amends §122.136(c) to clarify that additional information will not be required to be submitted to the executive director before the commencement of the technical review period to address requirements that become applicable to the site after an application is filed. This is consistent with 40 CFR §70.5(b) and will reduce the amount of application material that will need to be continually updated before the release of the draft permit. The commission amends the title of §122.136 to "Application Deficiencies and Supplemental Information" to better describe the contents of the section.

The commission adopts amended §122.139. Section §122.139(1) is deleted and existing §122.139(2) is amended to remove reference to the interim and full operating permit programs. The commission also renumbers the section and updates existing §122.139(4), now §122.139(3), to reference

paragraphs (1) - (2), instead of paragraphs (1) - (3). In addition, the commission corrects grammar in existing §122.139(2), now §122.139(1).

The commission adopts amended §122.140. Section 122.140(3) is amended to clarify that information specified in §122.714(a), Compliance Assurance Monitoring, or §122.612, Periodic Monitoring, becomes conditions under which a permit holder shall operate upon the granting of an authorization to operate under a compliance assurance monitoring general operating permit (GOP) or periodic monitoring GOP. The commission also corrects a typographical error in §122.140(3) and adds the appropriate section titles for the rule citations.

The commission adopts amended §122.142. In response to comments, the commission amends §122.142(b)(2)(B)(ii) to require that each permit contain monitoring, recordkeeping, reporting, and testing requirements sufficient to ensure compliance with the permit. This is consistent with 40 CFR §70.6(c)(1). The commission amends §122.142(b)(3) to specify that permits shall contain preconstruction authorizations and that the incorporation of preconstruction authorizations shall be done in accordance with §122.231. The commission adopts this amendment in response to the EPA June 7, 1995 notice which specifically identified that the section on permit content did not properly identify minor NSR as an applicable requirement. The commission also amends §122.142(b)(3) to remove the requirement for applications for an authorization to operate to contain preconstruction authorizations because it was redundant with §122.132(e)(11). In response to comments, the commission adopts a new §122.142(h) to specify that permits must include compliance assurance monitoring, as specified in Subchapter H. This is consistent with 40 CFR §70.6(a)(3)(i)(A).

The commission adopts amended §122.143. In response to comments and for consistency with 40 CFR §70.6(a)(6)(i), the commission amends §122.143(4) to specify that any noncompliance with the terms or conditions codified in the permit or the provisional terms and conditions is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. In response to comments, the commission amends §122.143(8) to require, upon request by the executive director, that the permit holder provide copies of records to be kept by the permit, including any information claimed to be confidential. This is consistent with 40 CFR §70.6(a)(6)(v). The commission deletes §122.143(9). This paragraph described the requirements for removing the federally enforceable only designation once an applicable requirement is adopted by the commission. The commission is eliminating the federally enforceable only designation; therefore, this paragraph is no longer needed. The remaining paragraphs of §122.143 are renumbered accordingly.

The commission adopts amended §122.145. The commission amends §122.145(1)(A) to specify that reports of monitoring data required to be submitted by an applicable requirement, or by the permit, shall be submitted to the executive director. The commission proposed the deletion of §122.145(2)(D). In response to comments, the commission retains §122.145(2)(D), with amendments, and deletes §122.145(3). Section 122.145(2)(D) now specifies that upset reporting does not substitute for deviation reporting. The commission deletes §122.145(3) because it is redundant with upset and maintenance reporting requirements in Chapter 101, General Air Quality Rules.

The commission adopts amended §122.146. In response to comments, the commission amends §122.146(2) to specify that compliance certifications shall be submitted to the executive director and the EPA administrator. This is consistent with 40 CFR §70.6(c)(5)(iv). The adopted amendment to §122.146(4) requires permit holders to identify any material information that must be included in the certification to comply with FCAA, §113(c)(2), which prohibits knowingly making a false certification or omitting material information. This requirement is consistent with 40 CFR §70.6(c)(5)(iii)(B). Also in §122.146(4), the commission adds language to clarify that compliance certifications are not limited to the information obtained through the required monitoring. The commission corrects the punctuation among the series of subparagraphs in §122.146(5). The amendment to §122.146(5)(A) requires certifications to contain information stating whether the method used for determining the compliance status of each emission unit provides continuous or intermittent data. This requirement is also consistent with 40 CFR §70.6(c)(5)(iii)(B). The commission adopts a new §122.146(5)(E) which clarifies that annual compliance certifications are not required to include any information on facilities identified as de minimis under §116.119, De Minimis Facilities or Sources, provided that the facility has no applicable requirements. As previously mentioned, the commission is proposing to add §122.132(g), which specifies that operating permit applications are not required to include information for de mininis facilities which have no applicable requirements. Since the information is not necessary in the application, the executive director will not require the information to be certified for compliance. The commission adopts a new §122.146(6) which allows the executive director to request additional information if necessary to determine the compliance status of an emission unit. This requirement is consistent with 40 CFR §70.6(c)(5)(iii)(D).

Subchapter C - Initial Permit Issuances, Revisions, Reopenings, and Renewals

The commission adopts amended §122.210. The commission proposed changes to §122.210(a), but in response to comments, the commission is not adopting the proposed changes. The commission agrees with the commenter that the proposed language did not clarify the subsection. The commission deletes §122.210(b) which identified the situations warranting a permit revision. This information is redundant and not as inclusive as that in §§122.211, 122.215, 122.218, and 122.219 which identify the types of changes that qualify as administrative, minor, or significant revisions, respectively. The subsequent subsections are renumbered accordingly.

The commission adopts amended §122.211. The commission adopts a new §122.211(2) that is consistent with 40 CFR §70.7(d)(1)(ii) and specifies that a change in name, address, contact phone number, or other similar change qualifies as an administrative permit revision. The subsequent subsections are renumbered accordingly. The commission also adopts a new §122.211(5), which specifies that changes which incorporate preconstruction authorizations under an EPA-approved program that meets procedural requirements substantially equivalent to those of Subchapters C and D, and compliance and requirements substantially equivalent to §§122.143, 122.145, and 122.146 may qualify as administrative permit revisions. This is consistent with 40 CFR §70.7(d)(1)(v) and would provide additional flexibility offered by Part 70 that could be used in the future to incorporate requirements into operating permits. The commission deletes the language which specified that removing

a federally enforceable only designation is an administrative revision. The commission eliminated this designation of federally enforceable only because it may be inconsistent with 40 CFR Part 70.

The commission adopts amended §122.212 to clarify that the application information requirements apply to administrative permit revisions.

The commission adopts amended §122.213. Section 122.213(a) is amended to replace the text referring to changes required as the result of the adoption of a state-only requirement with text describing changes listed in §122.211. This text is more accurate because §122.213 describes procedures for administrative permit revisions, and changes that affect or add state-only requirements are only one type of administrative amendment identified in §122.211. Also, the appropriate section title is added to the rule citation. The commission also deletes §122.213(a)(1) because the requirements listed in the paragraph are now included as applicable requirements under the FOP program. The subsequent paragraphs are renumbered accordingly. The commission amends §122.213(d) by adding the word "administrative" to describe the permit revision type for clarity.

The commission repeals the existing §122.215 and adopts a new §122.215 to make the criteria for minor permit revisions the same as the criteria in 40 CFR §70.7(e)(2)(i)(A)(1) - (5). The commission corrects a typographical error in §122.215(4)(A) by deleting "an" and inserting "any".

The commission adopts amended §122.216. Because 40 CFR §70.7(e)(2)(v), allows the site to operate a change once a minor permit application is submitted and 40 CFR Part 70 does not allow the permit to be revised after notices have been sent over a 12-month period, the commission deletes §122.216(a). Due to this deletion, the section contains only one subsection which requires no further designation other than the section number. The commission amends §122.216 to specify the minimum information required in the subsection applies to minor permit revisions. In response to comments and to be consistent with 40 CFR §70.7(e)(2)(ii)(A), the commission adds a new §122.216(6) to require minor permit revision applications to include the emissions resulting from the change.

The commission adopts amended §122.217. The commission deletes §122.217(a)(1)(A) and (b)(1)(A) because these subparagraphs were redundant citations requiring that permit holders comply with Chapter 116 which is now included in the FOP program as an applicable requirement. The remaining subparagraphs in each subsection are renumbered accordingly. In response to comments and to be consistent with 40 CFR §70.7(e)(2)(v), the commission amends §122.217(a)(1)(A) - (C) and §122.217(b)(1)(A) - (C) to specify that the permit holder must comply with applicable requirements, state only requirements, and provisional terms and conditions governing the change at a site. The commission amends §122.217(a)(2) to require that permit holders submit an application to the executive director instead of a notice to address an inconsistency with Part 70 identified by the EPA in the June 7, 1995 notice and to be consistent with 40 CFR §70.7(e)(2)(v). The commission amends §122.217(a)(2) and (3) and (b)(2) and (3) to correctly reference the amended §122.216. The commission deletes an incorrect phrase in §122.217(b). The commission also amends §122.217(b)(2) to remove the requirement to record the information and also to require the information relating to the minor permit revision to be submitted no later than the compliance date of a new requirement or effective date of a repealed requirement, not 45 days after such date. This is consistent with 40 CFR §70.7(e)(2)(v), which requires minor permit revision applications to be submitted before a change is operated. Section §122.217(b)(2) requires a compliance date or an effective date and, for clarification, the commission has added the phrase "whichever is applicable." Section 122.217(b)(3) specifies that the information relating to minor permit revisions is to be maintained until the permit is revised. The commission amends this paragraph to reflect that the information is to be maintained until the permit revision is final, for clarity and consistency with 40 CFR §70.7(e)(2)(v). To be consistent with 40 CFR §70.7(e)(2)(iii), the commission adopts a new subsection (e) requiring the executive director to notify the EPA and affected states of minor permit applications. The commission amends §122.217(f)(2) to specify that the executive director may issue a revision provided that a complete application is submitted. Lastly, in order to address Part 70 inconsistencies identified by the EPA in the June 7, 1995 notice, the commission amends §122.217(g) requiring the executive director to take final action on a minor permit revision application no later than 90 days after the receipt of an application or 15 days after the end of the EPA review period, whichever is later. This is consistent with 40 CFR §70.7(e)(2)(iv).

The commission adopts a new §122.218 that is consistent with 40 CFR §70.7(e)(2)(i)(B). This section allows permit holders using economic incentives, marketable permits, and emissions trading to incorporate the changes into operating permits using a minor permit revision. Title 40 CFR §70.7(e)(2)(i)(B) provides that the minor permit revision process may be used for revisions involving these actions, as long as the SIP, or the particular applicable requirement, allows for the use of the minor permit revision process. In order to allow for this option in Chapter 122, §§122.215 - 122.218 will be submitted as a SIP revision. The commission also adds the appropriate title to the rule citation for §122.215.

The commission repeals the existing §122.219 and adopts a new §122.219 specifying that changes to a permit shall be processed as significant revisions if they do not meet the criteria for administrative or minor revisions. This is consistent with 40 CFR §70.7(e)(4)(i). In response to comments, the commission adds a new §122.219(b) to be consistent with 40 CFR §70.7(e)(4)(i) which specifies that, at a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered a significant permit revision.

The commission adopts amended §122.221 to delete §122.221(b)(1) which specifies that significant revisions may be issued if the change meets the criteria for a significant permit revision. This requirement is unnecessary because the commission has deleted the criteria for significant permit revisions and made significant revisions the default revision type. The subsequent paragraphs are renumbered accordingly. The commission clarifies existing §122.221(b)(2), now §122.221(b)(1), by adding the term "complete."

The commission adopts a new §122.222 to provide operational flexibility in order to be consistent with 40 CFR §70.4(b)(12) and to specify requirements for off-permit changes in order to be consistent with 40 CFR §70.4(b)(14). In response to comments and to be consistent with §70.4(b)(12)(i), the commission modifies §122.222(a)(4) to state that a change may be operated under operational flexibility if the permit holder has obtained any

preconstruction authorization, which cannot be a modification under FCAA, Title I. In response to comments, the commission adds a new subsection (b) that allows the removal of applicable conditions and permit terms from a permit following the removal of a unit from a site provided the applicable requirements and permit terms for the remaining units are not affected. Also in response to comments, the commission amends existing §122.222(b), now designated as §122.222(c), to specify that written notification of operational flexibility be submitted to the EPA on the same schedule as the executive director and to specify that notice may be provided within two working days of implementation of operational flexibility changes due to an emergency and that the notice shall also include an explanation of the emergency. These amendments are consistent with 40 CFR §70.4(b)(12). In response to comments, the commission adds new §122.222(d) and (e) to incorporate the operational flexibility provisions provided in 40 CFR §70.4(b)(12)(ii) - (iii). Existing subsections (c) - (g) become (f) - (j). Also in response to comments, the commission adds a clarifying statement to paragraph (1) and adds new paragraphs (2) and (3) to the newly designated §122.222(f) to describe procedures for use with emissions trading. The commission adds clarification regarding written notification in existing §122.222(f)(2), now designated as §122.222(f)(4). The commission also adds appropriate section titles to rule citations in this section. In response to negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, the commission adds §122.222(k) to address off-permit changes, consistent with 40 CFR §70(b)(14). The commission also changes the title of the section to Operational Flexibility and Off-Permit Changes.

The commission adopts amended §122.231 for clarification. In response to comments, the commission amends the language in §122.231(a)(1)(B) to be more consistent with 40 CFR §70.7(f)(1)(i). The commission adopts a new §122.231(a)(1)(C) that is consistent with 40 CFR §70.7(f)(1)(i) requiring the executive director to reopen permits to incorporate newly promulgated or adopted applicable requirements when the remaining permit term is less than three years. In response to comments and to be consistent with 40 CFR §70.7(f)(1)(iii), the commission amends §122.231(a)(2) to specify that the executive director has cause for reopening a permit when the executive director or the EPA administrator determines that the permit contains a material mistake. In response to comments and to be consistent with 40 CFR §70.7(f) and (g), the commission amends §122.231(a)(4) to require a reopening if the executive director or the EPA administrator determines that the permit must be revised or terminated to assure compliance with applicable requirements. To be consistent with 40 CFR §70.7(f)(1)(ii), the commission adds a new §122.231(a)(6) to specify that the executive director has cause to reopen a permit to incorporate additional requirements, including excess emissions requirements, if those requirements become applicable to an affected source under the acid rain program. Upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

The commission also amends §122.231(b)(1) to state that the executive director is required to submit a proposed determination no later than 180 days after receipt of a notification of a reopening initiated by the EPA if the EPA has extended the period for response. This is consistent with 40 CFR §70.7(g)(2). The commission amends §122.231(b)(3) to require the executive director to resolve and take action on a reopening 90 days after receipt of an EPA objection. The previous language required the executive director to take action on a reopening 90 days from the end of the EPA review period or the resolution of any objection. Part 70 does not allow the action on the reopening to be delayed in this manner and the amendment is consistent with 40 CFR §70.7(f)(2).

The commission adopts new subsection (c), with revisions, to address the incorporation of minor NSR. The amendment states that the executive director shall institute proceedings to reopen permits and authorizations to operate that do not contain the applicable requirements relating to minor NSR, as adopted in §122.10(2)(H). This is consistent with 40 CFR §70.4(d)(3)(ii)(D). The commission adds language stating that applications for which the executive director has authorized initiation of public notice by the effective date of this rule , requirements under Chapter 106, Subchapter A, or Chapter 116 of this title or any term or condition of any preconstruction permit will be incorporated no later than permit renewal. Applications for which the executive director has not authorized initiation of public notice by the effective date of this rule will include NSR at initial issuance. Existing subsections (c) - (f) become (d) - (g). The commission amends newly designated subsection (d) to state that, except as provided in §122.231(c), reopenings shall be made as soon as possible. This is consistent with 40 CFR §70.7(f)(2). The commission also clarifies the 30-day notice language in newly designated subsection (e).

Subchapter D - Public Announcement, Public Notice, Affected State Review, Notice and Comment Hearing, Notice of Proposed Final Action, EPA Review, and Public Petition

The commission adopts amended §122.320 to make the sign posting requirements in Chapter 122 consistent with those of 30 TAC Chapter 39, Public Notice, which specifies public notice requirements for solid waste, water quality and air quality permit applications. As a part of the public notice requirements, new source review permits are required to post signs in accordance with the requirements of Chapter 39. The adoption makes Chapter 122 requirements consistent with Chapter 39 requirements in order to simplify the public notice process if the executive director should, at some point, allow for concurrent NSR permitting and operating permit public notice. The commission amends §122.320(h) to require all lettering be no less than 1 1/2 inches in size in block printed capital lettering, which is consistent with Chapter 39. Also, for consistency with Chapter 39, the commission amends §122.320(h)(1) to clarify that the sign is provided by the applicant and should substantially meet §122(h)(1)(A) - (G). The commission also adopts a new §122.320(h)(G) requiring that the company name applying for the permit be printed on the sign.

For consistency with the definition of affected state in 40 CFR §70.2, the commission amends §122.330(b)(1) to clarify that an affected state is one whose air quality may be affected by the issuance or denial of an operating permit and also that the state must be contiguous to Texas. The commission amends §122.330(b)(2) to clarify that §122.330(b)(1) and (2) are two separate criteria defining an affected state.

The commission adopts a new §122.340(f) requiring an applicant to submit a copy of the notice of hearing of a permit action and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

The commission adopts amended §122.350. The proposed §122.350(b)(1) enabled the public notice period and the EPA

review period to run concurrently with, rather than after the end of the public comment period. In response to comments, the commission amends §122.350(b)(1) to give the executive director discretion to extend the EPA review period.

The commission adopts amended §122.360(c) to clarify that the petition for GOPs must be filed no later than 60 days after issuance of the GOP by the executive director to address timing concerns with the GOP issuance process.

Subchapter G - Periodic Monitoring

The commission adopts amended §122.608(e) to correctly reference compliance assurance monitoring (CAM) instead of periodic monitoring. The commission also adds language to identify a rule citation.

Subchapter H - Compliance Assurance Monitoring

The commission adopts amended §122.706(a) and (a)(1)(E) to correct typographical errors.

The commission also adopts amended §122.708(b)(1)(A) and (2)(B) to correct inaccurate identifying references.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission does not believe that the adopted rules will have an adverse, material effect on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full FOP program approval must be submitted to the EPA not later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all operating permits program interim approvals (65 FR 32035). The commission's FOP program is an interim-approved program subject to the EPA's notice. The commission adopts these rules to resolve inconsistencies which exist between Chapter 122 and Part 70 so that the EPA may grant full program approval to the commission's operating permit program. The commission must submit program revisions to the EPA no later than June 1, 2001. The revisions that are necessary to obtain full program approval will have an impact on the major sources subject to the program. However, the commission does not believe that this impact will be adverse or material. All of the affected major sources in the state have either already obtained an operating permit or have applications pending. The requirements of this adoption to incorporate preconstruction authorizations into operating permits will begin no later than renewal of the operating permits. Although the new requirement to incorporate minor NSR may be seen as a significant change to the program, the commission believes that most, if not all, of the facilities covered by the preconstruction authorizations are already addressed in operating permits. As discussed in the preamble, sites currently authorized by a rule-based GOP will most likely need to apply for the new executive director-issued GOP or obtain a different federal operating permit due to the extensive revisions to include new and revised applicable requirements and the minor NSR authorizations. The commission believes most of the sites authorized by a GOP will be able to meet the new GOPs. If the commission fails to submit a program that the EPA can approve by December 1, 2001, the EPA must implement 40 CFR Part 71 in the state and the state could face sanctions including loss of highway funds and increased offsets in nonattainment areas.

The adopted rules do not meet any of the four applicability criteria for requiring a regulatory analysis of "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.

During the 75th Legislative Session, Senate (SB) 633 amended the Texas Government Code to require agencies to perform a regulatory impact analysis of certain rules. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. If each rule proposed for implementation of federally required programs, such as Part 70, was considered to be a major environmental rule that exceeds federal law, then every such rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the revisions to Chapter 122 may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and Part 70.

The TNRCC has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617

(Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967) ; *Sharp v. House of Lloyd*, Inc., 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.- -Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

These rules are adopted in order to meet the requirements of FCAA, Title V and Part 70. Therefore in addition to not exceeding an express standard set by federal law, these rules do not exceed state requirements, and are not adopted solely under the general powers of the agency because the provisions of the TCAA and TWC provided in the STATUTORY AUTHORITY section of this preamble, provide the commission the authority necessary to implement the FOP program. The rules will achieve their stated purpose by addressing the EPA's comments from the interim program approval notice and by making necessary revisions to be consistent with Part 70. The remaining applicability criteria, pertaining to exceeding a delegation agreement or contract between the state and the federal government does not apply. Thus, the commission is not required to conduct a regulatory analysis as provided in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an assessment of whether the adopted rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that assessment. On May 22, 2000, the EPA set a deadline that any program revisions necessary for obtaining full FOP program approval must be submitted to the EPA not later than June 1, 2001, and granted a third extension, extending up to December 1, 2001, for all operating permits program interim approvals (65 FR 32035). The commission's FOP program is an interim-approved program subject to the EPA's notice. The commission adopts these rules to resolve inconsistencies which exist between Chapter 122 and Part 70 so that the EPA may grant full program approval to the commission's operating permit program. The commission must submit program revisions to the EPA no later than June 1, 2001. If the commission fails to submit a program that the EPA can approve by December 1, 2001, the EPA must implement Part 71 in the state and the state could face sanctions including loss of highway funds and offsets in nonattainment areas.

The purpose of this rulemaking is to address the inconsistencies which exist between Chapter 122 and Part 70 so that the EPA may grant full program approval for the state's operating permit program. The rules will achieve their stated purpose by addressing the EPA's comments from the interim program approval notice and by making necessary revisions to be consistent with Part 70. Because the amendments are an action that is reasonably taken to fulfill an obligation mandated by federal law, the amendments meet the exception in Texas Government Code, §2007.003(b)(4). The commission has included elsewhere in this preamble the necessity for the proposed rules. For these reasons the rules do not constitute a takings under Chapter 2007 and do not require additional analysis.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that this rulemaking action is consistent with the applicable CMP goals and policies. The CMP goal applicable to the adopted rules is 31 TAC §501.12(1). This goal requires the protection, preservation, restoration, and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. The CMP policy applicable to the adopted rules is §501.14(q), concerning policies for specific activities and coastal natural resource areas. Title 31 TAC §501.14(q) requires commission rules under the Texas Health and Safety Code (THSC), Chapter 382, governing emissions of air pollutants, to comply with the regulations in 40 CFR adopted pursuant to 42 United States Code (USC) §§7401 *et seq.*, to protect and enhance air quality in the coastal areas so as to protect coastal natural resource areas and promote public health, safety, and welfare. The adopted rules are necessary in order to meet the provisions of Part 70 so that the commission's operating permit program can obtain full program approval. These amendments are consistent with the previously stated goals and policies of the CMP. The permits issued under Chapter 122 do not authorize the increase in air emissions nor do these permits authorize new air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

This adoption deals exclusively with major sources holding FOPs. Owners or operators of these sources should be prepared to amend their permits as discussed previously in this preamble.

HEARING AND COMMENTERS

The commission held a public hearing on the proposal at the TNRCC Complex in Austin, Texas, on February 20, 2001. The commission received comments from 12 organizations and 118 individuals during the public comment period which closed on February 26, 2001. All the commenters supported the commission's effort to obtain final approval of its federal operating permit program but opposed specific parts of the proposal.

Representatives from the Environmental Enforcement Project of the Rockefeller Family Fund (EEP), Neighbors for Neighbors (NFN), Public Citizen (PC), Sustainable Energy and Economic Development Coalition (SEED), Lone Star Chapter of the Sierra Club (Sierra), and the Texas Campaign for the Environment (TCE) made comments at the public hearing.

Baker Botts, L.L.P., on behalf of the Texas Industry Project (TIP); BP; United States Environmental Protection Agency (EPA); ExxonMobil; NFN; Quality of Life El Paso (QLEP); Texas Chemical Council (TCC); Texas Oil & Gas Association (TXOGA); and 118 individuals submitted written comments. PC submitted written comments on behalf of its Texas office, American Lung Association, Texas Impact, Environmental Defense, Sierra, Henry Lowerre & Frederick, Public Interest Research Group, TCE, SEED, San Antonio Coalition for Environmental and Economic Justice, Galveston Houston Association for Smog Prevention, NFN, Mothers for Clean Air, Blue Skies Alliance,

Downwinders at Risk, People United for the Environment, and QLEP.

RESPONSE TO COMMENTS

Comment

The EPA commented that it supports the commission's efforts to correct previously identified inconsistencies in the FOP program. However, the EPA commented that further inconsistencies must be addressed in order for Texas to have a fully approvable program. First, the commission's regulations do not define "emergency" consistent with 40 CFR §70.6(g)(1). Chapter 101 contains a definition of upset, but it does not meet the Part 70 definition of emergency. The Chapter 101 definition of upset is broader than the Part 70 definition of emergency, hence allowing more situations to be subject to the exemption from enforcement. Also, the definition of upset differs from the definition of emergency in that upsets are not limited to the exceedence of technology based emission limits. The EPA gave, as an example of non-technology based standard, an exceedence of permit limits due to an extension of operating hours. PC also commented that Chapter 101 exempts excess emissions which do not qualify as emergencies under 40 CFR §70.6(g). BP concurred with the commission's opinion that the notification requirements of Chapter 101 meet the requirements of Part 70.

Response

The commission does not change the rule in response to these comments. The commission believes that its definition of upset and the criteria for exempting upset emissions from compliance is consistent with the definition of emergency under Part 70. The EPA definition of emergency is an event that is sudden, reasonably unforeseeable, and beyond the control of the owner or operator that causes the exceedence of a technology based standard. The commission definition of upset is an unscheduled occurrence or excursion of a process or operation that results in an unauthorized emission of air contaminants. The commission's definition of upset includes events other than technology based failures which can cause unauthorized emissions. However, the requirements that must be met in order to be considered an upset are consistent with the language and intent of Part 70. Chapter 101 specifies that upset emissions are exempt from compliance with air emission limitations if the owner or operator complies with the requirements of §101.6; the unauthorized emissions were caused by a sudden breakdown of equipment beyond the control of the operator; the unauthorized emissions did not stem from any activity that could have been foreseen and avoided and could not have been avoided by good design, operation, and maintenance practices; the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions; prompt action was taken once the operator knew that applicable emission limitations were being exceeded; the amount and duration of the unauthorized emissions were minimized; all emission monitoring systems were kept in operation, if possible; the owner's or operator's actions in response to the unauthorized emissions were documented by contemporaneous operation logs or other relevant evidence; the unauthorized emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and the unauthorized emissions did not cause or contribute to a condition of air pollution. The commission believes that its requirements under Chapter 101 are at least equivalent to those under the federal rules concerning emergencies. Section 101.11 requires an owner or operator of a source to meet certain criteria in order to receive an exemption for unauthorized emissions. These criteria require that the unauthorized emission must be the result of sudden breakdowns in equipment or process beyond the control of the owner or operator and could not have been avoided by good design, operation, and maintenance. The section also requires the proper documentation of actions taken in response to the upset. In §101.11, the commission states that upset emissions are exempt from compliance with emission limitations in permits or rules if the owner or operator satisfies the exemption criteria. The exemption requirements were developed from language suggested by the EPA during the revision of the commission's upset/maintenance rules in the Spring and Summer of 2000 and are equivalent to the federal conditions that establish the existence of an emergency. The rules containing these requirements were subsequently approved into the SIP.

To consider the EPA's example of a non-technology based standard, an extension of operating hours might represent an excursion from normal process, but it would have to be a planned or scheduled event. Even if the planning or scheduling interval was short, it would not meet the criteria to be exempt from compliance with the applicable rule, since it was a planned event. The commission's criteria to exempt upset emissions require the owner or operator to demonstrate that the event was a sudden breakdown in equipment or process, was beyond the control of the owner or operator, and could not have been foreseen or avoided by good design, operation and maintenance practices. These criteria clearly exclude operator error from exemption which might also be taken as an example of an event that is non-technology based.

Comment

The EPA commented that Chapter 101 improperly provides for exemptions from permit requirements rather than an affirmative defense as required in 40 CFR §70.6(g)(2) and (3).

Response

The commission does not change the rule in response to this comment. Under 40 CFR §70.6(g)(2), an emergency constitutes an affirmative defense in any action brought for noncompliance with technology based emission standards. The burden of proof to establish the occurrence of an emergency is on the owner or operator of the source; therefore, the responsibility to establish an affirmative defense is that of the owner or operator. The Part 70 definition of emergency includes situations that are unforeseen and unavoidable and assumes proper operation of the source. The commission assumes that, under the federal rules, any proceeding evaluating the existence of an emergency and determining that an emergency existed will result in the deferment of enforcement for any emissions in excess of permitted or otherwise authorized limits.

The commission believes that its requirements under Chapter 101 are equivalent to those under the federal rules concerning emergencies. Section 101.11 requires an owner or operator of a source to meet certain criteria in order to receive an exemption for unauthorized emissions. These criteria require that the unauthorized emission must be the result of sudden breakdowns in equipment or process beyond the control of the owner or operator and could not have been avoided by good design, operation, and maintenance. The section also requires the proper documentation of actions taken in response to the upset. The exemption requirements were developed from language suggested by

the EPA during the revision of the commission's upset/maintenance rules in the Spring and Summer of 2000 and are equivalent to Part 70 conditions that establish the existence of an emergency. The revisions to Chapter 101 implementing these requirements were subsequently approved into the SIP and they clearly place the burden of proof to establish the exemption conditions on the source owner or operator. In §101.11, the commission states that upset emissions are exempt from compliance with emission limitations in permits or rules if the owner or operator satisfies the exemption criteria. The emissions are still considered unauthorized, and the phrase "exempt from compliance" means that the commission will not pursue an enforcement action for that particular occurrence of unauthorized emissions. The commission believes that this is the same result that occurs from the application of the emergency and affirmative defense criteria in Part 70 and that the two procedures place an identical burden of proof on the owner or operator and achieve equivalent results.

Comment

The EPA commented that 40 CFR §70.6(g)(5) provides that an upset in a SIP cannot substitute for the emergency reporting and related affirmative defense provisions in Part 70. Therefore, a separate emergency provision is required in order to correct this inconsistency.

Response

The commission believes that the arguments EPA made in the final Part 70 concerning the de minimis justification for minor permit modification procedures (57 FR 32284) can be used to support the insignificant distinctions between the Chapter 101 upset provisions and the Part 70 emergency provisions. Although the goal of Title V is to issue permits that assure compliance with applicable requirements, the provisions concerning enforcement are general in nature. Title V does not have any provisions for the treatment of emergencies or upsets for major sources. Thus the emergency provisions in Part 70 are not required to conform to statutory restrictions for emergencies. Since EPA is not constrained by statutory limitations for emergency provisions, the commission believes that EPA can exercise its discretion to approve de minimis exemptions to the emergency provision requirements of Part 70. The differences between the upset provisions of Chapter 101 and the emergency provision in Part 70 are not significant and requiring an emergency provision in addition to the upset provisions in Chapter 101 would "yield a gain of trivial or no value," *Alabama Power Company v Costle, 6* 36 F.2d 323, 361 (D.C. Cir. 1979). As developed in the immediately previous response, the commission believes that the reporting and exemption requirements in Chapter 101 are equivalent to, and yield the same results as, the emergency and affirmative defense provisions of Part 70. Reports of unauthorized emissions under Chapter 101 must also be included or referenced in deviation reports under §122.145, Reporting Terms and Conditions. The commission notes that the Chapter 101 upset/maintenance provisions have been approved into the SIP. The result of including a separate emergency provision for upset reporting would be two required reports on the same event and containing the same information. The commission believes this would be a redundant and unnecessary requirement and does not change the rule in response to this comment.

Comment

PC commented that Chapter 101 violates federal requirements by automatically exempting facilities from penalties and injunctive relief; exempting emissions from predictable and scheduled events; exempting violations which are not technology based; and barring the EPA's and citizens' ability to enforce applicable requirements. NFN commented that broad, automatic exemptions that the commission allows, coupled with the barriers to the EPA or citizen enforcement of applicable requirements, violate federal requirements. EEP commented that operating permits should not be drafted to provide special exemptions when upsets occur and that it is not appropriate for a regulatory agency to write forgiveness right into a permit. If something goes wrong and the permit holder fails to comply with the permit limit, that is a violation that should subject the permit holder to enforcement action.

Response

The commission does not change the rule in response to this comment. The commission rules governing the exemption from enforcement of unauthorized emissions from upsets and maintenance do not provide an automatic exemption. The commission has previously stated in this response to comments (and in the rulemaking to the recently revised and the EPA approved provisions in Chapter 101) that the responsibility, under commission rules, of the owner or operator of a source to demonstrate that upsets resulting in unauthorized emissions are sudden and unavoidable events beyond his or her control and could not have been prevented by good design, operation, and maintenance practices. The exemption criteria for emissions resulting from maintenance place a similar burden of proof on the owner or operator to demonstrate that maintenance emissions could not have been prevented through planning and design and are not part of a recurring pattern. The commission's rules only address enforcement under state law and do not preclude action by the federal government nor the introduction of evidence by citizens.

Comment

The EPA requested clarification of whether Chapter 101 is consistent with Part 70. Title 40 CFR §70.6(g)(3)(i) specifies that the permit holder must be able to identify the cause of the emergency in order to establish an affirmative defense. Section 101.6(a)(2)(A) and (3)(A) only require that the owner identify the cause in its notice if it knows the cause. The EPA also pointed out that §101.11(a) specifies that the exemption only applies to unauthorized emissions caused by a sudden breakdown of equipment or process.

Response

The commission does not change the rule in response to this comment. The commission believes that Chapter 101 is consistent with Part 70. The EPA is correct in stating that §101.6(a)(2)(A) and (3)(A) require reporting the cause of an upset if that cause is known at the time of original notification. Emissions resulting from upsets must be reported to the commission within 24 hours if those emissions are above a certain specified amount. The commission recognizes that the cause of the upset may not be known within that period. Should the cause of an upset be determined to be different than that originally reported or was not known at the time of the original report, then a follow-up report under §101.6(c) must be submitted to the commission within two weeks of the upset.

Comment

The EPA commented that Chapter 101 is inconsistent with 40 CFR §70.6(g)(3)(iv), which contemplates written notification of emergencies. Also, Chapter 101 is inconsistent with Part 70 in that Chapter 101 only provides for prompt reporting of upsets which exceed the reportable quantity. Title 40 CFR §70.6(g) requires the reporting of all emergencies. Contrary to the requirements of 40 CFR §70.6(g), Chapter 101 would allow upsets which did not exceed the reportable quantity be eligible for an exemption for enforcement even though notification was not submitted to the state.

Response

The commission does not change the rule in response to this comment. The commission does not believe that the language in §70.6(g)(3)(iv) contemplates a particular form of a notice, but rather, it requires certain information to be provided to the permitting authority regarding an emergency. Further, the commission believes that had EPA intended to specifically require a written notice, it would have done so, as it does in the National Pollutant Discharge and Elimination System (NPDES) rules. EPA states in the preamble to the 1992 Part 70 that the emergency provision in §70.6 is "modeled after the NPDES upset provision in 40 CFR §122.41," (57 FR 32279). Although EPA notes that the NPDES provisions will not be binding precedent for the implementation of Title V, it did state that it would look to the NPDES program for guidance, (57 FR 32260). The provisions of §70.6(a)(3) are patterned after 40 CFR §122.41(n), Upset. Title 40 CFR §122.41(n) requires a permittee to submit notice of an upset as required by §122.41(l)(6)(ii)(B). The rule provides that "any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the permittee becomes aware of the circumstances." In the NPDES rules, EPA required specific methods for the reporting of an upset. In Part 70, EPA requires only that a "permittee submitted notice of the emergency" as one of the criteria in order to be eligible for the affirmative defense of emergency.

The commission believes that its requirement for notification of reportable upsets is equivalent to and may, in some cases, be more timely than Part 70 requires. Owners or operators of sources may notify the commission by phone, in writing, by telefax, or through electronic data transfer within 24 hours, which is twice as prompt as the Part 70 requirement to submit notice within two working days. The commission believes that any of these methods provides a verifiable method of notification and is consistent with Part 70. The commission has developed the concept of reportable quantity based on a similar federal concept under the Emergency Planning and Community Right-to-Know Act (EPCRA), regarding when to report releases to any environmental media. Upsets that result in emissions below a reportable quantity do not need to be reported within 24 hours but must be recorded and reported in deviation reports and are subject to the same exemption criteria as any upset. Permit holders are required to make this information available upon request.

Comment

QLEP and 118 individuals commented that deviation reports should be submitted within 48 hours of a violation and that the commission's rules allow a permit holder to wait six months before reporting a violation to the commission. NFN also commented that six months between reports about monitoring activities, such as stack tests and inspections, is not prompt. Also, excess emissions below the reportable quantity become a company's in-house records, which are difficult for the public to obtain, impeding citizen enforcement action or citizen questioning of exemptions for unreported excess emissions. In addition, NFN stated that the commission's reports indicate a 50% decrease in reported excess emissions from upset, maintenance, startup, and shutdown occurrences. EEP also expressed concern that the proposed rules will allow polluters to avoid reporting of violations for six months and that they see no reason why these violations cannot and should not be reported within 48 hours of occurrence. PC commented that upsets under the reportable quantity are not required to be reported.

Response

The commission does not change the rule in response to these comments. The commission adopted the concept of reportable quantity into the upset/maintenance rules in 1997. While every upset must be recorded, those that exceed a certain reportable quantity must be reported to the commission within 24 hours of occurrence. This concept is patterned after a similar concept used in the EPCRA and has resulted in a decrease in the number of 24-hour reports sent to the commission. The reportable quantity concept allows the commission to concentrate resources on those events most likely to affect the general public. All upsets, regardless of size, are subject to the exemption criteria in §101.11. The records of non-reportable upsets would be retained by the source owner or operators and submitted to the commission every six months in accordance with deviation reporting requirements, and must be made available to the commission upon request. These events would be examined under the exemption requirements of §101.11, and those failing to meet the requirements for exemption will be subject to enforcement.

Comment

PC commented that the commission's rules allow facilities to report upset, startup, shutdown, and maintenance under Chapter 101 rather than satisfy the deviation reporting requirements in Chapter 122. Also, Chapter 101 does not provide for compliance certifications. Chapter 122, to satisfy Part 70, should be amended to clarify that upset emissions must be reported as deviations.

Response

The commission does not change the rule in response to this comment. Deviations, as defined in Chapter 122, are any indications of noncompliance with the conditions of a permit. The commission considers any unauthorized emissions resulting from upset, start-up, shutdown, and maintenance to be deviations and requires that they be included or referenced in any six- month deviation report submitted to the commission under §122.145. As deviations, these reports of unauthorized emissions are subject to the compliance certification requirements of §122.146, Compliance Certification Terms and Conditions. Any deviations that do not result in unauthorized emissions must also be recorded and submitted as deviations under §122.145.

Comment

The EPA commented that the amnesty provisions set forth in SB 766, Section 12 (§12) poses impediments to the minimum enforcement and implementation authorities that Texas must maintain in order to remain an approved operating permit program under Part 70. The EPA is concerned that the amnesty provision may surrender the commission's ability to assure compliance with applicable requirements of the Clean Air Act at facilities subject to the Part 70 operating permit program, by prohibiting

the state from initiating an enforcement action against a permit holder for certain preconstruction violations. The EPA is calling upon Texas to address the concerns with amnesty in the Attorney General's statement, as required by 40 CFR §70.4(b)(3). The opinion should also evaluate and attest to the adequacy of the state's authority to carry out all aspects of the program, specifically with respect to whether §12 restricts implementation and enforcement of the state program.

Response

Because EPA has requested an Attorney general's statement on the impact of the amnesty provisions from SB 766, the commission does not believe it is appropriate to provide a response to that issue in this adoption. The commission has forwarded EPA's comments to the Attorney general's and anticipates submitting a statement by the end of June, 2001.

Comment

BP suggested that the commission add a definition of affected state in §122.10 which is consistent with the language in §122.330.

Response

The commission does not change the rule in response to this comment. Section 122.330(b) specifies which states may be affected states, and §122.330(b)(1) and (2), as proposed, specifies the criteria for an affected state as defined in 40 CFR §70.2.

Comment

PC supports the inclusion of minor NSR as an applicable requirement and recommended additional amendments to the definition of applicable requirement. The definition should include all requirements that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective compliance dates, as required by 40 CFR §70.2.

Response

The commission agrees and amends the definition of applicable requirement in response to this comment. A statement concerning the inclusion of requirements with future-effective dates appears in 40 CFR §70.2. It is currently the commission's practice to include, in permits, requirements that have been promulgated or approved by the EPA through rulemaking at the time of permit issuance but which have future effective compliance dates. The commission will continue this practice.

Comment

PC stated that the definition of applicable requirement should include a broad statement that applicable requirements include "any standard or other requirement provided for in the applicable implementation plan approved or promulgated by the EPA through rulemaking under Title I of the Federal Clean Air Act (FCAA) that implements the relevant requirements of the FCAA, including any revisions to that plan." PC commented that the definition of applicable requirement does not appear to include all provisions in the applicable SIP. PC observed that Texas' rules may change before or without corresponding changes in the SIP.

Response

The commission does not change the rule in response to this comment. The commission currently includes in the definition of applicable requirement those chapters and portions of chapters provided in the SIP that are relevant to permit content. The definition of applicable requirement includes those requirements that implement relevant requirements of the FCAA.

Comment

TCC supports the proposed minor NSR/Part 70 integration. TCC requested that TNRCC take into consideration stakeholder resource limitations when developing the implementation process. TCC suggested that the process be designed to allow minor NSR authorizations to be effectively and efficiently incorporated into the operating permit while providing the option to phase-out duplicative NSR requirements. TXOGA envisions an approach that allows for elimination of redundant and duplicative standards and provisions contained in NSR permits from overlapping regulatory requirements. TXOGA explained that this approach would result in a simple, more streamlined process. TCC and TXOGA proposed that minor NSR permits be incorporated into FOPs by reference only. TCC proposed that subsequent permit modifications or renewals go through stringency reviews for the purpose of removing duplicative special conditions determined to be redundant. TCC explained that this proposed process would "help filter out" duplicative requirements in minor NSR permits that are also in Title V operating permits. Similarly, ExxonMobil requested that the following sentence be added to §122.142(b)(3): "Such preconstruction authorizations may be incorporated into the Title V permit by reference."

Response

The commission does not change the rule in response to this comment. The adopted rule requires the executive director to institute proceedings to reopen permits for the incorporation of minor NSR. The commission agrees that this incorporation could be done by simply including minor NSR permit numbers. The executive director is in the process of identifying the most efficient implementation method of eliminating duplicative, redundant, and/or contradicting applicable requirements between minor NSR and FOPs consistent with federal requirements. The commission will continue to work with the stakeholders in the development of procedures for the incorporation of minor NSR.

Comment

BP commented that the incorporation of NSR into the operating permit program should not result in additional permit fees.

Response

The incorporation of minor NSR into the operating permit program will not cause an increase in application fees for NSR permitting.

Comment

The EPA commented that the commission has never submitted Chapter 106, Subchapter A, General Requirements as a SIP revision and that it encourages the commission to do so.

Response

In April 2001, the commission proposed amendments to Chapter 106, Permits by Rule, for proposal and publication that address recordkeeping and what types of maintenance emissions may be authorized under permit by rule. Chapter 106, Subchapter A will be submitted as a SIP revision after the conclusion of that rulemaking.

Comment

PC recommended that the phrase "as found using, at a minimum, compliance method data from monitoring, recordkeeping,

reporting, or testing required by the permit" be deleted from the definition of deviation. PC explained that permit holders should be required to identify and report a deviation if they have any evidence of a deviation. PC commented that Chapter 101 should clarify that facilities may not use selective reporting to avoid reporting a deviation. Facilities must not be allowed to monitor repeatedly until the results are to their liking and report only the favorable results. Any monitoring or testing performed by the facility that indicates a potential violation must be included in the deviation report. PC argued that permit holders should not be allowed to avoid reporting a deviation of which they are aware simply because the deviation was not identified by the compliance method required by the permit. PC agrees with the definition's introductory clause that a deviation is any indication of noncompliance. PC explained that the compliance certification rules can then require that certification be based on all reasonably available credible evidence including compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit.

Response

In response to this comment, the commission adds rule language to the definition of "deviation" and to §122.146(4) stating that the determination of a deviation will not be limited to information obtained from required monitoring. This language does not impose additional requirements but is added as a clarification. The minimum compliance method data that must be used to identify deviations is consistent with that identified in 40 CFR §70.6(c)(5) as necessary for FOP compliance certifications. However, the definition of deviation does not relieve a permit holder from considering any additional information to identify a deviation. The commission already requires permit holders to consider additional information to determine whether a deviation has occurred.

Comment

PC commented that the definition of emission unit appears to be more limited than the federal definition. PC noted that the agency's definition includes "a discrete or identifiable structure, device, item, equipment or enclosure" but that the federal definition also includes an "activity." PC stated that the commission should amend its rules to use the federal definition of emission unit.

Response

The commission does not change the rule in response to this comment. The regulatory and conventional concept of an emission unit has always been that of a tangible item. This concept is codified in the commission's definition of emission unit. Under Chapter 122, any tangible item housing an activity that produces air pollutants is an emission unit. Thus, the commission's definition of emission unit is substantially equivalent to that of the EPA's.

Comment

PC commented that the commission's rules should delete the definition of final action, since it does not include all actions relating to operating permits which may constitute final action by the commission. The definition is unnecessary, creates confusion, and it should be left to the courts to determine which agency actions constitute final action.

Response

The commission does not change the rule in response to this comment. The term "final action" indicates the end of the executive director's review process and that a permit has been issued or denied. Any subsequent action by either the commission, the EPA, or the public is not included in this term.

Comment

PC commented that the definition of major source is impermissibly limited. Section 122.10(14)(C)(xxvii) limits sources for which fugitives should be counted in determining major source status.

Response

The commission does not change the rule in response to this comment. The commission believes that Chapter 122 permissibly identifies sources for which fugitive emissions must be considered in major source determinations in a manner that is consistent with FCAA, §302(j) and with Part 71. The FCAA, §302(j) specifies that in determining whether a source is major, fugitive emissions are included when determined by rule by the administrator. Rulemaking for FCAA, §302(j) was last done on August 7, 1980. Part 70 specifies that fugitive emissions should not be considered in determining major source status unless the source belongs to one of the source categories identified in 40 CFR §70.2, major source definition. The definition further enumerates source categories for which fugitive emissions must be included in the major source determination, including stationary source categories regulated by a standard promulgated under FCAA, §111 or §112, but only with respect to those air pollutants that have been regulated for that category. Title 40 CFR Part 71 (Part 71) sets forth the FOP program that would be implemented by the EPA in a state without an approved operating permit program. In the preamble for the Part 71 final rule, the EPA discussed the issue of the missing reference to August 7, 1980, and acknowledged that "it did not follow the procedural steps necessary under §302(j) to expand the scope of sources in this category for which fugitives must be counted in Part 70 major source determinations." Therefore, the EPA promulgated the final Part 71 is consistent with FCAA, §302(j). The definition of major source in Part 71 specifies that fugitive emissions must be counted for stationary source categories regulated by a standard promulgated as of August 7, 1980, under FCAA, §111 or §112, but only with respect to those air pollutants that have been regulated for that category. The Chapter 122 definition of major source requires fugitive emissions to be considered in determining a major source for any stationary source category regulated under FCAA, §111 or §112 for which the EPA has made an affirmative determination under FCAA, §302(j). Thus, the definition of major source in Chapter 122 is consistent with the definition of major source in Part 71, as well as FCAA, §302(j). Since the aforementioned source categories are the only sources that would be required to count fugitive emissions in the event that the EPA implements Part 71, it is the commission's opinion that only these sources should be required to count fugitive emissions in determining major source status for Chapter 122 and Part 70 applicability. Although the EPA did not submit comments on this issue during the comment period, it is the commission's understanding that the EPA concurs with this analysis.

Comment

PC commented that §122.10(14)(E) limits the sources for which fugitive emissions must be considered in determining the major source status of facilities in nonattainment areas; Part 70 does not establish such limits.

Response

The commission does not change the rule in response to this comment. The commission believes that §122.10(14)(E) is consistent with Part 70. Title 40 CFR §70.2, Major Source, (2) specifies that fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source unless the source belongs to one of the specified source categories. Since 40 CFR §70.2, Major Source, (2) specifies the inclusion of fugitive emissions for any air pollutant, the specified source categories are also the only source categories required to include fugitive emissions under 40 CFR §70.2, Major Source, (3), which defines major stationary sources in nonattainment areas. Therefore, the commission believes that §122.10(14)(E) is consistent with the definition of major source in 40 CFR 70.2.

Comment

PC commented that §122.10(14)(F) allows facilities to calculate potential to emit without including emissions from temporary sources. PC also commented that §122.204(c), Temporary Sources should be deleted. The commission cannot exempt temporary source calculations from a site's potential to emit.

Response

The commission does not change the rule in response to this comment. The commission did not propose amendments to §122.204; therefore, under Texas administrative law, the section cannot be amended at this adoption. Sections 122.10(14)(F) and 122.204(c) specify that temporary sources located at a site for less than six months would not affect a major source determination. If a temporary source remains at a site for more than six months, the emissions must be included in the potential to emit and any applicable requirements must be included in the operating permit.

Comment

PC commented that the commission's rules do not include a definition of fugitive emissions and suggested incorporating the definition contained in 40 CFR §70.2.

Response

The commission does not change the rule in response to this comment. The commission does not believe that it is necessary to include a definition of fugitive emissions in Chapter 122 since Chapter 101 defines fugitive emission as any gaseous or particulate contaminant entering the atmosphere which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow. This is consistent with Part 70 which states that fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

Comment

PC questioned why the applicability of Chapter 122 is based on the eligibility of a deferral rather than an actual deferral. PC requested that the phrase "no longer eligible for a deferral" contained in §122.120(a)(4) be replaced with the phrase "no longer deferred." PC explained that their request would clarify §122.120(a)(4) and make it consistent with Part 70. BP commented that the commission should clarify in §122.120(a)(4) the types of deferrals which relieve the operator from the obligation to obtain a permit. PC questioned the necessity and appropriateness of §122.120(b). PC stated that it is unclear what sites or types of sites will fall under this exemption that are not already subject to §122.120(a). PC added that an exemption for individual sites is not allowed under Part 70.

Response

The rule was not changed in response to this comment. The EPA has granted permitting authorities the discretion to defer Title V operating permitting requirements until December 9, 2004, for area sources of air pollution that are subject to certain regulations (64 FR 69637). Based on the deferral in that rulemaking those area sources are not required to obtain operating permits. Therefore, those sources are eligible for deferral of a Title V permit; however, the EPA may at some future date determine that those sources are no longer eligible for deferral. The commission's text makes clear that, should that occur, those sources must obtain an operating permit. Section 122.120(b) is intended to help owners and operators correctly apply Chapter 122. The commission cannot anticipate what types of sites would be eligible for deferral.

Comment

PC commented that §122.120(b) is written too broadly. PC explained that owners or operators of sites which may qualify for exemption or deferral from the requirements of Chapter 122 are not themselves exempt from the Chapter 122 requirements. PC continued that those persons may own or operate multiple sites, some of which, are not exempt.

Response

The commission agrees with PC's comment and deletes the phrase "owners and operators of one or more of the" from §122.120(b).

Comment

PC commented that §122.122(e), Potential to Emit allows facilities to keep on site the registration limiting its potential to emit. If a registration is not submitted to the commission, the limits would not be practically enforceable, as is required by the EPA's 1996 document "Effective Limits on Potential to Emit."

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission agrees that a registration limiting a site's potential to emit must be practically enforceable, but that certified registrations kept onsite meet this requirement. The §122.10 potential to emit definition specifies that "any certified registration or preconstruction authorization restricting emissions ...shall be treated as part of its design if the limitation is enforceable by the EPA." The EPA, in 40 CFR §52.21(b)(17), defines federally enforceable as "all limitations and conditions which are enforceable by the administrator, including those...requirements within any applicable SIP." Since the commission submitted §122.122 for incorporation into the SIP, the commission considers limits established under §122.122 to be federally enforceable. Further, §122.122 specifies that certified registration of emissions and records demonstrating compliance with the registration must be kept on-site, or at an accessible location, and shall, upon request, be provided to the commission or any air pollution control agency having jurisdiction. The commission does not believe that a certified registration of emissions must be submitted in order to be practically enforceable, since the owner or operator must make the registration and any supporting documentation available during an inspection.

Comment

PC was supportive of the discontinuation of the phased permit process in §122.131.

Response

The commission agrees that the phased permit process should not be an option for new applications and appreciates the comment.

Comment

PC commented that §122.130 and §122.132(c) are inconsistent with 40 CFR §70.5(c) by allowing applicants to submit abbreviated initial applications and that this procedure does not allow the public to gather the necessary information to participate in operating permit proceedings. Complete applications are not due unless requested by the executive director, hence, applications may not contain emissions information, applicable requirements, or compliance information. Therefore, abbreviated initial applications should be eliminated from the commission's rules. PC also made similar comments on §122.502(a), Authorization to Operate, which was not proposed for amendment and allows the owner or operator to submit an abbreviated application, which is insufficient to comply with the 40 CFR §70.6(d)(2) and FCAA, §7661b. NFN also expressed concern that abbreviated initial applications would impair the commission's access to full information and the public's right to participate in the permit review.

Response

The commission does not change the rule in response to this comment. Section 122.132(c) states that an applicant may submit an abbreviated application and that the executive director shall inform the applicant in writing of the deadline for submitting the remaining information. The executive director requires a full application for every operating permit action. The remaining information required for a full application is itemized in §122.132(e), including applicable requirements for each emission unit and a compliance plan. The commission uses abbreviated applications primarily to identify major sources and they were the basis for the subsequent schedule developed to require applicants to submit full applications.

When initially implementing the program, the commission required abbreviated applications to be submitted for all permitting actions. This required an abbreviated application for every site to be submitted. The executive director did not, however, intend to begin the technical permit review on all applications at the time each application was submitted. Allowing owners and operators to submit abbreviated applications enabled the executive director to develop the full application submittal schedule without requiring the applicant to continually update and certify the detailed application information prior to the technical review of the permit. Once all information has been submitted, the executive director performs a technical review and develops a draft permit, which will be made available for comment during the public notice period, along with the full permit application. The application process described here also assists interested persons since their review of the applications would not be done on outdated application information. Further, interested persons would not have to track the submittal of outdated application information.

Comment

PC commented that §122.132(e) does not require an application to include all of the information required by 40 CFR §70.5(c), that the rules themselves need to specify the required application content and that it is not sufficient that the applicable form developed by the agency may contain the information required. Chapter 122 should be amended to require applications to include 1.) identifying information, including company name and address, owner's name and agent, and telephone number and names of plant site manager or contact; 2.) a description of the source's processes and products, including any associated with alternate scenarios identified by the source; 3.) all emissions of pollutants for which the source is major, and all emissions of regulated air pollutants, including a description of all emissions of regulated air pollutants emitted from any emission unit, except where such units are exempted; 4.) identification and description of all points of emissions in sufficient detail to establish the basis for fees and applicability of requirements; 5.) emissions rate in tons per year and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method; 6.) fuels, fuel use, raw materials, production rates and operating schedules to the extent they are necessary to determine or regulate emissions; 7.) identification and description of all pollution control equipment and compliance monitoring devices or activities; 8.) limitations on source operation affecting emissions or any work practice standards, where applicable for all regulated pollutants at the source; 9.) other information required by any applicable requirement, including information related to stack height limitations developed pursuant to FCAA, §123; 10.) calculations on which emissions related information is based; 11.) an explanation of any proposed exemptions from otherwise applicable requirements; and 12.) additional information as necessary to define alternative operating scenarios identified by the source or to define permit terms and conditions. PC also commented that the general permit application should be required to include information regarding emissions. NFN also commented that Chapter 122 should be amended to specify that applications include a detailed explanation of how facilities qualify for exemptions and documentation to support that explanation. The detailed explanation should include a precise listing of how the facility complies with each of the requirements of the exemption; an answer of "none" to a question is not adequate. The facility should also be required to certify in its annual compliance certification whether or not it continues to meet each requirement for an exemption. Certifications for exempt status would decrease the likelihood of false claims since they carry the consequence of personal liability.

Response

The commission does not change the rule in response to this comment. The commission agrees that Chapter 122 must specify the required application content, however, 40 CFR §70.5(c) states that the permitting authority may use discretion in developing application forms that best meet program needs and administrative efficiency and that the forms and attachments shall include the elements identified in Part 70. The commission believes that the rule and the forms developed for the program meet the requirements of 40 CFR §70.5(c). If necessary, §122.136 enables the executive director to request emission calculation information. Specific emissions information is contained in NSR permits and Emissions Inventory reports, as required by §101.10. Because that information is already available, the duplication of that information in operating permit application forms is not necessary. Additionally, the commission does not require fee information in operating permit applications because major sources annually report emission inventories on which fees are assessed.

The commission believes that it requires sufficient information to determine applicability of specific requirements. The commission uses application forms that require applicants to provide the

basis for establishing why a facility is not subject to a given requirement. For example, some regulations do not require facilities below certain sizes to comply with the regulations and, in all cases, the applicant is required to identify the regulatory citation that excludes the facility from the regulation. All application information is required to be certified by the responsible official. The certification establishes that the submitted information is true, accurate and complete. The certification to whether or not a facility meets an exemption is only required when the application is submitted. If the status of an emission unit has changed and the unit is no longer exempt from an applicable requirement, the permit holder must seek the appropriate revision to the FOP, which would include a compliance certification. Once the permit is revised, the permit holder must certify compliance with the applicable requirement annually and this would include certifying that a unit is in compliance with its applicable requirements. When permit holders certify compliance status, they are also certifying that a unit's applicability has not changed, and that they continue to be exempt.

Comment

PC commented that §122.132(e)(4)(C)(iii) be amended for consistency with 40 CFR §70.5(c)(8)(iii)(C). Compliance schedules for out of compliance sources should include an enforceable sequence of actions with milestones and a statement that any compliance schedule is supplemental to, and does not sanction noncompliance with, the applicable requirements.

Response

The commission changes the rule in response to this comment. The commission agrees that §122.132(e)(4)(C)(iii) should be amended to specify that any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based for consistency with 40 CFR §70.5(c)(8)(iii)(C). The commission does not believe that Chapter 122 requires an amendment to specify that compliance plans include an enforceable sequence of actions with milestones because this information is already required by §122.132(e)(4)(C)(ii) and (iv). Section 122.132(e)(4)(C)(ii) states that a compliance plan for any emission unit not in compliance with applicable requirements shall include a narrative description of how the emission unit will come into compliance with all applicable requirements. Further, §122.132(e)(4)(C)(iv) specifies the compliance plan include a schedule for the submission, at least every six months after issuance of the permit, of certified progress reports. Section 122.142(e)(2), specifies that a permit shall contain a requirement to submit progress reports, which include the dates for achieving the activities, milestones, or compliance required in the compliance schedule and the dates that these were achieved or an explanation of why the dates were not or will not be met and any preventative or corrective measures adopted.

Comment

EEP commented that if a facility is out of compliance with applicable requirements, the permit must include a compliance plan and that compliance certifications are required both at the time that a permit application is submitted and on an annual bases. Sierra noted the importance of compliance certifications and monitoring, recordkeeping and reporting that are added to permits. In the past, many of these requirements were not spelled out in the permits and the information was not easily accessible. Title V is very powerful program for ensuring that these facilities are going to be in compliance with all of these various requirements if all these requirements are going to be in the permit.

Response

The commission does not change the rule in response to this comment. The commission agrees that the operating permits program provides a number of effective enforcement tools. Under the current program, an application is required to contain a compliance plan. Compliance certifications are required for permit applications and on an annual basis for permits. Section 122.142(e) specifies that permits shall contain a compliance schedule for units not in compliance with the applicable requirements at the time of initial permit issuance or renewal. As previously stated, progress reports are required every six months. Section 122.132(e)(4) states that an application shall include a compliance plan and §122.132(e)(9) requires applications to include a certification by the responsible official. Further, §122.146(1) specifies that the permit shall contain a term and condition to specify that the permit holder is required to certify compliance with the terms and conditions of the permit for at least each 12-month period following initial permit issuance. Also, new §122.143(15), formerly §122.143(16), requires any report or annual compliance certification to contain a certification by the responsible official.

Comment

BP commented that the commission should add the following sentence to §122.132(e)(11): "Applications submitted prior to July 2000 shall be updated to include minor NSR permit at permit renewal." Similarly, TXOGA suggested that the following phrase be added to §122.132(e)(11): "except that for applications submitted prior to July, 2000, updates to the applications for this information is not required until permit renewal." TXOGA explained that an amendment to §122.132(e)(11) is necessary so that applications already submitted are not immediately out of compliance upon the effective date of this rule.

Response

Based on negotiations with the EPA regarding its comments regarding the timing of minor NSR incorporation, §122.132(e)(11) is revised to state that applications for which the executive director has not authorized initiation of public notice by the effective date of this rule must include preconstruction authorizations.

Comment

PC commented on §122.132(g). Title 40 CFR §70.5(c) requires an application to include a list of insignificant activities and also that the commission needs to specify that the information omitted from the application under de minimis may not include information needed to determine the applicability of or to impose any applicable requirement or to evaluate the fee amount.

Response

The commission changes the rule in response to this comment. The EPA noted in the June 7, 1995 *Federal Register*, with regard to the insignificant activities list, that "the design and approach the state uses to keep activities out of the operating permit application is considered practical and equivalent to Part 70. This design attains the same results as a list of insignificant activities or emissions thresholds for units. The EPA believes the procedures set forth in the Texas permit regulation to identify insignificant activities achieves the goal and intent of the Part 70 regulations and therefore is consistent and acceptable." (60 FR 30040).

In response to the comment about de minimis activities, the commission clarifies in §122.132(g) that sources identified as de minimis under Chapter 116 do not have to be included in the application for determining Chapter 116 applicability, but such units would need to be included if they are needed to determine the applicability of any other applicable requirement. A de minimis unit under Chapter 116 is not subject to Chapter 116, but that does not automatically make it a unit that may be listed as an insignificant activity under Part 70. Fees are addressed in §101.27, Emission Fees, and §122.132(g) does not change how emission fees are to be calculated.

Comment

PC commented on §122.134 and stated that an application for a permit should not be considered complete unless the application contains all of the information required by 40 CFR §70.5(c).

Response

The commission does not change the rule in response to this comment. The commission believes that §122.134 is consistent with 40 CFR §70.5(a)(2) which specifies that the program shall provide criteria and procedures for determining when applications are complete and also specifies that applications shall be deemed to be complete within 60 days unless the permitting authority determines that an application is not complete.

Comment

TCC requested that the section header for §122.136 be changed from "Application Deficiencies" to "Application Deficiencies and Supplemental Information." TCC explained that their suggested header accurately describes the intent of the section. Similarly, TXOGA commented that §122.136 should be retitled "Duty to Supplement or Correct Application," since much of the section outlines requirements for supplemental information not constituting an application deficiency.

Response

The commission agrees with TCC and TXOGA and changes the title of §122.136 to "Application Deficiencies and Supplemental Information."

Comment

TCC and TXOGA commented that additional text should be added to §122.136(c) to specify that additional information to address requirements that become subject to a site after application submittal is not required to be submitted before the commission begins the permit technical review, upon request, the applicant will submit the necessary information within 60 days, and that additional time for information submittal is at the discretion of the executive director. BP supported this and added that the revision is needed to avoid continual revisions to the permit application. TXOGA suggested additional language be added to §122.136(c) to specify that information not yet submitted under §122.131, Phased Permit Detail, need not be submitted except in accordance with the schedule associated with the phase-in of that information.

Response

The commission agrees with this comment and amends §122.136(c) to specify that additional information is not required to be submitted before the executive director's technical permit review period. This is consistent with 40 CFR §70.5(b) which specifies that an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to the release of a draft permit. The amendment will allow the applicant to submit the needed application information in a timely manner without requiring multiple updates of application information until the commencement of the technical review, and will assist the executive director and interested parties since they will not be reviewing application information that is out of date. This amendment will also address TXOGA's concern in that each portion of a phased permit has an associated technical permit review. Therefore, additional information to address requirements that become applicable will not be required to be submitted before the technical permit review of each phased permit.

Comment

TIP, BP, ExxonMobil, TCC, and TXOGA indicated that §122.140(3) contained a typographical error. The word "respectfully" should be replaced by the word "respectively."

Response

The commission agrees with this comment and amends §122.140(3) by replacing the word "respectfully" with "respectively."

Comment

TCC suggested that the phrase "application for an authorization to operate" be removed from §122.142(b)(3) because it is already stated in §122.132(e)(11). BP made the same request and explained that application requirements should not be addressed in a section titled "Permit Content." TXOGA, ExxonMobil and TIP commented in a similar fashion. TIP requested that §122.142(b)(3) be revised to clarify that the preconstruction authorizations will only be incorporated into Title V permits in accordance with §122.231(c) for those sites that submitted applications prior to the effective date of this rule change. Similarly, TXOGA suggested that the following sentence be added to §122.142(b)(3): "Effective at the renewal of the initial permit, each permit shall contain any preconstruction authorization that is applicable to the emission units at the site." TXOGA reasoned that their suggested sentence would preclude permits or applications from being out of compliance upon promulgation of this rule.

Response

The commission agrees with the comments and deletes the phrase "or permit application for an authorization to operate" from §122.142(b)(3). In addition, the commission clarifies that preconstruction authorizations are incorporated into operating permits as specified in §122.231(c).

Comment

TIP expressed concern about the level of detail currently required in operating permits and that detailed citation requirements greatly increase the paperwork and processing burden associated with initial permit issuance and permit revisions for both the regulated community and the commission staff with no corresponding environmental benefit. Further, §122.142(b)(2)(B) goes beyond the intent of Part 70 and the Title V program. By removing the specific, detailed regulatory citations from operating permits, the commission can produce permits that serve as more useful tools for the regulated community, the public, the EPA and the commission, without compromising any person's ability to identify or to enforce the applicable requirements at a site. TIP and TCC requested that the commission address the issue of

detailed citation requirements in the preamble and assure the regulated community that another rule opening will take place to propose amendments to §122.142(b)(2)(B) to reduce the level of detail required in operating permits. ExxonMobil also requested that the commission address the issue in the preamble and expressed concern that the rule language in §122.142(b)(2)(B) as currently written could result in more stringent interpretations than is the intent of Part 70. TIP, ExxonMobil, and TCC recommended the deletion of the words "detailed" and "specific" from §122.142(b)(2)(B) and (B)(i). BP supported TCC's suggestion concerning detailed citation requirements and added that permits should be streamlined by removing unnecessary detail. TXOGA supported the above amendment to §122.142(b)(2)(B) and stated that their intent was to submit comments to make the rule as flexible and workable as possible, while maintaining the Part 70 Operating Permits requirements and that the efforts and resources expended by both the commission and the regulated community should be reasonable and meaningful. TXOGA expressed their emphasis on the reduction of paperwork and processing burden associated with the program. Even requirements for minor permit revisions will be unduly burdensome and expensive, with no corresponding environmental benefit. This can be remedied by reducing the reliance on specific, detailed regulatory citations for each and every requirement and by implementing a more descriptive approach which will require less paperwork and less revision process. All parties, including the commission and EPA inspectors, site operators and the public will find such a tool much more useful in maintaining and understanding current, accurate regulatory requirements for the site. The suggested changes to §122.142(b)(2)(B) are consistent with Part 70 language and will not diminish the ability to identify or enforce all specific requirements for emission units at a site.

Response

The commission does not change the rule in response to this comment but is currently involved in meetings with all stakeholders, including the EPA, to address level of detail issues. Chapter 122 currently provides the flexibility for the commission to structure the level of detail in operating permits in a manner that provides for compliance with Part 70 and also serves as a useful compliance tool for the commission, the regulated community and the public. The commission will continue its work with all stakeholders to arrive at a level of detail that provides enforceability but eliminates unnecessary permit detail and associated permit revisions. Whether the solution is through another rule opening to propose amendments to Chapter 122 or through a procedural process change has yet to be determined.

Comment

PC commented that §122.142(b)(2)(B)(i) should require a permit to include emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance. PC referenced 40 CFR §70.6(a)(1).

Response

The commission does not change the rule in response to this comment. Section 122.142(b)(2)(B)(i), although not a word-for-word reiteration of 40 CFR §70.6(a)(1), is consistent with its provisions. Section 122.142(b)(2)(B)(i) requires each permit to contain the specific regulatory citations for each applicable requirement identifying the emission limitations and standards. In this manner, each permit includes emission limitations and standards and operational requirements.

Comment

PC commented that §122.142(b)(2)(B)(ii) should require that each permit include testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit, for consistency with 40 CFR §70.6(c)(1). This requirement is independent of CAM or periodic monitoring requirements. PC also commented that reports of monitoring data should include monitoring required by an applicable requirement as well as monitoring required by the operating permit itself. Therefore, §122.145(1)(A) should be amended to specify that reports of monitoring data required to be submitted by an applicable requirement or by a provision of the permit, shall be submitted to the executive director. In addition, monitoring reports must be required to clearly identify deviations. This is consistent with 40 CFR §70.6(a)(3)(iii)(A).

Response

The commission changes the rule in response to these comments. The commission believes that §122.142(b)(2)(B)(ii), as written, meets the requirements of 40 CFR §70.6(c)(1) which does not require an independent monitoring program but rather refers back to the requirements of 40 CFR §70.6(a)(3) for periodic monitoring and CAM. Some monitoring is required by the underlying applicable requirements. If the applicable requirement does not contain monitoring, then periodic monitoring is required, and CAM may apply. However, amending these sections clarifies that reports must address monitoring covered by an applicable requirement, and the definition of applicable requirement includes CAM or periodic monitoring as required by the permit.

Comment

TIP requested that §122.142(b)(3) be amended to allow preconstruction authorizations to be incorporated into operating permits by reference.

Response

The commission does not change the rule in response to this comment. Section 122.142(b)(3) was added in response to an inconsistency identified by the EPA to ensure that NSR authorizations will be included in the permit content requirements of Chapter 122. As a part of the implementation process for the inclusion of preconstruction authorizations in operating permits, one option is to incorporate by reference. The commission does not believe it is necessary to specify in the rule how preconstruction authorizations will be included in operating permits.

Comment

PC commented that §122.142(c) is inconsistent with 40 CFR§70.6(a)(3)(i)(B) in that the executive director has discretion to implement periodic monitoring. The citation should be deleted and replaced with text that is consistent with 40 CFR §70.6(a)(3)(i)(B).

Response

The commission does not change the rule in response to this comment. Title 40 CFR §70.6(a)(3)(i)(B) requires that where the applicable requirement does not require periodic testing or instrumental or non-instrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), the permit must contain periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of an emission unit's compliance with the permit. In the rulemaking completed in 2000, the commission amended §122.142(c) so that it tracks

the language in 40 CFR §70.6(a)(3)(i)(B). However, §122.142(c) does specify that permits contain periodic monitoring as required by the executive director. The executive director makes a determination of what periodic monitoring requirements are needed at initial permit issuance. The executive director has reviewed all applicable requirements to determine which requirements contained no monitoring. The executive director, working with the EPA, developed acceptable procedures and appropriate monitoring requirements to satisfy the Part 70 periodic monitoring provisions. These requirements are included in initially issued permits. The EPA is agreeable to phasing in the remainder of the needed periodic monitoring requirements. The executive director called in full applications based on Standard Industrial Classification (SIC) codes. CAM and periodic monitoring GOPs are being developed and phased in according to this call-in schedule. Therefore, the commission can ensure that adequate and appropriate CAM and periodic monitoring are available when needed for incorporation into permits.

Comment

PC commented that §122.142(e)(1) is not consistent with 40 CFR §70.6(c)(3). Each emission unit not in compliance with an applicable requirement at permit issuance must include a compliance schedule and it is not sufficient for the permit to include a reference to a compliance schedule. The compliance schedule should be a clearly enforceable condition in the permit.

Response

The commission does not change the rule in response to this comment. Including compliance plans by reference does not affect the enforceability of such compliance plan. All terms and conditions in the permit are enforceable by the commission, including those incorporated by reference.

Comment

PC commented that the phrase "unless otherwise specified in the permit" be deleted from §122.143 and §122.144; §122.145, and §122.146. Part 70 requires the items listed in these sections to be included in permits.

Response

The commission does not change the rule in response to this comment. The phrase gives the executive director the authority to include site specific conditions when needed. For example, more frequent deviation reporting may be included as a part of a compliance plan.

Comment

PC recommended amendments to §122.143(4) to be consistent with 40 CFR §70.6(a)(6)(i), to specify that any noncompliance with the terms and conditions of the permit or the provisional terms and conditions is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

Response

The commission agrees with this comment and revises the rule to make it consistent with 40 CFR §70.6(a)(6)(i).

Comment

PC commented that §122.143(8) be amended to be consistent with 40 CFR §70.6(a)(6)(v) by adding the language, " Upon request, the permittee shall also furnish to the permitting authority copies of records required to be kept by the permit or, for information claimed to be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality." Information required to be kept pursuant to a permit is public information and should be accessible to the public, upon request, through the commission.

Response

The commission agrees to amend §122.143(8) to be consistent with 40 CFR §70.6(a)(6)(v) regarding submitting records required to be kept by the permit. The commission does not agree that information claimed to be confidential should be sent directly to the EPA administrator because it could adversely affect the commission's ability to assure compliance with Chapter 122. The commission agrees that public information should be accessible to the public as prescribed under Texas Government Code, Title 5, Chapter 552, regarding public information and exceptions from required disclosure and THSC, §382.041 regarding confidential information. In addition, on April 14, 2000, the commission and the EPA entered into a memorandum of agreement regarding the transmission of confidential information to the EPA and in which the EPA agrees to adhere to the provisions of §382.041 and federal law regarding claims of confidentiality.

Comment

PC commented that the word "relevant" and the phrase "which are deemed necessary to characterize emission rates" be deleted from §122.144(1)(F) to be consistent with 40 CFR §70.6(a)(3)(iii).

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission may consider this change for future rulemaking. Chapter 122 requires the records to reflect the operating conditions that existed at the time of sampling or measurement.

Comment

PC commented on §122.145(2)(B). The rules require submission of a deviation report once every six months. Part 70 requires prompt deviation reporting. For many deviations, reporting once every six months is prompt.

Response

The commission agrees with this comment and, therefore, makes no change to the rule. Generally, the commission agrees that for many deviations six-month reporting is prompt; however, many instances may warrant more frequent deviation reports.

Comment

PC commented on §122.145(2)(B) in that a deviation report should be required even if no deviations have occurred, to state that there have been no deviations. Otherwise, it is impossible for the commission or the public to know whether a facility has had no deviations or simply has failed to submit the required deviation report until the annual compliance report is submitted.

Response

The commission does not change the rule in response to this comment. The commission believes that reporting should be kept to the minimum needed to demonstrate compliance with commission rules. In this case, the commission will interpret the absence of a report to indicate no deviations occurred during the

reporting period. All permit holders are required to submit an annual compliance certification report in which they certify that, with the exception of the information attached in the deviation table, all emission units were in continual compliance. If there were deviations, they would be noted in the annual compliance certification.

Comment

Sierra noted an additional loophole in the language in the compliance certifications that allow a facility to avoid having to admit noncompliance. Citizens have big concerns about upsets, which would be one source of excess emissions where the compliance certifications would allow facilities and the responsible official to basically avoid indicating that they are in noncompliance or exceeding some limitation.

Response

The commission does not change the rule in response to this comment. All deviations must be reported, including those resulting from an upset. In addition, permit holders are required to state if compliance was continuous or intermittent.

Comment

The commission proposed the deletion of §122.145(2)(D). ExxonMobil, TCC and TOGA recommended that the commission keep the citation, with amendments, and recommended the deletion of §122.145(3) because it requires a permit holder to submit redundant upset and maintenance reports already specified by Chapter 101. TIP supported this and further clarified that this will better achieve the commission's goal of eliminating redundant provisions from Chapter 122. The current §122.145(2)(D) prevents duplication of reports by allowing permit holders to reference upset or maintenance reports in a deviation report. Section 122.145(3), however, is redundant as it merely restates a permit holder's obligation to report upset or maintenance activities under Chapter 101. BP pointed out that §122.145(2)(D) explains the relationship between deviation reporting and the reporting required in Chapter 101 and that a deviation may or may not be an upset and vice versa. However, if a deviation were an upset, then they would request that any reporting requirements of Chapter 101 be sufficient to satisfy any deviation reporting requirements under Chapter 122. Therefore, the commission should either address reporting equivalency in the preamble or add a new §122.145(D) specifying if a deviation is reported and that deviation is an upset per Chapter 101, then the deviation report need only reference the unauthorized emissions, upset or maintenance and start-up and shutdown report containing the details related to the deviation.

Response

The commission changes the rule in response to these comments. After reviewing the comments, the commission believes that §122.145(2)(D) should be retained but with amendments. Because all upsets, regardless of the size, are deviations under Part 70, they must be included in the six-month deviation report. The commission amends §122.145(2)(D) to state that reports submitted under the upset and maintenance rules of Chapter 101 do not substitute for reporting deviations under §122.145(2). The commission will continue to allow owners or operators to reference in six-month deviation reports any reports submitted under Chapter 101 during the reporting period. Guidance on reporting is available through the commission's regional offices and internet site. The commission agrees that §122.145(3) simply restates existing requirements and deletes that subsection in the adopted rule.

Comment

PC commented that §122.145(3) states that reports of deviations resulting from upset, maintenance, startup, or shutdown are to be submitted in accordance with Chapter 101, which does not require a certification by the responsible official. Chapter 101 also does not require reporting of these emissions which are below the reportable quantity and should be clarified to specify how these types of emissions below the reportable quantity be reported. There should also be a clear requirement that these type of emissions comply with all Part 70 deviation reporting requirements.

Response

The commission does not change the rule in response to this comment. As previously discussed, the commission is deleting §122.145(3). However, any upset regardless of the amount of emissions resulting from it must be included in a six-month deviation report and is subject to the same certification requirements as any deviation report. An upset reported under §101.6 need only be referenced in the deviation report. Those upsets resulting in emissions that need not be reported under §101.6 must appear in the six-month deviation report with all information as required by Part 70.

Comment

BP commented on §122.146. They suggested that the commission use available information/format of the CAM/PM programs, for example, to simplify the requirement for annual compliance certifications to identify whether the methods used to certify compliance for each emission unit are continuous or intermittent.

Response

The commission does not change the rule in response to this comment. Section 122.146(5)(A) specifies that the annual compliance certification must include or reference the term or condition for which compliance is being certified, the method used for determining compliance, and whether the method provides continuous or intermittent data. This information is contained in the periodic monitoring or CAM GOP and could be referenced for the annual compliance certification. However, the permit holder is still required to state whether the emission units were in continuous compliance.

Comment

PC commented that the EPA is not receiving compliance certifications pursuant to §122.146(2), as is required by 40 CFR §70.6(c)(5)(iv). These documents were supposed to have been available on-line, but are not, and it is, therefore, impossible for the EPA to perform its required oversight. Operating permits should include a requirements that the permit holder submit compliance certifications to the commission and the EPA, as is required by Part 70.

Response

The commission changes the rule in response to this comment. The commission amends §122.146(2) to specify that the permit holder must submit a copy of the certification to the EPA administrator. The commission is unaware of any situation for which the EPA has not been able to perform its required oversight functions.

Comment

PC commented that the commission's compliance certification rules limit the evidence that a facility must consider when determining compliance, facilities should not be exempt from reporting a violation because it was discovered through some method other than monitoring required by the permit, and that the information required in §122.146(4) is insufficient to ensure that facilities are reporting all known compliance due to the narrow definition of deviation. PC commented that the compliance status of a facility, as determined by §122.132(e)(4)(B), should not be determined solely by "any compliance method specified in the applicable requirements". PC explained that this excludes testing, reporting, recordkeeping and monitoring requirements added to the permit to satisfy the periodic monitoring and compliance assurance monitoring requirements in Part 70. PC stated that the compliance status should be based upon all information available as required by EPA regulations. PC expressed that responsible officials with information that a facility is not in compliance with an applicable requirement must state that the facility is out of compliance and asserted that the commission's regulations should make this requirement clear.

Response

The commission changes the rule in response to this comment. The commission adds clarification to §122.132(e)(4)(B) and §122.146(4) to specify that the determination of compliance status will be based on, at a minimum, but not be limited to, compliance methods specified in the applicable requirements. The commission also revises the definition of deviation.

Comment

PC commented that the compliance certification form is inconsistent with EPA and TNRCC rules.

Response

The commission does not change the rule in response to this comment. The commission acknowledges that the form does not require a list of applicable requirements or a description of the method used for determining compliance for all instances. Instead, the form requires this information for all deviations, and it must certify that the company was in continuous compliance with all terms and conditions in the permit, except for the identified deviations. The form will also be revised to address Part 70 revisions to require certification of intermittent compliance. The commission believes that its form requires all appropriate information.

Comment

TCC commented that the annual compliance certification information required in §122.146(5) for each emission unit could be overly burdensome, especially for larger sites. TCC also stated that the information on the method used for determining the compliance status of each emission unit and whether such method provides continuous or intermittent data will already be contained in a CAM or periodic monitoring GOP and that the commission should clarify that these references can be used to meet §122.146(5).

Response

The commission does not change the rule in response to this comment because §122.146(5) already allows reference to terms and conditions of the permit, which includes CAM or periodic monitoring GOPs. Section 122.146(5) is consistent with 40 CFR §70.6(c)(5)(iii) which specifies prescriptive compliance certification information.

Comment

PC commented that 40 CFR §70.6(c)(5)(iii) requires the compliance certification to include the information listed under §122.146(5). The commission should delete the statement in §122.146(5) that the compliance certification could reference the information, since it is not clear how any referenced information would be subject to the required certification by responsible official.

Response

The commission does not change the rule in response to this comment. Title 40 CFR §70.6(c)(5)(iii) specifies that the compliance certification should include the information required in 40 CFR §70.6(c)(5)(iii)(A) - (D). The identification of applicable information may be done by cross-referencing the permit or previous reports, as appropriate. The Permit Compliance Certification Form allows a permit holder to reference previously submitted deviation reports, thus the referenced information is subject to the required certification by the responsible official.

Comment

PC commented that §122.146(5)(A) is inconsistent with 40 CFR §70.6(c)(5)(3)(B), which specifies that the compliance certification should include a statement indicating whether the compliance methods used for certification provide continuous or intermittent data.

Response

The commission agrees with the comment. The language recommended by PC was added to Chapter 122 in the proposal package published in the January 26, 2001 issue of the *Texas Register*. The commission adopts the language in this rulemaking.

Comment

PC commented on §122.148(b), Permit Shield. All information required by 40 CFR §70.6 should be submitted in an application before the agency makes a determination regarding qualification for a permit shield.

Response

Section 122.148 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. However, the commission believes that §122.148(b) does require sufficient information because it requires compliance with §122.132(e)(2), (3), and (8). These subsections require the submission of information regarding general applicability determinations and specific regulatory citations. Title 40 CFR §70.6(f), which specifies the requirements for permit shields, does not specify that all information required by 40 CFR §70.6 be submitted in an application before the executive director makes a permit shield determination.

Comment

PC commented that §122.148(c) is extremely confusing and should be amended to clearly track the requirements of 40 CFR §70.6(f) regarding permit shields and 40 CFR §70.6(a)(3)(A) regarding streamlining. Also, the source of the commission's authority to grant a permit shield for state-only requirements

is unclear. Such authority should be identified or state-only provisions should be deleted from the rule.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the §122.148 permit shield requirements are consistent with Part 70. Section 70.6(f)(1)(ii) allows permitting authorities to determine that certain requirements are not applicable to a source. Section 122.148(c) refers to this "negative applicability determination" as "potentially applicable requirements." Section 122.148(c)(2) is consistent with 40 CFR §70.6(f)(1) because it specifies that the permitting authority may include a provision in operating permits stating that compliance with the conditions of the permit shall be deemed in compliance with any applicable requirements, or in the case of Chapter 122, potentially applicable requirements. Additionally, §122.148(c)(1)(B) enables the executive director to perform stringency determinations to eliminate duplicative, redundant and/or contradicting requirements. This is consistent with 40 CFR §70.6(a)(3)(i)(A), which states that the permit may specify a streamlined set of monitoring or testing provisions if more than one requirement applies. Although Part 70 does not require the inclusion of state-only requirements, the commission chose to include such requirements in permits to provide a more complete enforcement tool. The commission has the authority to establish rule requirements to provide for compliance with all rules and regulations.

Comment

PC commented on §122.148(c)(1)(A). Chapter 122 should clarify that a negative applicability shield must include a written determination, or concise summary thereof, explaining the agency's determination that the listed requirements are not applicable to the specified emission unit.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. If a permit shield is requested and approved, the executive director includes a permit shield section in the operating permit that provides a basis for the permit shield determination. The commission believes this meets the 40 CFR §70.6(f)(1)(ii) permit shield requirements.

Comment

PC commented that §122.148(e) should be deleted since permit shield modifications should follow revision or reopening procedures. PC also commented that a statement should be added to §122.148(f) and §122.210(c) to specify that minor permit revisions are not eligible for a permit shield pursuant to 40 CFR §70.7(e)(2)(vi). Also, a statement should be added that administrative revisions are not eligible for a permit shield, except for those cases that are specified in 40 CFR §70.4(d)(4).

Response

The commission revises §122.219 in response to this comment. However, §122.148 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. For consistency with 40 CFR §70.7(e)(2)(vi), the commission specifies in §122.219 that a change to a permit shield must follow significant permit revision procedures. This is consistent with the previous requirements of §122.219(9). In addition, when the executive director determines that a permit shield must be amended to assure compliance with the applicable requirements, the permit will be reopened as required by §122.231. Section 70.4(d)(4) only applies to permit shield revisions for permits issued under an interim program. The operating permits issued under the interim program did not contain a permit shield for minor NSR because it was not an applicable requirement.

Comment

PC commented that a provision should be added to §122.161, Miscellaneous, stating that the commission shall not grant an emergency order excusing violations of operating permits.

Response

Section 122.161 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. Under TWC, §5.501, the commission may issue emergency orders to temporarily suspend or amend a permit condition. This action would only be taken to protect public safety or welfare, and the specific conditions causing the issuance of the order cannot be predicted. The order does not excuse violations of operating permits but would only temporarily suspend the conditions.

Comment

PC commented on §122.165(a). The list of documents that require a signed certification of accuracy and completeness should specifically include deviation reports and upset, maintenance, startup and shutdown reports.

Response

Section 122.165 was not proposed for amendment by the commission; therefore, under Texas administrative law, the section cannot be amended to incorporate the suggested comments at this adoption. The commission does not agree with this comment because deviation reports are required by the permit and, therefore, are required to be certified in accordance with §122.165(a)(7). A deviation report should include all unauthorized upset, maintenance, start- up, and shutdown emissions or make reference to them.

Comment

PC commented that §122.201(a), Initial Permit Issuance, should be amended to be consistent with 40 CFR §70.7(a)(5) which requires the commission to provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to applicable statutes or regulatory provisions) to the EPA and any other persons who request it. The commission's rules should be amended to require the preparation of such a statement prior to the beginning of the public comment period.

Response

The commission does not change the rule in response to this comment. The executive director does not prepare a specific "statement of basis" for each permit, but rather has implemented this Part 70 provision by developing a permit that states a regulatory citation for each applicable requirement. The commission is unaware of any self-implementing statutory requirements that do not have parallel regulatory provisions. These permit conditions are based on the application and the technical review which includes a site inspection. The commission believes including this

detail in the permits meets the requirements of Part 70 for including a statement of basis.

Comment

PC commented on §122.201(a)(1). A permit or a draft permit for public review should not be issued before the executive director has received a complete application containing all of the requirements in 40 CFR §70.5.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the commission would like to clarify that a draft permit is not made available for public notice nor is a permit issued until the executive director has requested, received, and completed a technical review of an application that contains the requirements in §122.132(a) and (e), except for phased permits which comply with the requirements contained in §122.131. As previously stated, the commission believes that §122.132 is consistent with the requirements contained in 40 CFR §70.5(c).

Comment

PC commented that §122.201(a)(2) is inconsistent with 40 CFR §70.7(a)(1)(iv). It should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122. PC commented that §122.217(f)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122, for consistency with 40 CFR §70.7(a)(1)(iv).

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission may consider this comment for future rulemaking. However, §122.201(a)(2) requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires that all applicable requirements be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

PC commented on §122.201(c). Title 40 CFR §70.7(a)(1)(v) requires that the EPA has received a copy of the permit application and any notices before the permit may be issued and it is not sufficient for the commission's rules to provide that the permits are accessible to the EPA. These copies must be submitted to the EPA, even if they are only sent electronically.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The EPA commented on the requirement, appearing throughout the October 1997 rulemaking, that information be submitted to the EPA upon written request. The EPA requested that the rule instead require the information to be made accessible by electronic means. To accommodate this request, the commission currently provides the EPA electronic access to application and permit information.

Comment

PC commented that the phrase, "unless the executive director allows for a shorter period due to an emergency," be deleted from §122.204(f) because 40 CFR §70.6(e) does not provide for exceptions to the requirement that temporary sources notify the state ten days in advance of a change in location.

Response

The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission believes that the emergency provision in §122.204(f) will be used infrequently and is a reasonable procedure.

Comment

PC commented that §122.204(h) be added, consistent with 40 CFR §70.6(e), to require that permits for temporary sources include conditions that will assure compliance with all applicable requirements at all authorized locations.

Response The commission did not propose amendments to this section; therefore, under Texas administrative law, the section cannot be amended at this adoption. A change in location does not relieve the temporary source from the obligation to have a permit that assures compliance with all applicable requirements. The commission does not believe that such an addition would be necessary since §122.204(b) requires that an owner or operator of any temporary source apply for a permit consistent with Chapter 122.

Comment BP and TCC requested that the commission specifically define the changes at a site which alter or change the applicable requirements contained in the permit as stated in §122.210(a).

Response

After reviewing the comment, the commission is not adopting the proposed revisions to §122.210(a). The commission has defined criteria for changes which would be administrative, minor, and significant revisions.

Comment

PC commented that §122.210(b) be amended to specify that permit applications and notices be provided to the EPA to be consistent with 40 CFR §70.7(a)(1)(v) and (d)(3)(ii). The commission should provide a copy to the EPA rather than just make the documents accessible to the EPA.

Response

The commission does not change the rule in response to this comment. In the adoption preamble to the October 1997 Chapter 122 rulemaking, the EPA commented on the requirement appearing throughout the rule that information be submitted to the EPA. In response to this comment, the commission amended the rule to specify that information will be made accessible to the EPA.

Comment

PC commented that §122.211(4) should require that the written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permit holder be submitted to the commission to be consistent with 40 CFR §70.7(d)(iv). PC commented identically on §122.503(a), Application Revisions for Changes at a Site.

Response

The commission does not change the rule in response to this comment. Part 70 does require the submission of a written agreement. However, the commission does not believe it is necessary or appropriate to require an entire agreement to be submitted since such documents may be large and contain extraneous information. The commission can easily access this information, since it will be kept with the permit, and the permit holder must still provide information regarding the transfer as part of the application. Section 122.211(4) and 122.503(a)(3) require that this information be maintained with the permit at the site which makes it available to the commission when needed.

Comment

PC commented that the meaning of §122.211(5) is unclear. BP and TXOGA concurred with §122.211(5) because it allows the incorporation of the requirements from preconstruction authorizations as an administrative permit revision.

Response

The commission does not change the rule in response to this comment. The commission proposed and is adopting §122.211(5), which is consistent with 40 CFR §70.7(d)(1)(v), to provide flexibility in the future to incorporate specified preconstruction review requirements into operating permits. Section 122.211(5) specifically states that the incorporation of preconstruction authorization requirements is an administrative revision provided that the program meets procedural requirements substantially equivalent to those of Chapter 122, Subchapters C and D, and compliance requirements substantially equivalent to those contained in §§122.143, 122.145, and 122.146. The commission may initiate a separate rulemaking to establish an option for enhanced NSR procedures to allow an administrative permit revision to be used to incorporate changes requiring minor NSR authorizations.

Comment

TXOGA requested clarification that new federal or state regulations which have undergone public comment and participation and for which there are also no changes at the site fall within the description of §122.211(7) in that they are similar and, if EPA-approved, are therefore administrative revisions.

Response

The commission does not change the rule in response to this comment. The type of change mentioned by TXOGA does not meet the criteria in §122.211(7) because the change is not similar to the changes in §122.211(1) - (6).

Comment

TCC requested that the commission clarify that changes to an operating permit resulting from the renumbering of citations in a regulation is an administrative permit revision. BP commented that the commission clarify in the preamble that administrative changes in regulatory language (renumbering, rule citations, or the like) are not, in and of themselves, applicable requirements triggering a permit revision.

Response

The commission does not change the rule in response to this comment. However, §122.211(7) affords the EPA the opportunity to approve similar changes. Any EPA- approved type of administrative revision will be posted to the Air Permits web page and included in updated revision guidance.

Comment

PC commented that §122.212 and §122.213(a) and (d) appear to authorize changes at a site that would require an administrative permit revision to be operated before an administrative permit revision application is submitted, which is inconsistent with 40 CFR §70.7(d)(3)(iii).

Response

The commission does not change the rule in response to this comment. Part 70 does require an application for an administrative permit revision to be submitted prior to operating the change. However, the commission believes that the use of provisional terms and conditions coupled with the recordkeeping requirement and the fact that the sources must always be in compliance with the applicable requirements and provisional terms and conditions justifies this insignificant variation from Part 70.

Comment

TCC suggested that the commission delete §122.213(a)(1)(A) - (C) to be consistent with Part 70. Part 70 only specifies that sources may implement the changes as requested in the administrative permit revision immediately after submittal, but makes no reference regarding the applicable requirements contained in §122.213(a)(1)(A) - (C). TIP and ExxonMobil supported this but commented that the entire §122.213(a)(1) be eliminated to make the administrative permit revision procedures consistent with Part 70. Furthermore, read literally, §122.213(a)(1) would not allow a permit holder to proceed with an administrative revision at the site if any emission unit at the site is not in compliance with an applicable requirement, state only requirement or provisional term or condition. This was not the intent of the Title V program and is inconsistent with Part 70. Typographical errors were also identified in the existing §122.213(a)(2) and (3). TXOGA supported TIP comment and added that §122.213(a) was not a Part 70 requirement and is not pertinent to the types of revisions that are administrative in nature.

Response

The commission agrees with these commenters and deletes §122.213(a)(1). The requirements contained in §122.213(a)(1)(A) - (C) are not required by Part 70.

Comment

PC stated that it was supportive of Chapter 122 amendments that were adopted in the October 1997 rulemaking, including the elimination of "off-permit" changes formerly contained in §122.215, the requirement in §122.132(e)(4)(C)(iii) specifying that compliance schedules be at least as stringent as that contained in any judicial consent decree or administrative order, and the elimination of the "interpretation shield" from §122.145(e).

Response

The commission appreciates the comment.

Comment

TIP, ExxonMobil, and TCC requested clarification in the preamble that the deletion of "off- permit" changes does not limit a permit holder's ability to make changes to sources that qualify for the Off-Permit Application Sources and Activities (OPASA) list. BP supported this and suggested clarification in the preamble that "off-permit" changes are not the same as the OPASA list.

Response

The commission does not change the rule in response to these comments. The commission agrees that "off-permit" changes and sources that qualify for the Off-Permit Application Sources and Activities (OPASA) list are different. Also, the deletion of "off-permit" in the October 1997 Chapter 122 rulemaking does not limit a permit holder's ability to make changes to sources that qualify for the OPASA list.

Comment

BP and TCC requested clarification for the type of permit revisions that would be required for major NSR/PSD, minor NSR, permits by rule, and newly promulgated requirements. Further, at a minimum, revisions related to changes which are minor NSR revisions within Chapter 106 and Chapter 116 should be minor operating permit revisions. Changes that trigger Federal NSR and PSD requirements should require significant operating permit revisions. TCC further commented that the incorporation of newly promulgated requirements which: 1.) do not require a change at the site should be administrative operating permit revisions; and 2.) do require a change at the site should be minor revisions. BP commented that the incorporation of new rule requirements, like a new MACT requirement, should be handled as an administrative permit revision. For example, MACT standards pursuant to §112(g) or (j) that have already undergone public notice should be included in the permit as an administrative revision. BP commented that the revision process must be clear, concise, and must not unduly hinder operators from conducting their business. Part 70 language is vague and is subject to interpretation by the commission. BP also commented that minor permit revisions should continue to be the default revision type, since large, complex facilities will likely be required to constantly revise operating permits if significant revisions are the default revision type. TXOGA also commented that a greater number of significant changes will render the program unworkable. BP suggests that incorporation of new rule requirements be typically handled as administrative permit revisions unless the change triggers PSD/major NSR permitting actions. ExxonMobil commented that the operating permit process should be reasonable and meaningful. Significant revisions should reflect changes associated with PSD and Major NSR; changes associated with minor NSR and standard permits should be minor revisions; and changes qualifying for a permit by rule or a rule renumbering should be administrative revisions.

Response

Based on negotiations with EPA regarding its comments pertaining to the incorporation of minor NSR, actions authorizing new facilities through minor NSR permits and amendments will be considered off-permit changes, as specified in §122.222, when no other applicable requirements in the permit are affected. If rules are revised to include the option for enhanced NSR procedures, the following activities will be considered administrative revisions: 1) new or modified facilities under permits by rule or standard permits and 2) facilities authorized to be modified through minor NSR permits or amendments. NSR activities such as address changes are currently administrative permit revisions. Minor NSR permits involving major PSD or nonattainment netting will be considered minor permit revisions. PSD, nonattainment NSR, FCAA §112(g) or (j), and significant changes to monitoring will be considered significant revisions.

In the preamble to the proposed Part 70, EPA stated in Footnote 6 what it believed to be a Title I modification. EPA concluded that a Title I modification would include a modification under §111, §112(g) and (j), PSD and nonattainment permitting. (56 FR 21712, 21747). In the July 1, 1996 *Federal Register* promulgating the 40 CFR Part 71 rule (61 FR 34202), the EPA discussed the status of the definition of Title I modification. The EPA stated that it "is not yet prepared to adopt a final definition for the term, in implementing the Phase I Part 71 program {and} EPA will treat the issue consistently with the approach the Agency has advised states to take under the current Part 70 regulation. Consequently, it will not consider Title I modifications to include changes subject to state minor NSR programs." (61 FR 34213).

Changes to qualified facilities under §116.116(e) or changes to facilities covered under a flexible permit under Chapter 116, Subchapter G that are not considered an amendment under Chapter 116 and that do not add or remove an operating permit applicable requirement are not envisioned to be a change subject to any revision process under Chapter 122, when the operating permit contains §116.116(e) and/or §116.710(a) as an applicable requirement. Permit holders must ensure that operating permits contain all potential operating scenarios that may be needed for the flexible permit or changes to qualified facilities to avoid unnecessary operating permit revisions. In addition, the operational flexibility provisions contained in §122.222 allow the removal of a unit from the site without requiring a permit revision when the applicable requirements for any other unit remaining in operation at a site are not affected.

Newly promulgated regulations that add new applicable requirements will be incorporated in a permit under the reopening process contained in §122.231 or the renewal process. The commission does not believe that the incorporation of new rule requirements, such as a MACT, meets the criteria under 40 CFR §70.7(d)(1)(v) because this clause is specifically limited to preconstruction review permits.

Comment

TXOGA requested clarification as to the threshold at which changes at a site are minor. The intent of Part 70 for changes to be significant under FCAA, Title I appears to be the definition of modification under Title I. Therefore, all revisions related to changes which are minor NSR revisions within Chapter 106 or Chapter 116 should be minor revisions and all changes at a site which trigger federal NSR and PSD requirements should be significant. At a minimum, changes are minor which fall under the thresholds of 40 CFR §70.7(e)(3). TXOGA requested that the commission establish an alternative threshold as allowed in §70.7(3) at the level of major versus minor NSR.

Response

The commission does not change the rule in response to this comment. The commission believes that adding a threshold at which changes at a site are minor is inconsistent with Part 70 which requires that any case-by-case determination be a significant revision and thus would not qualify for a revision under 40 CFR §70.7(3). As discussed previously, the commission agrees that changes under Chapters 106 and 116 that do not involve a case-by-case determination can be minor permit revisions.

Comment

The EPA commented that the commission proposes to submit §§122.215 - 122.218 as a revision to the SIP to satisfy 40 CFR §70.7(e)(2)(i)(B), which provides that minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an

applicable SIP or in applicable requirements promulgated by the EPA. The EPA pointed out that §§122.215 - 122.218 only address the process for using minor permit modification procedures and do not include the SIP requirements to implement requirements involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches. Those regulations must be part of the SIP before minor permit revision procedures can be used to include these items in operating permits. Approval of §§122.215 - 122.218 alone do not satisfy 40 CFR §70.7(e)(2)(i)(B).

Response

The commission adopted Chapter 101, Subchapter H, Emissions Banking and Trading, and submitted it as a SIP revision. It is the rules contained in Chapter 101, Subchapter H to which §122.218 refers.

Comment

PC commented that §122.215(2) should be amended to specify that a minor permit revision does not involve significant changes to, or relaxation of, existing monitoring, reporting, or recordkeeping requirements in the permit, for consistency with 40 CFR §70.7(e)(4). PC also commented that §122.219 be amended to specify that every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant, for consistency with 40 CFR §70.7(e)(4).

Response

The commission changes the rule in response to this comment. Consistent with 40 CFR §70.7(e)(4), the commission adopts a new §122.219(b) to specify that, at a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. The commission also clarifies under what conditions it is not a significant revision to remove existing monitoring, reporting, or recordkeeping for a unit removed from the site. In new §122.222(b, the commission clarifies that removing a unit from the site that does not otherwise change another unit's applicable requirements can be removed through operational flexibility. Lastly, the commission wishes to clarify that §122.215(2) is consistent with 40 CFR §70.7(e)(i)(2) and remains unchanged.

Comment

PC commented that a new §122.216(6) should be added to require minor permit revision applications to include the emissions resulting from the change and any new applicable requirements that will apply if a change occurs, for consistency with 40 CFR §70.7(e)(2)(ii)(A).

Response

The commission agrees with the comment and adds new §122.216(6) to require minor permit revision applications to include the emissions resulting from the change. This is consistent with 40 CFR §70.7(e)(2)(ii)(A). The incorporation of minor NSR will include any emissions resulting from a change. In addition, Chapter 122 currently requires that minor permit revision applications include any new applicable requirements that will apply if a change occurs. Section 122.216(3) specifies that an application for a minor permit revision include provisional terms and conditions that codify the new applicable requirements. The concept of provisional terms and conditions is consistent with 40 CFR §70.7(e)(2)(v).

Comment

PC commented that a new §122.216(7) should be added to require minor permit revision applications to include completed forms for the permitting authority to use to notify the EPA administrator and affected states, for consistency with 40 CFR §70.7(e)(2)(ii)(D).

Response

The commission does not change the rule in response to this comment. The commission implements a practical and appropriate process to notify the EPA and affected states of minor permit revision applications. This includes electronically accessible information, recommended by the EPA in its comments on the October 1997 Chapter 122 rulemaking. The commission proposed amendments to §122.217(e) to specify that the executive director notify the EPA and affected states of requested minor permit revision applications, consistent with 40 CFR §70.7(e)(2)(iii). In addition, §122.330(c) and (d) requires the executive director to notify affected states of minor permit revisions and provides the opportunity for affected states to comment. The commission, therefore, considers it unnecessary for permit holders to complete forms for the executive director to use to notify the EPA and affected states of minor permit revisions.

Comment

TCC commented that §122.217(a)(1)(A) - (C) and (b)(1)(A) - (C) imply that the permit holder is required to be in compliance with every applicable requirement for every emission unit at the site in order to implement the change for a minor permit revision. The citations should be amended to specify that the permit holder complies with applicable requirements, state only requirements and provisional terms and conditions governing the change. TXOGA supported the suggested amendment. TIP and ExxonMobil also supported this and further added that their suggestion would be consistent with 40 CFR §70.7(e)(2)(v). BP suggested using the phrase, "concerning the change."

Response

The commission agrees with the comment and amends §122.217(a)(1)(A) - (C) and (b)(1)(A) - (C) to specify that the permit holder must comply with applicable requirements, state only requirements, and provisional terms and conditions governing the change. This is consistent with 40 CFR §70.7(e)(2)(v), which specifies that a site may operate a change after submitting a minor permit revision application and must comply with both the applicable requirements governing the change and the proposed permit terms and conditions.

Comment

TXOGA requested verification that §122.217(b) refers to newly promulgated rule requirements which cause a change at the site. Part 70 does not contemplate new rule requirements causing a minor revision where no change was required at the site. New requirements that are simply promulgated but do not require any change at the site meet the criteria for administrative permit revisions.

Response

The commission changes the rule in response to this comment. The commission deletes the language in §122.217(b) that relates to changes to a permit required as the result of the promulgation or adoption of an applicable requirement. This language should have been deleted in the Chapter 122 proposal

because it is inconsistent with Part 70 and other amended sections of Chapter 122. Even if no change at the site is required, the incorporation of newly promulgated or adopted applicable requirements could result in an administrative permit revision, a significant permit revision, or a permit reopening depending on the requirements of the new applicable requirement.

Comment

BP commented that §122.217(b)(2) should be revised to retain the 45-day period for information submittal.

Response

The commission believes that incorporating this comment would be inconsistent with Part 70. Title 40 CFR §70.7(e)(2)(v) allows a source to make a change qualifying for a minor permit revision immediately after an application is filed. Because a site is required to be in compliance by the compliance date of a requirement, any appropriate changes must be in place. Therefore, the application, including provisional permit terms and conditions, must be submitted prior to making the change contemplated by the revision.

Comment

PC commented that §122.217(e) should be amended to state that the executive director shall promptly notify the EPA and affected states of any refusal to accept all recommendations that the affected state submitted during the public or affected state review period, for consistency with 40 CFR §70.8(b)(2).

Response

The commission does not incorporate this comment in the rule because the requirement is already addressed in §122.330(e).

Comment

PC commented that §122.217(f)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements and the requirements of Chapter 122 for consistency with 40 CFR §70.7(a)(1)(iv).

Response

The commission does not change the rule in response to this comment. Section 122.217(f)(3) requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires all applicable requirements to be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

TCC was supportive of the commission's proposed §122.218, making permit revisions involving the use of economic incentives, marketable permits, and emissions trading minor permit revisions. TXOGA was also supportive, but also requested clarification that only changes in the requirements of these programs are revisions to the permit and that any individual trade or use of an emission credit within an approved program is not a revision to the permit. PC requested clarification of the types of changes that can qualify for minor permit revision under §122.218, involving economic incentives, marketable permits, or other similar approaches.

Response

The commission does not change the rule in response to this comment. Part 70 specifies that any revisions involving the use of economic incentives, marketable permits, and emissions trading qualify as a minor permit revision. The commission does not believe that Part 70 requires that each trade or use of an emission credit under Chapter 101, Subchapter H result in a minor revision because Chapter 101 specifies how and when each emission credit may be traded or used. Chapter 101, Subchapter H is included in the definition of applicable requirement. If a permit revision was necessary every time a trade was made, the flexibility provided by such programs would be reduced.

Comment

PC commented that §122.221(b)(3) should be amended to specify that the conditions of the permit provide for compliance with all applicable requirements for consistency with 40 CFR §70.7(a)(1)(iv).

Response

Section 122.221(b)(2) requires any permit issued under Chapter 122 to provide for compliance with all conditions of Chapter 122. Chapter 122 requires all applicable requirements be codified in FOPs. Therefore, compliance with all conditions of Chapter 122 includes compliance with all applicable requirements.

Comment

BP supported the incorporation of operational flexibility.

Response

The commission appreciates the comment.

Comment

PC commented that §122.222 appears to allow changes that contravene an express permit term without a permit revision and that these changes will not be subject to review by the public, affected states, the EPA, or even the executive director. Also, these changes will not be incorporated into the permit until renewal, which may be longer than five years, depending on the pace of renewal application processing. Therefore, the commission should define and limit the types of changes allowed under §122.222. Section 122.222(3) states that the change may not exceed emission limits in the permit, but it does not address the type of emissions. PC questioned whether a new pollutant could be emitted under this section that is not addressed by the permit, whether a permit holder could make changes that would require different control technologies under §122.222, whether any changes in monitoring, recordkeeping, reporting or compliance certification would be allowed under this section, whether changes made under this section would be subject to annual compliance certification or deviation reporting, and whether Chapter 122 would specifically list any change that could occur under §122.222 and the commission should provide an opportunity for the public and the EPA to comment on the list.

Response

The Chapter 122 operational flexibility provisions are consistent with the Part 70 definition of "§502(b)(10) changes" and the provisions of 40 CFR §70.4(b)(12)(i). The commission includes this amendment in response to an EPA comment noting that Chapter 122 must be revised to include the Part 70 provisions for operational flexibility. The rule as adopted defines the criteria for changes that meet the conditions for operational flexibility. Part 70 does not require the changes for operational flexibility to be incorporated into permits at renewal, but only requires the notice to be attached to the permit. An attempt to further define these changes in the rule may unnecessarily limit those changes that

would otherwise qualify under the criteria set forth by Part 70, which does not require the state to list or further define operational flexibility in their implementing rule. The commission will develop guidance and seek input from interested parties concerning the implementation of operational flexibility provisions.

Comment

The EPA commented that §122.222(a)(4) may conflict with §122.222(a)(1). Many preconstruction authorizations are also Title I modifications. Therefore, §122.222(a)(4) could be inconsistent with §122.222(a)(1) and with 40 CFR §70.4(b)(12) which exclude Title I modifications. The commission should clarify which types of preconstruction authorizations would not be Title I modifications and §122.222(a)(4) should be revised to clarify that it does not include preconstruction authorizations which are also Title I modifications.

Response

The commission agrees with this comment and changes §122.222(a)(4) to specify that such preconstruction authorization cannot be a Title I modification. The commission also agrees that clarification is needed for the types of preconstruction authorizations that are Title I modifications. In the July 1, 1996 *Federal Register* promulgating the 40 CFR Part 71 rule (61 FR 34202), the EPA discussed the status of the definition of Title I modification. The EPA stated that it "is not yet prepared to adopt a final definition for the term, in implementing the Phase I, Part 71 program {and} EPA will treat the issue consistently with the approach the Agency has advised states to take under the current Part 70 regulation. Consequently, it will not consider Title I modifications to include changes subject to state minor NSR programs." (61 FR 34213). As discussed previously, the commission believes that the only actions that are Title I modifications are modifications under §111, §112(g) and (j), PSD and nonattainment permitting.

Comment

The EPA commented that, although a time frame for written notification to the executive director is specified, §122.222 does not set a time frame for written notice to the EPA. Title 40 CFR §70.4(b)(12) specifies that written notification be submitted to the state and the EPA.

Response

The commission agrees with this comment and changes §122.222(c) to specify that written notification must also be submitted to the EPA on the same schedule as to the executive director.

Comment

The EPA commented that §122.222 does not include the provisions in 40 CFR §70.4(b)(12)(iii), a requirement that the state program must include in order to receive full program approval.

Response

The commission agrees with this comment and adds new §122.222(e) to specify the requirements in 40 CFR §70.4(b)(12)(iii). The commission also adds new §122.222(d) to incorporate the operational flexibility requirements in 40 CFR §70.4(b)(12)(ii).

Comment

TIP requests amendments to §122.222(b) that will allow operational flexibility changes with less than seven days advance notice, provided that the commission determines that the shorter advance notice is merited due to an emergency situation. This is consistent with 40 CFR §70.4(b)(12).

Response

In response to this comment, the commission adopts changes to §122.222(c) to specify that notice may be provided to the commission within two working days of the implementation of operational flexibility changes due to an emergency. Such notice shall also include an explanation of the emergency. For clarification the commission amends §122.222(c) to specify that written notice must be submitted to the commission and EPA at least seven days in advance of the proposed change, except for an emergency.

Comment

The EPA commented that §122.231 must be amended to comply with 40 CFR §70.7(f)(2). The commission proposed to amend §122.231 to require the commission to institute proceedings to reopen permits to incorporate minor NSR no later than renewal of the permit. The commission also clarified in the preamble that the time frame will somewhat correspond with the renewal date of a permit. Thus, the commission will not incorporate minor NSR into some permits for up to five years. The EPA finds this unacceptable and states that 40 CFR §70.7(f)(2) requires that all reopenings for new applicable requirements be completed within 18 months after promulgation of applicable requirements. PC agreed with the EPA. Operating permits should be reopened, within 18 months to add minor NSR requirements, as specified in 40 CFR §70.7(f)(1)(i). Likewise, the proposed amendment to §122.231(d) should not be made.

Response

The commission does not change the rule in response to this comment. The commission acknowledges that minor NSR will have to be incorporated over a period of time and thus will institute proceedings to reopen permits in accordance with 40 CFR §70.4(d)(3)(ii)(D). The majority of the permits issued thus far have been authorizations to operate under GOPs. However, the commission anticipates that the majority of permit holders operating under a GOP (almost 900) will apply for the executive director issued GOPs by October 26, 2001. These GOPs by rules are required to be renewed by October 26, 2001. Because of the extensive changes to the applicable requirements in every GOP, the commission is not renewing the GOPs by rule. Instead, the executive director will issue new GOPs which will include minor NSR. The executive director will institute proceedings to reopen previously approved authorizations to operate. Each owner or operator authorized to operate under a GOP by rule will be required to apply for a new authorization to operate under the executive director issued GOP or submit an application for a site operating permit (SOP).

The EPA raises two issues in its comments concerning the incorporation of minor NSR permits into operating permits. First, the EPA states that 40 CFR §70.7(f)(2) requires all reopenings for new applicable requirements to be completed within 18 months after promulgation of applicable requirements. Since minor NSR will be a new applicable requirement, §122.231 must be revised to comply with §70.7(f)(2). {The 18-month requirement is actually in 40 CFR §70.7(f)(1)(i)}. Second, the EPA notes that the June 20, 1996 *Federal Register* notice which revised Part 70 to allow for a streamlined reopening process to incorporate minor

NSR permit terms into operating permits did not "contemplate that minor NSR could be excluded until renewal, which could be up to five years after full program approval." Read together, the EPA's comment is that minor NSR is a new applicable requirement and, as such, must be incorporated into operating permits under the 18-month deadline in §70.7(f)(1)(i) and not at renewal. This position can be refuted by the actual provisions of Part 70 as it was revised to address the issue of incorporation of minor NSR authorizations.

Minor NSR is not a new applicable requirement subject to 40 CFR §70.7(f)(1)(i). The FCAA, §502(b)(9) provides that permitting authorities "in the case of permits with a term of three or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this Act after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations." In order to give meaning to the provision in FCAA, §502(b)(9), the assumption must be that Congress anticipated situations where new applicable standards and regulations would be promulgated (Blacks Law Dictionary defines "promulgate" as "to publish; to announce officially; to make public as important or obligatory. The formal act of announcing a statute or rule of court.") after the operating permit was already issued.

In the preamble to the proposed Part 70 at 56 FR 21745 (May 10, 1991), the EPA stated that it "believes that §502(b)(9) should be read to require that the permitting authority reopen permits for major sources with three or more years remaining in the permit's life...to incorporate standards and regulations promulgated under the Act which are promulgated after the issuance of such a permit." In the preamble for the final Part 70 at 57 FR 32256 (July 21, 1992), the EPA stated that "any approvable program, at a minimum, must require that the permitting authority will revise all major source permits with a remaining life of three or more years to incorporate applicable requirements under the Act that are promulgated after the issuance of the permits. Such revisions must be made using the revision procedures that meet the requirements for permit revision and must be made within 18 months after the promulgation of the new requirement. No revision is required if the effective date of the requirement is after the expiration of the permit term." The EPA implemented §502(b)(9) in 40 CFR §70.7(f)(1)(i) which provides "additional applicable requirements under the Act become applicable to a major Part 70 source with a remaining permit term of three or more years. Such a reopening shall be completed no later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to 40 CFR §70.4(b)(10)(i) or (ii) of this part."

While the EPA has faithfully implemented the provisions of §502(b)(9) through 40 CFR §70.7(f)(1)(i), it is erroneously applying those provisions to the issue of incorporation of minor NSR. The clear intent of both §502(b)(9) and §70.7(f)(1)(i) is to establish a procedure to incorporate applicable requirements that are promulgated after the issuance of an operating permit, such as a new NSPS, a MACT, or a new RACT requirement. Section 70.7(f)(1)(i) provides that "such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement." Although it is true that Chapter 122 is being revised to add minor NSR authorizations to the definition of "applicable requirement," this does not mean that minor NSR is a new requirement, promulgated after issuance of operating permits, that facilities in Texas must now meet. The EPA has consistently maintained that minor NSR is an applicable requirement. In addition, facilities in Texas have been subject to the minor NSR program since 1971. Minor NSR is not a newly promulgated applicable requirement.

Part 70 does not require reopenings for incorporation of minor NSR authorizations prior to renewal. In the June 20, 1996 *Federal Register* notice (61 FR 31443), the EPA added a new 40 CFR §70.4(d)(3)(ii)(D) to provide a method for the incorporation of minor NSR terms. The EPA states at 61 FR 31444 that it is "adding rule language clarifying that, upon conversion to full approval, permits issued during the interim period would have to be revised or reopened to include any excluded minor NSR terms. Regarding reopening, today's rule also provides for a streamlined reopening process for excluded minor NSR terms that does not require the full permit issuance process." The EPA also noted at 61 FR 31446 that "in proposing to allow this type of interim approval, {the EPA} did not contemplate that minor NSR applicable requirements could be excluded until renewal which could be up to five years after full program approval."

However, in the actual rule text, the EPA did not include a specific deadline for the incorporation of minor NSR terms into operating permits. Nowhere in the June 20, 1996 notice does the EPA refer to the 18-month provision in 40 CFR §70.7(f)(1)(i) as being an element of the streamlined process for the incorporation of minor NSR. Nor does the rule specifically state the minor NSR cannot be incorporated into operating permits at renewal. Section 70.4(d)(3)(ii)(D) provides that a "program receiving interim approval for the reason specified in §70.4(d)(3)(ii)(B) of this section must, upon or before granting of full approval, institute proceedings to reopen Part 70 permits as required by 40 CFR §70.7(f)(1)(iv). Such reopening need not follow full permit issuance procedures nor the notice requirement of §70.7(f)(3), but may instead follow the permit revision procedure in effect under the State's approved Part 70 program for incorporation of minor NSR permits."

The EPA could have specified a deadline for reopenings in 40 CFR §70.4(d)(3)(ii)(D) but instead, it required states to "institute proceedings" to reopen operating permits in order to incorporate minor NSR authorizations. Again, the reopening will not incorporate newly promulgated applicable requirements; therefore, the 18-month deadline specified in 40 CFR §70.7(f)(1)(i) does not apply. The commission intends to institute proceedings to reopen permits and authorizations to operate shortly after adoption of the revisions to Chapter 122.

Comment

PC commented that §122.231(a)(1) is inconsistent with 40 CFR §70.7(f)(1)(i) and should be amended to specify that a permit may be reopened if an additional applicable requirement under the FCAA becomes applicable to a source, for any reason. PC commented that §122.231(a)(1)(A) should be deleted because it is inconsistent with §70.7(f)(1)(i).

Response

The commission does not change the rule in response to this comment. The commission believes §122.231(a)(1) is consistent with 40 CFR §70.7(f)(1)(i) which states that a reopening shall be completed not later than 18 months after "promulgation" of the applicable requirement. Part 70 ties a permit reopening to a rule promulgation and not to "any reason" that an applicable requirement becomes applicable. For example, when the permit holder

makes a change at a site that results in a change to applicable requirements in the permit, then the permit revision process under §§122.213 - 122.221 should be used.

Comment

TIP commented that minor NSR authorizations should be incorporated into operating permits for which applications have already been submitted at renewal and not before that time and requested confirmation in the preamble that it will not reopen operating permits until renewal. BP suggested amending §122.231(c) to specify that the executive director will reopen permits at renewal. TCC requested that the commission specify in the preamble or document in the final rule that, for permit applications submitted by July 22, 2000, minor NSR authorizations will not be incorporated until permit renewal. TIP also commented that the process of incorporating minor NSR authorizations may delay permit revisions, if done at that time, and thus impact the permit holder's ability to operate the change at the site. By incorporating minor NSR at renewal, the commission can assure that the process of integrating minor NSR and existing operating permits will not affect a site's ability to conduct time- sensitive activities. BP endorsed comments submitted by TCC and TXOGA and generally supported the integration of NSR and Part 70. However, this transition should be streamlined, concise, and understandable, and should not be unduly burdensome on either the commission or the operator in terms of additional resources or time to incorporate. Integration of existing NSR permits into the operating permit program should be handled in a manner that will minimize additional expense and paperwork for our plants. TXOGA requested that the commission clarify the intent to incorporate NSR permit requirements and operating permit requirements into a single document at, and not before, renewal of the operating permit. Any operating permit revision or reopening prior to renewal may have critical time constraints associated with it and should not be delayed due to incorporation of the administrative revisions related to the inclusion of NSR provisions. Permit holders need to have an assured time frame for resource and manpower scheduling purposes. TXOGA supported the concept of incorporating Chapter 106 and Chapter 116 at permit renewal and requested assurance to schedule the workload for the inclusion of information and also to avoid delay of critical permitting actions with strict time constraints. ExxonMobil supported comments submitted by TIP, TXOGA, and TCC and supported the commission's efforts to incorporate Part 70 language into Chapter 122. Specifically, ExxonMobil commented that minor NSR authorizations should be incorporated into operating permits and not before that time. The process of incorporating those authorizations may delay the permit revision and thus impact the permit holder's ability to operate the change at the site. The commission can ensure that the process of integrating minor NSR and existing operating permits will not affect a site's ability to conduct time-sensitive activities if NSR is incorporated at renewal. ExxonMobil requested that the commission confirm in the preamble that it will not reopen operating permits for the purpose of incorporating minor NSR authorizations until renewal and that the commission consider the resources available when developing the implementation process. The process should be designed with some flexibility to allow minor NSR authorizations to be incorporated into the operating permits by reference. ExxonMobil also supports stringency determinations which streamline and simplify redundant and duplicative standards. TCC commented that §122.231(c) be amended to clarify that the executive director institute proceedings to reopen permits for those holding operating permits as of the effective date of the rule, instead of permits for which applications were submitted to the executive director prior to the effective date of §122.231. BP supported this and further suggested to add that operators who have submitted applications to the executive director prior to the effective date of §122.231, but have not yet received their operating permit, will incorporate Chapter 106, Subchapter A or Chapter 116 preconstruction permits at renewal. TCC also requested that the commission clarify that preconstruction authorizations for applications submitted by July 22, 2000, not be incorporated into the permit until renewal. Also, TCC requested that §122.231 be amended to specify that operating permits for which applications were submitted to the executive director prior to the effective date of the amended Chapter 122 incorporate minor NSR at renewal.

Response

After reviewing these comments, and based on negotiations with the EPA regarding its comments pertaining to the incorporation of minor NSR, the commission changes §122.231(c). The rule language in §122.231(c) states that for permits already issued, the incorporation of minor NSR will occur no later than permit renewal. Applications for which the executive director has authorized initiation of public notice by the effective date of the rule will incorporate the requirements for minor NSR no later than permit renewal. Applications for which the executive director has not authorized initiation of public notice by the effective date of the rule will include NSR at initial issuance.

Comment

PC commented that §122.231(a)(1)(B) should be amended to be consistent with 40 CFR §70.7(f)(1)(i) to indicate that the effective date of the requirement is later than the permit expiration date, unless the original permit or any of its terms and conditions have been extended pursuant to the provisions for timely and complete applications for renewal.

Response

The commission agrees with this comment and amends §122.231(a)(1)(B) to be consistent with 40 CFR §70.7(f)(1)(i).

Comment

PC commented that §122.231(a)(1)(D) should be added to state that additional requirements (including excess emission requirements) become applicable to an affected source under the Acid Rain program and that upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit, to be consistent with §70.7(f)(1)(ii).

Response

The commission agrees with this comment and adds new §122.231(a)(6) for consistency with §70.7(f)(1)(ii).

Comment

PC commented that §122.231(a)(4) should be amended for consistency with 40 CFR §70.7(f) and (g) to indicate that the executive director or the EPA determines that the permit must be revised or terminated to assure compliance with applicable requirements. Because the EPA may reopen for the reasons listed in §122.231(a)(4), this list must include a determination by the EPA that the permit must be revised or terminated to assure compliance.

Response

The commission agrees with this comment and adds the suggested language to §122.231(a)(4).

Comment

PC commented that the exception in §122.231(c) to incorporate minor NSR into operating permits is unacceptable. If the state had initially included minor NSR, as it was required, full public participation would have been provided. The commission cannot now illegally avoid this public participation. Also, Part 70 provides no provision to justify the commission's attempt to exempt minor NSR incorporation from normal notice and comment procedures. PC also commented that they oppose any provision that would allow initial incorporation of minor NSR without public participation, which is required by the 42 USC §7661a(b)(6).

Response

The commission does not change the rule in response to this comment. Part 70 was revised on June 20, 1996 (61 FR 31443) to authorize the granting of interim approval to states with programs that did not include minor NSR as an applicable requirement. For every incorporation of NSR that occurs at initial issuance or at renewal, full public participation requirements, including public notice, will be satisfied. However, the adopted rule implements the provisions of 40 CFR §70.4 which allow for a truncated reopening process for the incorporation of minor NSR.

Comment

TIP commented that §122.231(d) should be amended to be consistent with 40 CFR §70.7(f)(2). The commission proposed the language, " as soon as possible," whereas §70.7(f)(2) states, "as expeditiously as practicable."

Response

The commission does not change the rule in response to this comment. The commission believes that the two phrases are equivalent.

Comment

TCC commented that the commission define that a cause for permit reopening does not exist if a material mistake or inaccurate statement made in the permit terms and conditions is discovered by the permit holder and corrected through the submission of the appropriate documentation to revise the permit.

Response

The commission agrees with the comment and adds language clarifying that cause for reopening includes the determination by the executive director or the EPA that the permit contains a material mistake. This is consistent with 40 CFR §70.7(f)(1)(iii). However, the permit holder will be required to revise the permit in accordance with the appropriate permit revision process and will not necessarily be relieved of any possible enforcement action.

Comment

QLEP, NFN, and 118 individuals commented that the proposed Title V rules do not protect citizens' right to know what pollutants facilities in their communities are allowed to emit and the air pollution laws for which compliance must be demonstrated. An individual also commented that the Title V rules should ensure that all applicable facilities are required to comply with every air quality requirement and that enforcement action is taken against all facilities that do not comply. Another individual commented that the Title V rules do not protect citizen's rights to be able to determine what pollutants citizens are exposed to and expressed specific concern about proper guidelines to improve air quality with respect to greenhouse gases. Allowing citizens to take part is an important venue that should not be denied. In addition, EEP submitted a copy of a handbook for citizens on how to participate in the Title V program, and also commented that once Title V is fully implemented and if the program is working properly, it should be relatively easy for federal and state enforcement officials and for members of the public to know what the requirements are that apply to a given facility. The program should therefore serve as an important law enforcement tool. Sierra also commented that the operating permit program is important because for a long time citizens who live in affected communities near large industrial sources have been interested in trying to understand the permit requirements and the other requirements in the past were not always written into these traditional air permits. This is a very powerful tool because these plants typically are only inspected maybe once a year or once every two years by the commission's staff. Also, for the first time, these requirements will help to ensure compliance on a 24-hour, seven-day basis, which is an effective tool for community people that want to know if a facility is operating in compliance and in compliance with its permits.

Response

The commission does not change the rule in response to this comment. The primary goal of the operating permit program is to provide a mechanism, via a permit, to assure compliance with all applicable rules and regulations. The commission agrees that these permits are an effective compliance and enforcement tool for the public, the applicant, the EPA, and the commission. The commission acknowledges the importance of public participation and the benefits associated with it. The commission assures that Chapter 122 provides public participation as required under 40 CFR Part 70 and, in certain cases, exceeds those requirements. The addition of NSR as an applicable requirement adds information to support a citizens' right to know what pollutants facilities in their communities are allowed to emit. In addition, SOPs already contain a pollutant column in the applicable requirements table that identifies the pollutant regulated by the applicable requirement. In response to this comment, when the GOPs are proposed for renewal in October 2001, the heading for each GOP table will include the pollutant(s) regulated within the table. Part 70 does not define greenhouse gas guidelines to be an applicable requirement. Currently, there are no green house gas applicable requirements for the commission to include in an operating permit. If and when such is promulgated, an operating permit application will include it.

Comment

QLEP and 118 individuals commented that the rules should be amended to require that notice of operating permit applications be mailed to all persons living within one-half mile of a site applying for an operating permit. PC also commented that notice should be mailed to all persons within a certain distance from the facility.

Response

The commission does not change the rule in response to this comment. Title 40 CFR Part 70 does not require mailed notice to persons within a given distance of the site, and Chapter 122 remains consistent with those requirements. The commission appreciates the commenters' interest and encourages continued

public participation in the operating permit program and in individual permit actions. The commission has established a procedure for individuals to receive all notices of permitting actions for an individual site or within a requested county. The commission believes the ability to be added to this mailing list provides sufficient opportunity for citizens to receive a notice for each site to which they are interested.

Comment

PC commented that Chapter 122 should be amended to provide for mailed and published notice more consistent with other air permitting notice provisions. Specifically, notice, or at least a reference to the full notice, should be published in a prominent location in the non-legal notice section of the newspaper consistent with 30 TAC §116.132(b). PC commented that §122.320(b) should be consistent with the public notice proceedings in §116.132(b). PC also commented that §122.340(e) should require notice of a public hearing to be published in the non-legal notice section of the paper.

Response

The commission agrees that both air permit programs' notice requirements should be as consistent as possible. Regarding mailed notices, both the operating permit and NSR programs mail notice of receipt of applications to affected state representatives and senators. In addition, both air permitting programs require a sign posting and bilingual public notice, responses to comments, an appeals process, a requirement to publish in a newspaper, the ability to be placed on a mailing list, and holding a public meeting when requested. In addition, to provide for easier public access to permit information, the commission provides electronic access to both NSR and operating permit actions and correspondence via the remote document server (RDS) located at: *http://www.tnrcc.state.tx.us/permitting/airperm/rdsinstr.htm*. As minor NSR is incorporated into operating permits and procedures for integrated permits are developed, the commission will evaluate its air permit newspaper notice requirements to further ensure consistent newspaper notice, appropriate placement of hearing notice in newspapers, as well as eliminate any duplicative air permit notice requirements.

Comment

PC commented that a mailing list should be maintained for persons who wish to receive notice of all operating permit applications. Also, the notice of existing mailing lists, only contained in the *Texas Register*, is so poor that few people know that they can have their names added to a mailing list. TCE commented that citizens should be able to get on a list for a particular facility or group of facilities in their area so that they can be informed in terms of permit problems and enforcement issues, violations, etc. SEED noted that they requested notification on 16 different plants, but was told that can be done for water but not for air. They would like to see that corrected.

Response

The commission does not change the rule in response to this comment. The commission does not rely strictly on any *Texas Register* notification to provide information about the option of being placed on a mailing list. Information concerning mailing lists is included in each air, water, and waste permit notice published in newspapers. TCAA, §382.056(b)(6) requires newspaper notices for air permit applications to provide a description of the procedures by which a person may be placed on a mailing list in order to receive additional information about the application. Section 122.320(b)(9) requires newspaper notices for draft operating permits to contain a description of the procedures by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit. Enforcement actions or violations are matters of public record and information on these actions are available upon request. Citizens may also request a summary of all violations for a specific time period for any facility.

The opportunity to be placed on a mailing list is available for all permit actions the commission requires to have a newspaper notice. The following procedures explain how to be placed on a mailing list for permit applications that undergo newspaper public notice. Specifically, a person may submit a request to be added to the mailing list for one or more sites by submitting the request to the TNRCC Office of the Chief Clerk. The request must include the requestor's name and address (with zip code), the name of the site or sites of interest, and the application project number or permit number. In addition, the requestor may instead ask to be placed on a mailing list to receive permit notices for every site in a given county.

Comment

PC commented that the commission should work towards providing notice of all operating permit activities on its Title V website.

Response

In addition to the current list of pending and issued operating permits contained on the website, the commission agrees to add a list of all draft operating permits in public notice.

Comment

PC and Neighbor for Neighbors do not support concurrent public notice and EPA review, since this would deny the EPA the benefit of reviewing citizen comments on a draft permit. Because facilities are allowed to continue to operate while their operating permit applications are pending, the permitting process should not be expedited at the expense of public participation and thorough review. TCC was supportive of the proposed §122.350(b)(1), to enable concurrent public notice and EPA review. TCC believes that this amendment will help make the NSR/Part 70 authorization more efficient and lessen the impacts on the permit holder's operations, especially on time-sensitive items. PC commented that §122.350(b)(1) should not be amended to allow public and EPA review periods. Part 70 does not provide for current public and EPA review period. TCC was supportive of the proposed §122.350(b)(1), to enable concurrent public notice and EPA review. TCC believes that this amendment will help make the NSR/Part 70 authorization more efficient and lessen the impacts on the permit holder's operations, especially on time-sensitive items. PC commented that §122.350(b)(1) should not be amended to allow concurrent public and EPA review periods. Part 70 does not provide for current public and EPA review periods.

Response

In response to this comment, the commission amends §122.350(b)(1) to state that EPA review may run concurrently with public notice and that, if appropriate, the executive director may extend the EPA review period. The commission also amends the definition of draft permit to clarify that it may be the same as a proposed permit. The commission adopts the option for concurrent review, since less than 4% of the issued SOPs have received public comment.

The draft permit is the permit the executive director intends to issue unless comments are received that result in a change to the permit. When no comments are received during public notice, the draft permit and the proposed permit are the same document. It is this same document that the executive director intends to issue as a proposed final action, which is consistent with Part 70. If comments are not received, public participation and thorough EPA review are in no way impacted by concurrent notice and review.

When comments are received, the concurrent EPA review period may be extended. Consistent with §122.345, Notice of Proposed Final Action, a notice of proposed final action (action) is prepared and sent to each commenter, each person on a mailing list for that permit, the applicant, and the EPA. This action must contain: a listing of all comments received, the commission's responses, identification of any changes to the permit, the dates for the 45-day EPA review period, the dates for the public petition period, and the procedures by which a petition may be filed. In this case, the EPA review period may be extended.

Comment

TXOGA supported the revisions to Subchapter D.

Response

The commission appreciates TXOGA's support of the revisions to Subchapter D.

Comment

PC commented that §122.320(b)(5) be amended to specify that notice include the air pollutants with emission changes involved in any modification.

Response

The commission does not change the rule as a result of this comment. Section 122.320(b)(5) is consistent with 40 CFR §70.7(h)(2) because newspaper notice is only required for significant revisions. The commission provides for a public announcement period for minor revisions, but this is above and beyond what is required in Part 70.

Comment

PC commented that §122.320(f) should be amended to specify that a copy of the permit application, draft permit and any required notices will be provided to the EPA, not just made accessible to the EPA, for consistency with 40 CFR §70.7(a)(1)(iv). Section 122.501(e), General Operating Permits, and §122.502(h), Authorization to Operate, should also be amended to specify that copies of draft GOPs and a copy of the authorizations to operate be provided to the EPA, either in electronic or paper format, and not merely made accessible to the EPA, to be consistent with 40 CFR §§70.4(b)(3)(v), 70.7(a)(1)(v) and (d)(3)(ii), and 70.8(a).

Response

The preamble to the adopted October 1997 Chapter 122 rules stated that the EPA commented on the requirement appearing throughout the rule that information be submitted to the EPA. In response to that comment, the commission amended to the rule to specify that information will be made accessible to the EPA.

Comment

PC commented that the word "substantially" should be removed from §122.320(h)(1), since the amendment may result in public notice signs with lettering too small to adequately alert the public or signs with insufficient information. Conversely, TCC was supportive of adding the word "substantially" to §122.320(h)(1) to adequately meet public notice requirements.

Response

The commission does not change the rule in response to this comment. The commission believes the language provides the executive director with necessary discretionary authority and that 40 CFR Part 70 does not require a sign to be posted. This change is added for consistency with Chapter 39 sign posting requirements.

Comment

SEED commented that no one has ever seen postings and these notifications are inadequate. People do not look for these notifications. There needs to be a better way for citizens to find out who is applying for an operating permit and obtain information in a timely manner so that citizens can have input to the process and have it be meaningful. SEED has also attempted to contact the agency and found that it was difficult and frustrating to call and obtain information about operating permits, to contact and obtain information via E-mail, or to obtain information at the TNRCC offices. Staff seemed uninformed about Title V and Air Permits staff, specifically, had difficulty in obtaining information quickly and easily and aid citizens in finding information. Even permits that have not been issued were not in the public information office where they can be viewed with the other permits, applications, and history of the company so that they can be viewed together, because that is the reason why Title V is potentially such a good tool. Permits that were viewed were very sketchy compared with those that have been held up as examples. These permits were already in place before citizens even knew about the process and the extent of the difficulty involved in trying to get a hold of this material. Therefore, SEED encourages the commission to make a system that works better. SEED recommended that the notification process be an easy, accessible process so citizens don't have to rely on catching some notification that they may easily miss in the newspaper if they don't read notifications every day of the year.

Response

As discussed in response to previous comments, the commission provides several avenues for providing notice to the public regarding operating permit actions. Some of these avenues are more comprehensive than federal requirements.

In addition, the commission commits to list all draft operating permits authorized to publish notice on the website and currently lists all pending and issued operating permits. To further assist the public, the commission will add the permit reviewer's name on the website. In September 1999, the commission amended §122.320(b)(9) to require that the newspaper notice include information on how a citizen may request to be on a mailing list. To provide for quicker transmission of open records requests, the commission has a specific e-mail address which is *openrecs@tnrcc.state.tx.us*. Each permitting division, including air, has a public notice coordinator and one or more open records request coordinators to assist in proper and prompt handling of information requests. Also, all notices for air, water, and waste permits include information on how to be placed on a mailing list for notices and include the toll-free Office of Public Assistance number.

Starting in January 2000, air operating permit application public notices have been available through the Office of the Chief Clerk. Each notice specifies that the permit file may be viewed

and copied at the TNRCC Austin Central Offices, the appropriate Regional Office, and in the public location that the applicant makes the permit application and draft permit available. In addition, to provide for easier public access to permit information, the commission provides electronic access to both NSR and operating permit actions and correspondence via the remote document server (RDS) located at: *http://www.tnrcc.state.tx.us/permitting/airperm/rdsinstr.htm*. Specifically the RDS provides electronic access to draft, proposed, and issued operating permits.

Comment

PC requested that §122.320(j) be amended to eliminate the requirement that a hearing be requested by a person who may be affected by emissions from a site. Operating permit hearings are not contested case hearings and should, therefore, not be so limited. Title 40 CFR §70.7(h) does not restrict the availability of a hearing. PC also commented that §122.340(d) should not give the executive director discretion to deny a public hearing request that is "unreasonable." PC commented that §122.340(d), which specifies that the executive director is not required to hold a hearing if the basis is determined to be unreasonable, should be amended to state that a public hearing will be held on an operating permit application if such hearing is requested. Operating permit hearings are notice and comment hearings and are not overly burdensome for the commission. The commission formerly used a "reasonable" standard in contested case hearings, which was ambiguous and led to numerous lawsuits, and the "reasonableness" standard was removed from the contested case hearing rules by the Texas Legislature and should be deleted from Chapter 122. PC commented that §122.508, Notice and Comment Hearings for General Operating Permits, should be amended to require a notice and comment hearing to be held if one is requested. It should not be limited to reasonable requests by an affected person.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. TCAA, §382.0561(c) specifies that a person who may be affected by emissions may request a hearing during the public notice period. It further specifies that the commission is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable. On May 6, 1996, the commission submitted an opinion from the Office of the Attorney General of Texas addressing the issue of standing to participate in contested case hearings. This opinion was requested by the EPA following the passage of SB 1546, of the 74th Texas Legislature, 1995. SB 1546 added a definition of "affected person" or "person affected" or "person who may be affected" for purposes of administrative hearings held by or for the commission involving a contested case. It was the opinion of the Attorney General that SB 1546 was intended to amend §5.115 of the TWC to address standing for the specific purpose of public participation in permitting matters for which a contested case hearing is required by the Administrative Procedures Act (APA) and the TCAA. Because §382.0561 specifically exempts operating permits from the contested case hearing requirements of the APA, the definition in SB 1546 does not apply to "affected persons" or "persons affected" or "persons who may be affected" as those terms may be used in reference to the operating permit program. Section 382.0561 continues to be the statutory authority for standing to participate in operating permit hearings. Thus, the commission believes that the reasonableness standard continues to apply to requests for hearings for operating permits. Procedurally, for operating permits, the commission has interpreted that a person that may be affected by emissions includes any interested person, which is consistent with Part 70. The commission has received eight hearing requests. Of these requests, five were granted, one was withdrawn by the requestor, and one was not granted since the request was dated after the end of public notice. So far, no hearing has been denied based upon executive director discretionary authority.

Comment

PC commented that the proposed language in §122.360(c) should not be adopted. The provision appears to run the public petition period for GOPs during the public notice and EPA review periods. This will not allow the public to know if the EPA objected to a permit and if there is a need to petition and is also inconsistent with Part 70.

Response

The commission does not change the rule in response to this comment. The commission wishes to clarify that by adopting this language, the commission is not running the public petition period during the public notice and EPA review periods. The public petition period for GOPs will start after completion of both the public notice period and the EPA review period. Adopting §122.360(c) allows the commission to extend the start of the petition period to the date of GOP issuance. The GOP will never be issued before the completion of the EPA review period.

Comment

PC commented that §122.501(a)(1), (d)(1)(B), (2)(B), (3)(B), and §122.505(f)(1), Renewal of the Authorization to Operate Under a General Operating Permit, should be amended to include the requirement to comply with all applicable requirements and with all requirements of Chapter 122 for consistency with 40 CFR §70.4(b)(3)(v) and §70.7(a)(1)(iv). GOPs should assure compliance with all applicable requirements as well as all of the requirements in Chapter 122.

Response

The commission did not propose amendments to the sections identified by the commenter; therefore, under Texas administrative law, the sections cannot be amended at this adoption. The commission does not believe that these sections require amendments. Chapter 122 requires that all permits comply with any applicable requirements as defined in Chapter 122. Therefore, compliance with Chapter 122 requires compliance with all applicable requirements.

Comment

PC commented that §122.502(a) should be amended to specify that GOP applications be required to include, at least, a compliance plan and certification as well as information regarding emissions and applicable requirements. Also, the application needs to include sufficient information to allow for public participation and affected state and EPA review.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission disagrees with the comments regarding §122.502(a) and the suggestion to specify that GOP applications be required to include a compliance plan. A qualification

criterion is in each GOP that requires emission units which are authorized to operate under the respective GOP to be in compliance with all codified requirements at the time of application submittal. If all units are in compliance, there is no need for a compliance plan to be submitted. Regarding a compliance certification, §122.501(a)(1) requires that the conditions of the GOPs provide for compliance with all requirements of Chapter 122. Therefore, the annual compliance certification requirement in §122.143(16) is inherent in all GOPs. The applications for GOPs do not require a submittal of applicable requirements because the purpose of the GOPs is to codify the applicable requirements for the applicants. GOP applications are not required to undergo public participation, affected state review, and EPA review because each GOP has already met these requirements prior to issuance under §122.501(a). Further, 40 CFR §70.6(d)(2) specifies that the permitting authority may grant a request for an authorization to operate under a GOP without repeating the public participation procedures. The applications are simply requests for approval to operate under the GOP.

Comment

PC commented that §122.503, Application Revisions for Changes at a Site, inappropriately allows sites authorized by GOPs to operate under provisional terms and conditions.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The provisional terms and conditions require permit holders to comply with the underlying applicable requirements as those requirements are changed in state and federal rules. Provisional terms and conditions do not allow for exemptions or any other condition of noncompliance with the state and federal rules.

PC commented that §122.506(a), Public Notice for General Operating Permits, should require notice of GOPs to be mailed to all persons who request to be included on an operating permit mailing list.

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission agrees with this comment, will address it procedurally and may consider this comment for future rulemaking.

Comment

PC commented that §122.509, Public Announcement for General Operating Permits, should be amended to specify that permit revisions to GOPs comply with the revision process in §§122.210 - 122.221. The public announcement provisions do not provide for adequate notice to the public.

Response

The commission did not propose amendments to §122.509; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission believes the GOP permit revision processes contained in §122.501(d) and §§122.506 - 122.509 parallel the permit revision processes in §§122.210 - 122.221. Specifically, §122.501(a) specifies the public participation required for issuance of a GOP which includes public notice, affected state review, EPA review, and public petition. Section 122.501(d) provides for administrative, minor, and significant revisions for GOPs. Section 122.501(d)(1) and (2), related to administrative and minor permit revisions, are included in case they are needed; although, the commission believes that GOP revisions will exclusively or almost exclusively use the significant revision process. Section 122.506 contains the public notice requirements for GOP issuance, significant permit revision, or rescission of any GOP. This section also requires notice of a draft GOP to be published in the *Texas Register*; on the commission's publicly accessible electronic media; and in the daily newspaper of largest general circulation in Austin, Dallas, and Houston if the GOP applies state-wide. Section 122.506 also specifies the information that must be contained in the newspaper notice, including an opportunity to request a notice and comment hearing. Section 122.508 contains the provisions for notice and comment hearings for GOPS and the hearing notice requirements. Section 122.509 contains the public announcement provisions that the commission will use to process a GOP minor revision which exceeds the 40 CFR §70.7(h) requirements.

Comment

PC commented that §122.510, General Operating Permits Adopted by the Commission, should be amended to specify that GOPs expire every five years and requested an explanation of the commission's authority to automatically transfer an authorization to operate under one GOP to an authorization to operate under another GOP.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Additionally, it is not necessary to amend §122.510 because §122.501(f) requires that GOPs be renewed at least every five years after the effective date. The basis for the commission's authority to automatically transfer an authorization to operate under one GOP adopted by the commission to an authorization to operate under another GOP adopted by the executive director is found under the TCAA, §382.012, which provides the commission the authority to create a comprehensive plan for the proper control of the state's air; §382.017, which provides the commission authority to adopt rules; §382.051(b)(2), which provides the commission authority to issue permits for numerous similar sources; and §382.054, which prohibits operation of a federal source of air pollution without a FOP obtained from the commission.

Comment

PC commented that GOPs do not appear to incorporate all applicable requirements. NSR permits are excluded, specifically in §122.511(b)(4)(A), Oil and Gas General Operating Permit - Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties. Also, the rules do not appear to include monitoring and reporting sufficient to meet the requirements of 40 CFR §70.6(a)(3)(i)(B) and §70.6(c)(1).

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. However, the commission is currently in the process of revising the GOPs to include any new applicable requirement (including minor NSR), monitoring, recordkeeping, and reporting requirements. In addition, the executive director is implementing

periodic monitoring and CAM through a phased approach. The executive director reviewed all applicable requirements to determine which requirements contain no monitoring and added any appropriate periodic monitoring to the GOPs scheduled to be issued in October 2001. The existing GOPs by rule are required to be renewed by October 26, 2001. Because of the extensive changes to the applicable requirements in every GOP, the commission is not renewing the GOPs by rule. Instead, the executive director will issue new GOPs which will include minor NSR. The executive director will institute proceedings to reopen previously approved authorizations to operate. Each owner or operator authorized to operate under a GOP by rule will be required to apply for a new authorization to operate under the executive director issued GOP or submit an application for an SOP.

The executive director, working with the EPA, developed acceptable procedures and appropriate monitoring requirements to satisfy the Part 70 periodic monitoring provisions. These requirements are included in initially issued permits. The EPA is agreeable to phasing in the remainder of the needed periodic monitoring requirements. The executive director called in full applications based on Standard Industrial Classification (SIC) codes. CAM and periodic monitoring GOPs are being developed and phased in accordance to this call-in schedule. Therefore, the commission can ensure that adequate and appropriate CAM and periodic monitoring are available when needed for incorporation into permits.

Comment

PC commented that the site-wide GOP provided for in §122.516, Site-wide General Operating Permit, does not apply to similar sources.

Response

The commission did not propose amendments to the section identified by the; therefore, under Texas administrative law, the section cannot be amended at this adoption. The commission disagrees with the comment that the site-wide GOP provided for in §122.516 does not apply to similar sources. The site-wide GOP was developed for simple sites having only site-wide requirements or for major source sites with no applicable requirements.

Comment

PC commented on §122.516(b)(3)(A)(i), (B)(i), (D)(i) and (E)(i). The compliance certification should be based on any credible evidence and not limited to a once per year visual observation of stationary vents.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Section 122.146(4) specifies that the certification be based on, at a minimum, the monitoring method (or recordkeeping method, if appropriate) required by the permit to be used to assess compliance. Title 40 CFR §70.6(c)(5)(iii)(B) specifies that permits shall include a requirement that the compliance certification include the identification of the method or other means used by the owner or operator for determining the compliance status with each term and condition and that such methods and other means shall include, at a minimum, the methods and means required under 40 CFR §70.6(a)(3), Monitoring and Related Recordkeeping and Reporting Requirements. Likewise, the Chapter 122 definition of deviation is any indication of noncompliance with a term or condition of the permit as found using, at a minimum, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit. This also is consistent with the information contained in 40 CFR §70.6(c)(5)(iii)(B).

The commission's rules do not prevent the consideration of any credible evidence to determine compliance with a Title V permit, including instances where the commission receives that information from citizens. The commission's regional offices are charged with reviewing Title V certifications and may include consideration of all credible evidence in evaluating certifications of compliance. The commission has preferred using evidence obtained by commission staff because they are trained to collect evidence in accordance with standard and legal methods and to handle that evidence properly to preserve the chain of custody. These standards of collection and handling are established to protect the reliability of that evidence. Whether the evidence is collected by the commission or by citizens, the information to be used as credible evidence must meet Texas Rules of Evidence before the commission can consider it in making decisions related to compliance or non-compliance. The commission is currently developing guidance concerning the use of evidence obtained from sources outside the commission and the criteria that must be met for the evidence to be considered in making decisions related to compliance. Once issued, the guidance will be consistent with any Texas legislation currently being considered that deals with credible evidence.

The commission determined that a once per year visual observation is acceptable periodic monitoring under §122.516(b)(3)(A)(i), (B)(i), (D)(i) and (E)(i). The EPA has accepted this through their review of SOPs containing the same terms and conditions.

Comment

PC commented on §122.516(c) in that general terms and conditions are subject to the same problems as that for the general terms and conditions of individual operating permits.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. The executive director is currently reviewing the GOPs and expects to revise them in the near future. The revisions will be consistent, as appropriate, with the general terms and conditions of individual operating permits.

Comment

The EPA commented that the commission never submitted Chapter 122, Subchapters G, Periodic Monitoring, and Subchapter H, Compliance Assurance Monitoring, for approval. It is not clear that the provisions of Subchapter H meet 40 CFR Part 64 (Part 64). If the commission intends to submit these subchapters to the EPA for approval, it must include documentation that these subchapters meet the requirements of Part 64 and other federal requirements applicable under Part 70.

Response

The commission is submitting Subchapters G and H as part of the full program submittal. Documentation demonstrating that the subchapters meet the requirements of Parts 64 and 70 will be provided with the submittal.

Comment

PC commented that the implementation of the CAM GOP, periodic monitoring GOP, and site- wide GOP are inconsistent with 40 CFR §70.6(d) in that they apply to sources that are not similar. Instead, CAM and periodic monitoring GOPS can cover every source and are not permits at all, but are required conditions of an operating permit and should be included in operating permits in the same manner as all other required conditions. PC also commented that periodic monitoring, provided in §122.600(a)(1), Implementation of Periodic Monitoring, should not be implemented through a GOP. Periodic monitoring does not apply to numerous similar sources and is a site-specific determination. It is a permit condition, not a permit, and is required to be included in each operating permit. Any new permit must include periodic monitoring.

Response

The commission does not change the rules in response to this comment. While 40 CFR §70.6(d) references sources that are similar, the implementation of the CAM and periodic monitoring GOP are for similar sources subject to applicable requirements. While these emission units may be found at different sites, the emission units subject to the applicable requirements must have similar attributes. Therefore, the commission believes that the implementation of CAM and periodic monitoring through the GOPs is consistent with 40 CFR §70.6(d). The commission would like to note that periodic monitoring is implemented in two phases. The first phase is at initial issuance for those emission limitations or standards with no monitoring, testing, recordkeeping, or reporting. The second phase is through the GOPs for those emission limitations or standards which only require a one-time test at start-up or when requested by the EPA.

Comment

PC commented that the commission's implementation of CAM is inconsistent with the EPA's CAM rule.

Response

The commission does not change the rules in response to this comment. Although Part 64 focuses on a "case-by-case" approach, it allows permitting authorities the flexibility to use a programmatic approach, such as the CAM GOP approach, for the implementation of CAM. The commission submitted several comments to the EPA during the development of Part 64 recommending that permitting authorities be allowed to establish CAM requirements on a programmatic basis. This programmatic approach would allow permitting authorities to design CAM monitoring requirements for a class of emission units that can be used across the state. The preamble to the promulgated Part 64 rule states that "{t}he EPA encourages States to consider adding monitoring requirements to existing and new rules that are consistent with 40 CFR 64 requirements." In this manner, the burdens associated with source-specific monitoring development could be reduced. To provide an incentive for this type of rule, the final rule includes a provision (see 40 CFR §64.4(b)) that allows the owner or operator to rely upon this type of programmatic rule as the primary documentation of the appropriateness of its monitoring. This approach would reduce the number of case-by-case reviews necessary to implement Part 64 (62 FR 54903). Although the 40 CFR 64 preamble discusses the programmatic approach in the context of rulemaking, the commission believes that the CAM GOP approach is consistent with the goals of the programmatic approach and achieves the same results. Thus, the CAM GOP streamlined approach is designed to address 40 CFR 64 requirements in a programmatic manner.

Comment

PC commented that it is not appropriate to incorporate periodic monitoring, as specified in §122.608, Procedures for Incorporating Periodic Monitoring or CAM, as specified in §122.708, through GOPs. Section 122.608(b)(1) allows the incorporation of periodic monitoring with no public participation. CAM GOPs and periodic monitoring GOPs do not allow public participation in determining the appropriateness of monitoring or deviation limits for specific facilities. Public comments on the CAM or periodic monitoring GOP itself is insufficient, since the public doesn't have the facility-specific information it needs for full participation at the time the GOP is issued, only until the facility submits an application for an individual permit. Thus, there is no real opportunity for the public to participate in the detailed site-specific determinations that must be made when determining monitoring. Since monitoring and reporting and the associated requirements are the only things that are added to an operating permit that are not included in underlying applicable requirements, it is very important that citizens have full participation in deciding what kind of reporting and monitoring requirements go into operating permits.

Response

The commission does not change the rule in response to this comment. The CAM and periodic monitoring GOPs are subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition, as are all GOPs when initially issued by the executive director. As permit holders apply to use a CAM and periodic monitoring GOP, the executive director will review the appropriateness of any monitoring option selected, as well as any additional, site-specific requirements that may be necessary to satisfy Part 64 if the emission unit is subject to CAM. Once approved, the monitoring option will be codified in either a FOP or a GOP. Therefore, when incorporating CAM or periodic monitoring into a FOP the monitoring option chosen, the deviation limits, and the justification for the deviation limit will be subject to public notice or public announcement, affected state review, public petition, notice and comment hearing (if applicable and if requested), and EPA review. For permit holders operating under traditional GOPs and using a CAM GOP, the approved monitoring options become representations under which the permit holder shall operate.

Comment

PC commented that Part 70 requires adequate testing, monitoring, reporting and recordkeeping requirements to be incorporated into operating permits if the underlying applicable requirements do not contain them. Section 70.6(a)(3)(i)(B) requires periodic monitoring and §70.6(c)(1) requires monitoring sufficient to assure compliance. Compliance assurance monitoring is actually a separate requirement from the CAM requirement and the EPA has made it clear in its regulations that operating permits still need to include their own compliance assurance monitoring if the CAM isn't going to be in effect. Chapter 122 should be amended to make it clear that each and every permit has to include compliance assurance monitoring for every requirement.

Response

The commission does not change the rules in response to this comment. The commission disagrees that 40 CFR §70.6(c) requires a separate compliance assurance monitoring program

from that required by Part 64. Section 70.6(c) provides general conditions for compliance purposes. On October 22, 1997, the EPA established the CAM Program with the promulgation of 40 CFR Part 64 to respond to FCAA, §114(a)(3), concerning enhanced monitoring and compliance certifications, and FCAA, §504(b), concerning monitoring and analysis (62 FR 54901). The EPA states that "the general purpose of the monitoring required by Part 64 is to assure compliance with emission standards through requiring monitoring of the operation and maintenance of the control equipment and, if applicable, operating conditions of the pollutant-specific emissions unit" (62 FR 54918). While 40 CFR 64 requires additional monitoring and analysis for emission units which exceed the major source threshold, periodic monitoring is required for all other emission units with applicable requirements which require only a one-time test or do not require any monitoring, testing, recordkeeping, or reporting. Therefore, with the implementation of the CAM and periodic monitoring GOPs, each permit will contain monitoring so that compliance can be determined.

Comment

PC commented that §122.142(c) only requires periodic monitoring to be included as required by the executive director. Since Part 70 requires that all operating permits include periodic monitoring for each applicable requirement, this condition should be removed. EEP also commented that each operating permit requires periodic monitoring.

Response

The commission does not change the rules in response to this comment. On April 14, 2000, the United States Court of Appeals for the District of Columbia Circuit decided *Appalachian Power Company, et al, vs. Environmental Protection Agency*. Appalachian Power set aside, in its entirety, the EPA's "Periodic Monitoring Guidance for Title V Operating Permits Programs," released in September 1998. The court stated that "state permitting authorities may not, on the basis of the EPA's Guidance or 40 CFR §70.6(a)(3)(i)(B), require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or Federal standard, unless that standard requires no periodic testing, specifies no frequency, or requires only a one-time test." The commission would like to note that periodic monitoring is implemented in two phases. The first phase is at initial issuance for those emission limitations or standards with no monitoring, testing, recordkeeping, or reporting. The second phase is through the GOPs for those emission limitations or standards which only require a one-time test (at start-up or when requested by the Administrator). Each permit will contain periodic monitoring as appropriate.

Comment

PC commented that §122.604, Periodic Monitoring Application Due Dates, and §122.704, Compliance Assurance Monitoring Application Due Dates, require that no facility need submit an application for periodic monitoring or CAM for approximately two years or longer; periodic monitoring and CAM should be included in operating permits. Those permits already issued that do not include periodic monitoring are defective and should be reopened. PC commented that periodic monitoring is a requirement of every operating permit and cannot be deferred as specified in §122.604.

Response

The commission does not change the rules in response to this comment. As previously discussed, the executive director is implementing CAM and periodic monitoring through a phased approach based on permit issuance and SIC codes. The commission considered several factors when developing the schedule for application due dates. Due to the technical requirements in 40 CFR Part 64, compliance with CAM and periodic monitoring may require permit holders to purchase and install new equipment or conduct performance testing. The application submittal schedule should allow permit holders a reasonable amount of time to budget for, purchase, install, and test equipment necessary to comply with CAM and periodic monitoring requirements. Furthermore, the schedule allows the executive director time to develop comprehensive monitoring options for inclusion in various CAM and periodic monitoring GOPs issued over time. Finally, under the schedule, permit holders will submit applications to the executive director in manageable numbers throughout each calendar year. The executive director will be able to review these applications in a more timely fashion than if all applications were due at the same time.

Comment

PC commented that §122.142 does not specify that operating permits must include compliance assurance monitoring.

Response

The commission agrees with the comment and adopts new §122.142(h) which includes a requirement for CAM.

Comment

Sierra commented that the commission's rules do not provide for sufficient monitoring, reporting, and recordkeeping in order to ensure that there is continuous compliance around the clock, 365 days a year, in terms of all of the applicable requirements.

Response

The commission does not change the rule in response to this comment. The commission believes that the requirements in Chapter 122 are sufficient to determine compliance with the applicable requirements because the program implements all required monitoring and recordkeeping required under Part 70.

Comment

PC commented that if it were appropriate to incorporate periodic monitoring through a GOP (it is not), the addition of periodic monitoring would be a significant change in monitoring provisions of the existing permit and, for consistency with 40 CFR §70.7(e)(4)(i), would be required to be incorporated through a significant permit revision. It is also not appropriate to incorporate periodic monitoring through a minor permit revision, provided in §122.608(b)(2) and (c). Incorporating CAM requirements would be a significant change in monitoring and would require a significant permit revision, consistent with 40 CFR §70.7(e)(4)(i).

Response

The commission does not change the rule in response to this comment. Section 122.608(b)(2) specifies that permit holders operating under a permit other than a GOP and applying for a periodic monitoring GOP must comply with §122.217(f) and (g). The EPA states in the preamble to the adopted Consolidated Air Rule that an instance where a permit holder has significant discretion over the monitoring to be contained in a FOP constitutes a significant permit revision (65 FR 78272). These changes are

not significant permit revisions because significant permit revisions to monitoring requirements are those over which the permit holder has significant discretion. Because the permit holder is selecting a monitoring option already determined by the executive director to satisfy periodic monitoring, the permit holder does not have significant discretion over those requirements. In addition, each periodic monitoring GOP is subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition; therefore, it is unnecessary to repeat these procedural requirements using the significant permit revision process.

Comment

PC commented that the periodic monitoring permit content in §122.610, Periodic Monitoring General Operating Permits Content, and the CAM permit content in §122.710, Compliance Assurance Monitoring General Operating Permit Content, do not meet the requirements of 40 CFR §70.6(a) and (b). PC commented that the periodic monitoring and CAM application requirements in §122.612, Periodic Monitoring Requirements in Permits and General Operating Permit Applications, and §122.706, Applications for Compliance Assurance Monitoring, do not contain all the information required by 42 USC §7661b, necessary to determine qualification for the GOP, and necessary to assure compliance with the GOP.

Response

The commission does not change the rules in response to this comment. The CAM and periodic monitoring GOPs were not designed to mimic a SOP; therefore, the content will not be identical to the requirements of 40 CFR §70.6(a) and (b). The CAM and periodic monitoring GOPs are unique in that the information submitted will become a part of the existing SOP or GOP and are supplemental to an existing operating permit. The commission believes that Part 70 implements the requirements listed in 42 USC §7661b, Permit Applications. The commission believes its application requirement is consistent with 40 CFR §70.6(a) and (b). These requirements have been incorporated into a previously issued SOP or GOP and are not required for CAM or periodic monitoring GOP applications.

Comment

PC commented on §122.700(a)(1), Implementation of Compliance Assurance Monitoring. Part 64 does not provide for the use of a GOP for establishing CAM. CAM is a permit requirement of all operating permits and should not be implemented through a GOP.

Response

The commission does not change the rule in response to this comment. Although 40 CFR Part 64 focuses on a "case-by-case" approach, it allows permitting authorities the flexibility to use a programmatic approach, such as the CAM GOP approach, for the implementation of CAM. The commission submitted several comments to the EPA during the development of 40 CFR 64, recommending that permitting authorities be allowed to establish CAM requirements on a programmatic basis. This programmatic approach would allow permitting authorities to design CAM monitoring requirements for a class of emission units that can be used across the state. The preamble to the promulgated 40 CFR 64 rule states that "{t}he EPA encourages States to consider adding monitoring requirements to existing and new rules that are consistent with 40 CFR 64 requirements." In this manner, the burdens associated with source-specific monitoring development could be reduced. To provide an incentive for this type of rule, the final rule includes a provision (see §64.4(b)) that allows the owner or operator to rely upon this type of programmatic rule as the primary documentation of the appropriateness of its monitoring. This approach would reduce the number of case-by-case reviews necessary to implement 40 CFR 64 (62 FR 54903). Although the 40 CFR 64 preamble discusses the programmatic approach in the context of rulemaking, the commission believes that the CAM GOP approach is consistent with the goals of the programmatic approach and achieves the same results. In addition, the CAM GOP approach would more easily accommodate changes in applicable requirements. The ability to quickly address revised applicable requirements is particularly important to ensure that FOPs reflect a site's most current compliance obligations.

Comment

PC commented that §122.702(c)(6), Compliance Assurance Monitoring Applicability, should be amended to state " ...continuous compliance determination method as defined in 40 CFR §64.1, unless the...".

Response

The commission does not change the rule in response to this comment. Section 122.10 defines "continuous compliance determination method." This definition is consistent with the definition contained in 40 CFR §64.1.

Comment

PC commented that the exemptions in §122.702(c)(7) and (8) are not provided for in §64.2.

Response

The commission does not change the rule in response to this comment. Section 122.702(c)(7) exempts emission limitations or standards, in addition to those identified in 40 CFR 64, that the EPA identifies in guidance as exempt from CAM. This exemption will allow the regulated community to take advantage of exemptions that the EPA identifies in guidance for 40 CFR 64. For example, the EPA states in its Compliance Assurance Monitoring Technical Guidance Document issued in August 1998 that the amendments to 40 CFR 61, Subpart L are exempt from CAM although the original emission limitations or standards were proposed before November 15, 1990. Section 122.702(c)(8) also exempts emission limitations or standards regulating fugitive emissions to be consistent with the EPA's 40 CFR 64 preamble which states that "fugitive emissions are not subject to any specific part 64 monitoring requirements" (62 FR 54909).

Comment

PC commented that §122.704 allows for submittal of untimely CAM applications. CAM applications are required to be submitted in accordance with 40 CFR §64.5. In addition to CAM, all operating permits are required to include monitoring sufficient to assure compliance.

Response

The commission does not change the rule in response to this comment. The executive director is implementing CAM and periodic monitoring through a phased approach based on permit issuance and SIC codes. The commission considered several factors when developing the schedule for application due dates.

Due to the technical requirements in 40 CFR Part 64, compliance with CAM and periodic monitoring may require permit holders to purchase and install new equipment or conduct performance testing. The application submittal schedule should allow permit holders a reasonable amount of time to budget for, purchase, install, and test equipment necessary to comply with CAM and periodic monitoring requirements. Furthermore, the schedule allows the executive director time to develop comprehensive monitoring options for inclusion in various CAM and periodic monitoring GOPs issued over time. Finally, under the schedule, permit holders will submit applications to the executive director in manageable numbers throughout each calendar year. The executive director will be able to review these applications in a more timely fashion than if all applications were due at the same time.

Comment

PC commented that a deviation limit is a very significant permit condition that should not be determined outside the public participation process and must be established in accordance with §64.3(d).

Response

The commission does not change the rule in response to this comment. Some monitoring options contained in a CAM GOP may have a deviation limit established in the CAM GOP. If this is not the case, the permit holder will submit a proposed deviation limit and supporting justification for approval by the executive director in accordance with §122.706(a)(1)(E). The deviation limit will be based on information about the specific operation of the control device and emission unit. As specified in §122.706(a)(3), the permit holder will typically use performance testing, engineering calculations, historical data, and manufacturer's recommendations to justify the proposed deviation limit. However, the CAM GOP may more specifically define the approach for justifying the deviation limit or provide alternatives to those specified in Subchapter H. In addition, 40 CFR §64.6(c)(1) specifies what monitoring needs to be codified in permit terms and conditions. Title 40 CFR §64.6(c)(1) states that the permit shall contain, at a minimum, the following: the indicator(s) to be monitored, the means or device to measure the indicator, and the performance requirements established to satisfy 40 CFR §64.3(b) and (d). Neither 40 CFR §64.3(b) or (d) contain indicator ranges or deviation limits, and the inclusion of the deviation limit is not required to be incorporated into the permit by 40 CFR §64.6.

Comment

PC commented that the phrase "Unless otherwise approved by the executive director," should be deleted from §122.706(a)(4) for consistency with 40 CFR §64.3, which requires that CEMS, COMS or PEMS be used. PC also commented that the phrase "Unless otherwise approved by the executive director," should be deleted from §122.714(b), Compliance Assurance Monitoring Requirements in Permits and General Operating Permit Applications, for consistency with 40 CFR §64.3(d), which requires that CEMS, COMS, or PEMS be used.

Response

The commission does not change the rule in response to this comment. As required by 40 CFR §64.3(d)(1), §122.706(a)(4) specifies that owners or operators of emission units subject to applicable requirements that require continuous emission monitoring systems (CEMS), continuous opacity monitoring systems (COMS), or predictive emission monitoring systems (PEMS) must submit a CAM GOP monitoring option that includes the use of the CEMS, COMS, or PEMS to satisfy CAM requirements for the other emission limitations or standards that are subject to CAM for that particular emission unit. Since Subchapter H applies on a pollutant-by- pollutant basis, this requirement also applies on a pollutant-by-pollutant basis. For example, a nitrogen oxides (NO_x) CEMS would be used for NO_x emission limits that apply to the emission unit but would not be used for SO_2 emission limits. Therefore, §122.704(a)4) is consistent with 40 CFR Part 64.

Comment

PC commented that the CAM GOP provided in §122.710 does not include the elements required by 40 CFR §64.4 or §64.6.

Response

The commission does not change the rule in response to this comment. The CAM GOP will include a list of emission limitations or standards that are subject to Subchapter H. Monitoring options established by the executive director to satisfy CAM will be associated with each emission limitation or standard. In addition, a CAM GOP will be subject to public notice, affected state review, notice and comment hearing (if requested), EPA review, and public petition as are all GOPs when initially issued. The monitoring option from the CAM GOP will then be incorporated into the traditional GOP or SOP. Therefore, the commission believes that the CAM GOP in combination with a traditional GOP or a SOP meets all the permit content requirements.

Comment

PC commented that §122.716, Compliance Assurance Monitoring Quality Improvement Plans, should provide that operating permits may specify an appropriate threshold for requiring the implementation of a quality improvement plan (QIP). The QIP should include the requirements listed in 40 CFR §64.8.

Response

The commission did not propose amendments to the section identified by the commenter; therefore, under Texas administrative law, the section cannot be amended at this adoption. Section 122.716 provides the executive director the authority to require permit holders to implement quality improvement plans (QIPs). Title 40 CFR §64.8 establishes that QIPs are optional, at the permitting authorities' discretion. The commission chose to establish QIPs on a "case-by-case" basis, as appropriate. A QIP may be required based on the frequency of deviations, the cause of deviations, the magnitude of deviations, the permit holder's response to deviations, or other information that indicates that the emission unit or control device is not being maintained and operated consistently with good air pollution control practices. The data to evaluate these criteria will be collected from deviation reports, compliance certifications, site inspections, and any other appropriate sources. Nothing in this section is intended to limit the commission's options for taking other enforcement action. Since QIPs are optional, at the permitting authorities' discretion, the commission does not believe this section needs to be revised.

Comment

PC commented that the commission should ensure that every file from which confidential information is withheld contains a clearly recognizable notice to the public that such information has been withheld and review the substance for confidentiality claims.

Response

The commission maintains a records retention and management system to address statutory requirements for public records, open records requests and confidentiality of records, including requirements under the Public Information Act. Public notice authorization packets sent to instruct an applicant on how to properly publish notice for a draft operating permit state that if the application is submitted to the TNRCC with information marked as confidential, the applicant is required to indicate which specific portions of the application are not being made available to the public. These portions of the application must be accompanied with the following statement: "Any request for portions of this application that are marked as confidential must be submitted in writing, pursuant to the Public Information Act, to the TNRCC Public Information Coordinator (MC 197), P. O. Box 13087, Austin, Texas 78711-3087." The commission's procedures include handling permit data and files in the same manner as specified above. So far, the commission is unaware of any open records request for an operating permit application that contained any confidential data. The commission has informed applicants that the whole operating permit application cannot be considered confidential and that data needed to determine which applicable requirements apply to the site are also not confidential. As discussed in a previous comment, the commission is obligated to address claims of confidential information consistent with the Texas Government Code, Title 5, Chapter 552, regarding public information and exceptions from required disclosure and THSC, §382.041 regarding confidential information.

Comment

QLEP and 118 individuals commented that the commission's rules should be amended to allow credible evidence of violations, including evidence gathered by citizens, to be used to prove air pollution violations and that the commission drafts operating permits so polluters can ignore citizen gathered evidence. NFN also requested that the agency recognize credible evidence gathered by responsible citizens whom Title V seeks to protect. PC commented that citizen gathered evidence is excluded form enforcement actions and requested the commission to amend 122 to specifically acknowledge that any credible evidence may be used to demonstrate a violation at a Title V facility. If citizens come up with credible evidence that there have been violations at a facility, the commission should be required to consider that evidence. PC also noted that public participation is crucial to the success of the operating permit program. The TNRCC cannot be everywhere at once, and citizens often have more information regarding facilities in their communities than the TNRCC does. The participation of those citizens in ensuring that all applicable requirements are included in permits and that facilities are complying with those requirements is essential. An individual also commented on the commission's inability to gather, accept, recognize and act upon credible evidence to prove air pollution violations, including evidence gathered by its own employees, as well as citizens. Further, EEP commented that Title V provides for the use of any credible evidence to prove violations, that evidence gathered by members of the public should be used in enforcement actions, and that such citizens should be thanked and encouraged by the commission. (An example was given that if opacity is monitored on a continuous basis, such monitoring is legitimate evidence of an opacity violation. You can't be limited to visual inspection by the operator of the facility.) The fact that the commission does not recognize this evidence damages the credibility of the commission. Title V rules should be amended, and operating permits should be written, to allow the use of all credible evidence, regardless of how it is collected.

Response

The commenters have raised two different, but related issues: the use of credible evidence in demonstrating compliance with Title V requirements and the use of credible evidence to prove the existence of a violation in an enforcement action. With regard to the Title V issues, the commission's rules do not prevent the consideration of any credible evidence to determine compliance with a Title V permit, including instances where the commission receives that information from citizens. The commission's regional offices are charged with reviewing Title V certifications and may include consideration of all credible evidence in evaluating certifications of compliance. The commission has preferred using evidence obtained by commission staff because they are trained to collect evidence in accordance with standard and legal methods and to handle that evidence properly to preserve the chain of custody. These standards of collection and handling are established to protect objectivity. Whether the evidence is collected by the commission or by citizens, the information to be used as credible evidence must meet Texas Rules of Evidence before the commission can use it as the basis for, or as a component of, decisions related to compliance or non-compliance. The commission is currently developing guidance concerning the use of evidence obtained from sources outside the commission and the criteria that must be met for the evidence to be considered in making decisions related to compliance. Once issued, the guidance will be consistent with any Texas legislation currently being considered that deals with credible evidence.

Comment

QLEP and 118 individuals commented that the commission's rules do not protect citizen's right to breathe clean air, the rules contain loopholes that allow facilities to illegally avoid pollution limits and penalties through claims of grandfathering, upsets and audit privilege and that it will be impossible to clean Texas' air until the commission closes these loopholes. Further, the commission's Title V rules should ensure that facilities are required to comply with every applicable requirement and that enforcement action is taken against facilities that do not comply. NFN commented that exemptions such as grandfathering, upsets and audit privilege laws, combined with the agency's failure to conduct meaningful investigations of whether the privilege of such exemptions is merited, allow emissions in excess of permit limits with no real threat of enforcement. Also, there is no assurance that a previously exempted facility will come under real scrutiny in advance of, or in connection with or after the permitting process. PC concurred and added that these loopholes prevent the commission from having the enforcement authority required by 40 CFR §70.11. Grandfathering should be eliminated altogether or, at the very least, operating permits should be used as a tool to ensure that facilities do not falsely claim grandfathered status and, thereby, avoid pollution control requirements. Because the commission is granting negative applicability permit shields, it is especially important that the commission does not wrongly allow facilities to claim grandfathered status. To be consistent with Part 70, Chapter 122 should specify that applications must include a detailed explanation of how the facility qualifies for any exemption claimed and documented to support that explanation. Also, operating permits should also contain an explanation for any exemption from applicable requirements. Also, the commission is not actually examining whether or not the facility qualifies for an exemption and is not including any such explanation

in permits, as required by Part 70. The commission should require permits to contain a detailed explanation of how the facility complies with each of the requirements of the exemption and the facility should be required to certify in its annual compliance certification whether or not it continues to meet each of the requirements for the exemption. The commission should not have the authority to issue permit shields unless its rules have procedures to ensure that facilities are not illegally claiming exemptions. NFN also expressed concern with grandfathered facilities and the possibility of a negative applicability permit shield as a result of a meaningless permit application review. Another individual commented that grandfather clauses and expecting companies to police themselves in an effort to clean up the environment will never adequately provide a healthy environment. Monetary penalties for failure to act or shutting down those who fail to comply with clean air acts will aid in providing air that is fit to breathe.

PC commented that the Texas Environmental, Health, and Safety Audit Privilege Act (the Act) prevents the commission from having adequate authority to enforce the requirements of Title V permits. This is contrary to §502(b)(5) of Title V, which requires that states have the authority to enforce the terms and conditions of operating permits. The Act is broad and allows facilities to claim audit privilege exemptions for a wide range of violations, thereby avoiding penalties or injunctive relief. Further, the Act prevents inspectors from having access to information they need to determine a facility's compliance history and even provides special penalties for commission staff, and anyone else, who discloses information that is privileged under the Act. The Act does not adequately prevent claims of immunity by repeat or continuous violators; facilities that benefit economically from their violations and have economic incentive to violate; facilities whose violations cause injuries or the risk of injuries. It appears that the Act is being abused by facilities that perform audits not to discover unknown violations, but to gain immunity for violations they for which they are already aware. PC commented that the rules should clearly state that the self reported notices of violation pursuant to the Act must be included with deviation reports.

Response

The commission disagrees with the commenters and believes its rules protect air quality and public health. Grandfathered facilities are exempt only from the requirement to obtain a preconstruction permit. They are not exempt from the emission rates and other restrictions on emissions of air contaminants contained in the commission's rules and state implementation plans. The commission does not currently have the authority to require grandfathered facilities to obtain a state NSR permit. The commission does not intend to grant permit shields for NSR requirements.

The commission recognizes that upsets at industrial facilities can cause the release of significant amounts of air contaminants over restrictions in permits or rules. The commission also recognizes that upsets occur despite the exercise of good operating practices by a facility owner or operator. The commission believes a procedure should exist for exempting upset emissions from enforcement provided that procedure requires that the owner or operator demonstrate that the upset was unavoidable and that he or she took prompt corrective action. The commission's rules provide this procedure and require that the event not be the result of improper design, maintenance, or operation. The commission also requires that logs of corrective action be kept and that upsets not be part of a recurring pattern in order to qualify for an exemption from enforcement. The commission has previously explained how the criteria it uses to exempt upsets from enforcement is equivalent to the procedures identified in Part 70.

The Audit Privilege Act (the Act) provides incentives for facility owners or operators to conduct a self audit. The intent of the audit is to identify emission units and other facility operations that are in violation of permits, laws, and commission rules. Disclosure under the Act only provides immunity from penalties if all of the statutory requirements are met, not immunity from enforcement, up to and including injunctive relief if necessary. The Act specifically excludes immunity for violations that result in injury or imminent and substantial risk of injury, violations that result in substantial economic benefit to the entity, and repeated violations that constitute a pattern of disregard of environmental laws. Additionally, immunity is conditioned upon correction of all violations. Failure to complete corrective action in accordance with a compliance schedule would be grounds for another enforcement action that would carry penalties. All disclosures of violations, notices of violations, and commission orders are part of a company's compliance record regardless of how the violations were disclosed. The Act does not limit an investigator's ability to inspect a facility. Pursuant to the Act, all documents, data, and reports required by the commission to be collected, developed, maintained, or reported under a federal or state law are not privileged. The commission believes this Act provides an incentive for owners and operators to identify and correct violations more quickly than would otherwise occur. Violations disclosed under the Act are deviations. Section 122.145(2)(A) requires all deviations to be reported.

In the June 25, 1996 EPA notice, the EPA commented that the commission would have to demonstrate that the passage of Texas HB 2473 (1995), the Texas Environmental, Health and Safety Audit Privilege Act does not limit the commission's ability to adequately administer and enforce the federal operating permit program.

EPA and the commission negotiated a set of technical amendments to the Act with the purpose of removing any barriers to state assumption of federal programs. The 75th Texas Legislature enacted Texas HB 3459 (1997) to adopt the amendments agreed upon without any other significant changes in the law. The amendments to the Act have been in effect since September 1, 1997, and the commission implements the Act consistent with the intent of the legislation and the agreement with EPA. EPA has agreed to conclude that the commission retains adequate authority to enforce the requirements of any authorized or delegated program.

Comment

PC commented that the operating permit program should provide members of certain environmental groups with access to monitoring and reporting data and enable them to be active participants in ensuring that facilities in Texas comply with air pollution requirements.

Response

Monitoring and reporting data is supplied to the commission and is a public record. Any member of the public can request to review that data.

Comment

NFN, while commenting on the operating permit program, also expressed specific concerns with ALCOA. Similarly, QLEP expressed concerns with Jobe Concrete and encouraged the commission to amend the Title V rules to protect and give equal protection to breathe clean air to all neighborhoods.

Response

The ALCOA and Jobe Concrete permit applications will be processed under the commission's adopted rules. However, the specific compliance status of any site is independent of this rulemaking and, therefore, will not be discussed here.

Comment

Sierra commented that the proposed rules do not consider Title VI of the 1964 Civil Rights Act and the environmental justice implications of that statute. Although the EPA did not require anything in the state rules for Title V, Sierra requests the commission to consider the incorporation of environmental justice concerns into Chapter 122. The fact that there may be circumstances with chronic violators raises issues of violation of Title VI of the 1964 Civil Rights Act because the commission is a recipient of federal funding and, therefore, it is required by federal law in its own rules and regulations to comply with Title VI. Sierra thinks that a lot of the staff people are very aware of the fact that Texas has a lot of communities of color. Not all live on the fence lines of big industrials sources, but Title VI does raise this concern about disproportionate impacts, cumulative impacts, and that operating permits provide an opportunity for these kinds of issues to be addressed because, otherwise, it would be inconsistent and a violation of Title VI of the 1964 Civil Rights Act. There are also a number of outstanding Title VI administrative civil rights complaints that are pending and involve allegations that the agency has not fully complied with Title VI. Therefore, Title V of the FOP program does offer an opportunity for the agency to do the right thing.

Response

The commission does not believe the rule needs to be changed to incorporate Title VI issues in response to this comment but wishes to clarify how it addresses complaints under Title VI of the 1964 Civil Rights Act. It is important to note that all Title VI complaints challenging the issuance of a permit are formally filed with and investigated by the EPA. In addition, any person may submit comments regarding Title VI issues on any operating permit application during the public comment period.

Any violation of an applicable requirement contained in an operating permit is grounds for enforcement action, regardless of whether or not there is a violation under Title VI of the 1964 Civil Rights Act. The commission's rules require compliance by the regulated facilities without regard to the ethnic makeup of the community. The commission believes its rules protect air quality and public health.

The FOP program will incorporate all applicable requirements for federal sources into one permit so that the permit holder is aware of all regulations that govern the operation of a site. FOPs are issued based on the accuracy and completeness of the application and whether the application ensures compliance with all applicable requirements. The commission implements these requirements through Chapter 122. FCAA, Title V requires permits to assure compliance with all applicable requirements and does not provide for the denial of a permit based on a complaint under the 1964 Civil Rights Act, Title VI.

Nonetheless, all environmental justice issues (including Title VI complaints) are addressed by the Environmental Equity Program within the Office of Public Assistance (OPA). The goals of the Environmental Equity Program are to thoroughly consider all citizens' concerns and handle them fairly. This is accomplished by seeking to: 1.) determine the nature of the problem or concern; 2.) identify the principal parties affected; 3.) provide opportunities for input by all interested parties; 4.) develop a plan of intervention or mediation; 5.) establish effective communication among all parties; 6.) educate affected parties about all sides of the issue; and 7.) negotiate or mediate mutually acceptable solutions. The commission believes that addressing problems in the early stages can keep the issue from escalating into more confrontational situations such as class action lawsuits or Title VI complaints. The commission further believes early intervention promotes a spirit of cooperation and often saves everyone money and time.

Comment

TCE submitted a report on the TNRCC citizen complaint process, completed by Public Research Works, and made the following comments. The citizen complaint process is seriously flawed and changes can be incorporated into the operating permit program. Citizens have difficulty in finding out to whom complaints should be submitted. In 1999, the legislature required the commission to have a toll-free number, but it is not listed on the homepage or citizen page of the TNRCC website. It was pointed out to the agency in August, 2000, and it still has not changed, indicating that it was not just an oversight. Citizens, unlike facilities that get investigated, do not get adequate information about the complaint process. Most people (75%) do not get a written response from the commission as to what happened with their complaints. This is true for written complaints as well, which are required by law to receive a written response.

Response

The report referenced by the commenter does not relate directly to this rulemaking but has been sent to the appropriate internal division of the commission. The commission did establish a toll-free number to register complaints as required by the legislature and made it available on commission's website at *www.tnrcc.state.tx.us/enforcement/complaints.html*.

Comment

TCE commented that the commission is required to keep a record of all complaints that it receives, however numerous examples have been found where the commission did not record complaints. TCE stated that this occurred when over 3,000 signed affidavits that were submitted to the Odessa regional office were never recorded in the database, falsely showing that the number of complaints in the state is declining. Also, in Harlingen, citizens were actually being dissuaded from filing complaints. Staff first accused them of being fellow community members instigating calls, then explained that further complaints would just slow the process down. When three nuisance violations for a similar problem within five years yields automatic enforcement action, it is critical that citizen's complaints not only be recorded, but be investigated promptly so that problems can be dealt with through automatic enforcement actions. They were told by the commission and other air pollution officials that, in many cases, the only way the agency learns of air pollution problems may be from citizen complaints. The agency also does not investigate complaints promptly, has an unfair rating

system to address complaints, and some complaints were not given the correct rating or were not an accurate indicator of problems. This ranking system should be done away with and the commission should just go out and investigate complaints as quickly as they come in like other agencies do.

Response

The commission sets a priority on complaints so that the most potentially serious are addressed first, but all complaints are recorded and investigated in accordance with commission procedures.

These procedures are not addressed through this rulemaking.

Comment

TCE commented that examples were found where clear violations of air pollution laws were not given violations and made the following comments. Facilities operating without a permit for up to a year still continue to operate. They stated that an investigator, in response to a complaint, left a citizen's property noticing no odor because the wind had shifted. The inspector then went to the facility and had to leave because the odor was so strong, but the complaint was written up as no violations occurred. They believe the commission must change its policies so that an investigator's experience of noxious odors is enough to write violations, and that if the wind has shifted, every effort is made to have a complainant go to the place where the wind has shifted so that violations can be noted, that it does not necessarily have to continue to be on their property. TCE also commented that investigations are flawed because they do not occur 24 hours a day, seven days a week, as the controller recommended in 1990. TCE specifically noted photographs and videos of parents in Lakeway trying to protect their children from being sprayed with sewage were ignored by the commission's staff. Further, they stated the commission's staff would not meet with the parents until a governor's staffer was contacted and got involved to schedule the meeting.

Response

The report and individual circumstances referenced by the commenter are issues that are addressed through the internal policies of the commission and are not addressed in this rulemaking. The report will be made available to the Field Operations Division to determine if any changes to policy and procedures are needed.

Comment

SEED Coalition supported comments submitted by the EEP, PC, Sierra, TCE, and NFN and added concerns from a citizen activist perspective. No one knows about operating permits; they don't know what they are, and they've never heard of them. This contrasts with industries that are rapidly submitting operating permit applications before citizens can even find out about the process itself.

Response

The commission does not change the rule in response to these comments. Interested groups can contact the commission or the EPA concerning participation and outreach programs. The commission currently provides outreach through its website and, in response to this comment, intends to develop and publish a basic overview of the operating permit program, along with a diagram that identifies the opportunities for public participation in the operating permit process. The commission also notes that its Office of Public Assistance website currently contains contact information for individuals who seek information about agency permits, the permitting process, and public participation opportunities. Public notice requirements for operating permits exceed Part 70 notice requirements. For example, operating permit public notice requires a sign posting and bilingual public notice which is not required by Part 70.

SUBCHAPTER A. DEFINITIONS

30 TAC §122.10

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

(A) nitrogen oxides;

(B) volatile organic compounds;

(C) any pollutant for which a National Ambient Air Quality Standard (NAAQS) has been promulgated;

(D) any pollutant that is subject to any standard promulgated under FCAA, §111 (Standards of Performance for New Stationary Sources);

(E) unless otherwise specified by the EPA by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection); or

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r) including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established pursuant to FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to the FCAA, §112(g)(2) requirement.

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the EPA through rulemaking at the time of issuance but have future-effective compliance dates:

(A) All of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site.

(B) All of the requirements of Chapter 112 of this title (relating to Sulfur Compounds) as they apply to the emission units at a site.

(C) All of the requirements of Chapter 113 of this title (relating to Control of Air Pollution from Toxic Materials), as they apply to the emission units at a site.

(D) All of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site.

(E) All of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site.

(F) All of the requirements under Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as they apply to the emission units at a site.

(G) Any site specific requirement of the state implementation plan (SIP).

(H) All of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any preconstruction permit.

(I) All of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under FCAA, §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain Program;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit; and

(x) any increment or visibility requirement under FCAA, Title I, Part C or any NAAQS, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources).

(J) The following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surface Coatings containing less than 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Compliance assurance monitoring (CAM) case-by-case determination--A monitoring plan designed by the permit holder and approved by the executive director to satisfy 40 CFR Part 64 (Compliance Assurance Monitoring).

(4) Compliance assurance monitoring general operating permit (CAM GOP)--A GOP issued under Subchapter F of this chapter (relating to General Operating Permits) which provides monitoring options established by the executive director to satisfy Subchapter H of this chapter (relating to Compliance Assurance Monitoring).

(5) Continuous compliance determination method--For purposes of Subchapter H of this chapter and Subchapter G of this chapter (relating to Periodic Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(6) Control device--For the purposes of Subchapter H of this chapter, equipment that is used to destroy or remove air pollutant(s) prior to discharge to the atmosphere.

(A) A control device does not include the following:

(i) passive control measures that act to prevent pollutants from forming, such as the use of seals, lids, or roofs to prevent the release of pollutants, use of low-polluting fuel or feedstocks, or the use of combustion or other process design features or characteristics; or

(ii) inherent process equipment, which is equipment that is necessary for the proper or safe functioning of the process, or material recovery equipment that is installed and operated primarily for purposes other than compliance with applicable requirements. Equipment that must be operated at an efficiency higher than that achieved during normal process operations in order to comply with the applicable emission limitation or standard is not inherent process equipment.

(B) If an applicable requirement establishes that particular equipment which otherwise meets this definition of a control device does not constitute a control device as applied to a particular emission unit, then that definition shall apply for purposes of Subchapter H of this chapter.

(7) Deviation--Any indication of noncompliance with a term or condition of the permit as found using, at a minimum, but not limited to, compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit.

(8) Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(9) Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(10) Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the acid rain program.

(11) FCAA, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(12) Final action--Issuance or denial of the permit by the executive director.

(13) General operating permit (GOP)--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple stationary sources may be authorized to operate.

(14) Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under FCAA, §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the EPA through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" shall have the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil-fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of major for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(15) Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(16) Periodic monitoring case-by-case determination--A monitoring plan designed by the permit holder and approved by the executive director to satisfy §122.142(c) of this title (relating to Permit Content Requirements).

(17) Periodic monitoring GOP--A GOP issued under Subchapter F of this chapter which provides monitoring options established by the executive director to satisfy Subchapter G of this chapter.

(18) Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any GOP, or group of GOPs, issued, renewed, or revised by the executive director under this chapter. The term "permit" refers to a CAM GOP or periodic monitoring GOP only when clearly indicated by the context.

(19) Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(20) Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, GOP, or any other similar application as may be required.

(21) Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a GOP.

(22) Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(23) Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration or preconstruction authorization restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the EPA. This term does not alter or affect the use of this term for any other purposes under the FCAA, or the term "capacity factor" as used in acid rain provisions of the FCAA or the acid rain rules.

(24) Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title. In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under FCAA, §112(g) (Modifications);

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit); and

(C) where appropriate, any preconstruction authorization under Chapter 120 of this title (relating to Control of Air Pollution from Hazardous Waste or Solid Waste Management Facilities) (as effective until December 1996) or Chapter 121 of this title (relating to Control of Air Pollution from Municipal Solid Waste Management Facilities).

(25) Predictive emission monitoring system (PEMS)--For purposes of Subchapter H of this chapter, a system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(26) Proposed permit--The version of a permit that the executive director forwards to the EPA for a 45-day review period.

(27) Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an

applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(28) Renewal--The process by which a permit or an authorization to operate under a GOP is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(29) Reopening--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(30) Site--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development (R&D) operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the R&D operation is a support facility for the manufacturing facility.

(31) State-only requirement--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the FCAA or under any applicable requirement.

(32) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 CFR Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-6087

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SUBCHAPTER B. PERMIT REQUIREMENTS
DIVISION 1. GENERAL REQUIREMENTS

30 TAC §122.120

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.120. Applicability.

(a) Except as identified in subsection (b) of this section, owners and operators of one or more of the following are subject to the requirements of this chapter:

(1) any site that is a major source as defined in §122.10 of this title (relating to General Definitions);

(2) any site with an affected unit as defined in 40 CFR 72 subject to the requirements of the Acid Rain Program;

(3) any solid waste incineration unit required to obtain a permit under FCAA, §129(e) (relating to Solid Waste Combustion); or

(4) any site that is a non-major source which the EPA, through rulemaking, has designated as no longer exempt or no longer

eligible for a deferral from the obligation to obtain a permit. For the purposes of this chapter, those sources may be any of the following:

(A) any non-major source so designated by the EPA, and subject to a standard, limitation, or other requirement under FCAA, §111 (relating to Standards of Performance for New Stationary Sources);

(B) any non-major source so designated by the EPA, and subject to a standard or other requirement under FCAA, §112 (relating to Hazardous Air Pollutants), except for FCAA, §112(r) (relating to Prevention of Accidental Releases); or

(C) any non-major source in a source category designated by the EPA.

(b) The following are not subject to the requirements of this chapter:

(1) any site that is a non-major source which the EPA, through rulemaking, has designated as exempt from the obligation to obtain a permit.

(2) any site that is a non-major source which the EPA has allowed permitting authorities to defer from the obligation to obtain a permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. PERMIT APPLICATION

30 TAC §§122.130 - 122.132, 122.134, 122.136, 122.139, 122.140

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.132. Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits.

(a) A permit application shall provide any information, including confidential information as addressed in Chapter 1 of this title (relating to Purpose of Rules, General Provisions), required by the executive director to determine the applicability of, or to codify, any applicable requirement or state-only requirement.

(b) An application for a general operating permit shall only be required to provide the information necessary to determine qualification for, and to assure compliance with, the general operating permit.

(c) An applicant may submit an abbreviated initial permit application, containing only the information in this section deemed necessary by the executive director. The abbreviated application shall include at a minimum, a general application form containing identifying information regarding the site and the applicant and a certification by a responsible official. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(d) An application for a site qualifying under §122.131 of this title (relating to Phased Permit Detail) may be submitted under the phased permit detail process.

(e) An application shall include, but is not limited to, the following information:

(1) a general application form and all information requested by that form;

(2) for each emission unit, information regarding the general applicability determinations, which includes the following:

(A) the general identification of each potentially applicable requirement and potentially applicable state-only requirement (e.g., NSPS Kb);

(B) the applicability determination for each requirement identified under subparagraph (A) of this paragraph; and

(C) the basis for each determination made under subparagraph (B) of this paragraph;

(3) for each emission unit, except as provided in §122.131 of this title, information regarding the detailed applicability determinations, which includes the following:

(A) the specific regulatory citations in each applicable requirement or state-only requirement identifying the following:

(i) the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph;

(B) the basis for each applicability determination identified under subparagraph (A) of this paragraph;

(4) a compliance plan including the following information:

(A) the following statement: "As the responsible official it is my intent that all emission units shall continue to be in compliance with all applicable requirements they are currently in compliance with, and all emission units shall be in compliance by the compliance dates with any applicable requirements that become effective during the permit term.";

(B) for all emission units addressed in the application, an indication of the compliance status with respect to all applicable requirements, based on, at a minimum, but not limited to, any compliance method specified in the applicable requirements;

(C) for any emission unit not in compliance with the applicable requirements identified in the application, the following information:

(i) the method used for assessing the compliance status of the emission unit;

(ii) a narrative description of how the emission unit will come into compliance with all applicable requirements;

(iii) a compliance schedule (resembling and at least as stringent as any compliance schedule contained in any judicial consent decree or administrative order to which the site is subject), including remedial measures to bring the emission unit into compliance with the applicable requirements; which shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based; and

(iv) a schedule for the submission, at least every six months after issuance of the permit, of certified progress reports;

(5) if applicable, information requested by the nationally-standardized forms for the acid rain portions of permit applications, and compliance plans required by the acid rain program;

(6) if applicable, a statement certifying that a risk management plan, or a schedule to submit a risk management plan has been submitted to the appropriate agency in accordance with FCAA, §112(r)(7) (Prevention of Accidental Releases);

(7) for applicants electing the phased permit detail process under §122.131 of this title, a proposed schedule for the incorporation of the remaining detailed applicability determinations into the permit;

(8) for applicants requesting a permit shield, any information requested by the executive director in order to determine whether to grant the shield;

(9) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official);

(10) fugitive emissions from an emission unit shall be included in the permit application and the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of major source; and

(11) for any application for which the executive director has not authorized initiation of public notice by the effective date of this rule, any preconstruction authorizations that are applicable to emission units at the site .

(f) The executive director shall make a copy of the permit application accessible to the EPA.

(g) An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement; however, any facilities that meet the requirements of §116.119 of this title (relating to De Minimis Facilities or Sources) are not required to be included in applications unless the facilities or sources are subject to an applicable requirement.

§122.136. Application Deficiencies and Supplemental Information.

(a) All applications submitted under this chapter are subject to the requirements of this section.

(b) If an applicant omits any relevant facts or submits incorrect information in an application, the applicant shall submit the relevant facts or correct the information no later than 60 days after discovering the error.

(c) An applicant shall provide additional information as necessary to address any applicable requirements or state-only requirements that become applicable to the site after the date the applicant files a complete application but prior to release of the draft permit. Such information is not required to be submitted prior to the executive director's technical permit review period.

(d) If while processing an application, the executive director determines that additional information is necessary to evaluate or take final action on that application, the executive director may request the information and set a reasonable deadline for a response.

§122.140. Representations in Application.

The only representations in a permit application that become conditions under which a permit holder shall operate are the following:

(1) representations in an acid rain permit application;

(2) upon the granting of authorization to operate under a general operating permit, applicability determinations and the bases for the determinations in a general operating permit application;

(3) upon the granting of the authorization to operate under a CAM GOP or periodic monitoring GOP, the information specified in §122.714(a) or §122.612 of this title (relating to Compliance Assurance Monitoring Requirements in Permits and General Operating Permit Applications and Periodic Monitoring Requirements in Permits and General Operating Permit Applications, respectively), excluding the justification for those requirements; and

(4) any representation in an application which is specified in the permit as being a condition under which the permit holder shall operate.

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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DIVISION 4. PERMIT CONTENT

30 TAC §§122.142, 122.143, 122.145, 122.146

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.142. Permit Content Requirements.

(a) The conditions of the permit shall provide for compliance with the requirements of this chapter.

(b) Each permit issued under this chapter shall contain the information required by this subsection.

(1) Unless otherwise specified in the permit, each permit shall include the terms and conditions in §§122.143 - 122.146 of this title (relating to General Terms and Conditions; Recordkeeping Terms and Conditions; Reporting Terms and Conditions; and Compliance Certification Terms and Conditions).

(2) Each permit shall also contain specific terms and conditions for each emission unit regarding the following:

(A) the generally identified applicable requirements and state-only requirements (e.g., NSPS Kb);

(B) except as provided by the phased permit detail process, the detailed applicability determinations, which include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards; and

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph sufficient to ensure compliance with the permit.

(3) Each permit for which the executive director has not authorized initiation of public notice by the effective date of this rule shall contain any preconstruction authorization that is applicable to emission units at the site.

(c) Each permit shall contain periodic monitoring requirements, as required by the executive director, that are designed to produce data that are representative of the emission unit's compliance with the applicable requirements.

(d) For permits undergoing the phased permit detail process, the permit shall contain a schedule for phasing in the detailed applicability determinations consistent with §122.131 of this title (relating to Phased Permit Detail).

(e) For emission units not in compliance with the applicable requirements at the time of initial permit issuance or renewal, the permit shall contain the following:

(1) a compliance schedule or a reference to a compliance schedule consistent with §122.132(e)(4)(C) of this title (relating to Application and Required Information for Initial Permit Issuance, Reopening, Renewal, or General Operating Permits); and

(2) a requirement to submit progress reports consistent with §122.132(e)(4)(C) of this title. The progress reports shall include the following information:

(A) the dates for achieving the activities, milestones, or compliance required in the compliance schedule;

(B) dates when the activities, milestones, or compliance required in the compliance schedule were achieved; and

(C) an explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(f) At the executive director's discretion, and upon request by the applicant, the permit may contain a permit shield for specific emission units.

(g) Where an applicable requirement is more stringent than a requirement under the acid rain program, both requirements shall be incorporated into the permit and shall be enforceable requirements of the permit.

(h) Permits shall contain compliance assurance monitoring as specified in Subchapter H of this chapter (relating to Compliance Assurance Monitoring).

§122.143. General Terms and Conditions.

Unless otherwise specified in the permit, the following general terms and conditions shall become terms and conditions of each permit.

(1) Compliance with the permit does not relieve the permit holder of the obligation to comply with any other applicable rules, regulations, or orders of the commission, or of the EPA, except for those requirements addressed by a permit shield.

(2) The term of the permit shall not exceed five years from the date of initial issuance or renewal of the permit. The authorization to operate under a general operating permit shall not exceed five years from the date the authorization was granted or renewed.

(3) Consistent with the authority in Texas Health and Safety Code, Chapter 382, Subchapter B (Powers and Duties of Commission), the permit holder shall allow representatives from

the commission or the local air pollution control program having jurisdiction to do the following:

(A) enter upon the permit holder's premises where an emission unit is located or emissions-related activity is conducted, or where records must be kept under the conditions of the permit;

(B) access and copy any records that must be kept under the conditions of the permit;

(C) inspect any emission unit, equipment, practices, or operations regulated or required under the permit; and

(D) sample or monitor substances or parameters for the purpose of assuring compliance with the permit at any time.

(4) The permit holder shall comply with all terms and conditions codified in the permit and any provisional terms and conditions required to be included with the permit. Except as provided for in paragraph (5) of this section, any noncompliance with either the terms or conditions codified in the permit or the provisional terms and conditions, if any, constitutes a violation of the FCAA and the TCAA and is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. It shall not be a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to comply with the permit terms and conditions of the permit.

(5) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal or before the granting of a new authorization to operate.

(6) In every case, the applicable requirements and state-only requirements are always enforceable.

(7) The permit may be reopened for cause and revised or terminated. Permit terms or conditions remain enforceable regardless of the following:

(A) the filing of a request by the permit holder for a permit revision, reopening, or termination;

(B) a notification of planned changes or anticipated noncompliance; or

(C) a notice of intent by the executive director for a permit reopening or termination.

(8) The executive director may request any information necessary to determine compliance with the permit or whether cause exists for revising, reopening, or terminating the permit. The permit holder shall submit the information no later than 60 days after the request, unless the deadline is extended by the executive director. Upon request, the permit holder shall also furnish to the executive director copies of records required to be kept by the permit, including information claimed to be confidential.

(9) If a state-only requirement is determined by the commission to be an applicable requirement, the permit holder shall submit an application for a significant permit revision for the incorporation of the requirement into the permit as an applicable requirement. The application shall be submitted no later than 12 months after the determination by the commission that the requirement is an applicable requirement.

(10) The permit holder shall pay fees to the commission consistent with the fee schedule in §101.27 of this title (relating to Emissions Fees).

(11) Each portion of the permit is severable. Permit requirements in unchallenged portions of the permit shall remain valid in the event of a challenge to other portions of the permit.

(12) The permit does not convey any property rights of any sort, or any exclusive privilege.

(13) A copy of the permit shall be maintained at the location specified in the permit.

(14) For general operating permits, a copy of the permit, the enforceable general operating permit application, and the authorization to operate shall be maintained at the location specified in the authorization to operate.

(15) Any report or annual compliance certification required by a permit to be submitted to the executive director shall contain a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official).

(16) Representations in acid rain applications and applicability determinations, and the bases for the determinations in general operating permit applications are conditions under which the permit holder shall operate. Representations in general operating permit applications for CAM and periodic monitoring, as specified in §122.140(3) of this title, are conditions under which the permit holder shall operate.

(17) No emissions from emission units addressed in the permit shall exceed allowances lawfully held under the acid rain program.

(18) State-only requirements will not be subject to any of the following requirements of this chapter: public notice, affected state review, notice and comment hearings, EPA review, public petition, recordkeeping, six-month monitoring reporting, six-month deviation reporting, compliance certification, or periodic monitoring.

§122.145. Reporting Terms and Conditions.

Unless otherwise specified in the permit, the following reporting requirements shall become terms and conditions of the permit.

(1) Monitoring reports.

(A) Reports of monitoring data required to be submitted by an applicable requirement, or by the permit, shall be submitted to the executive director.

(B) Reports shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting.

(C) The monitoring reports shall be submitted no later than 30 days after the end of each reporting period.

(D) The reporting of monitoring data does not change the data collection requirements specified in an applicable requirement.

(2) Deviation reports.

(A) The permit holder shall report, in writing, to the executive director all instances of deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit.

(B) A deviation report shall be submitted for at least each six-month period after permit issuance or at the frequency required by an applicable requirement which requires more frequent reporting. However, no report is required if no deviations occurred over the six-month reporting period.

(C) The deviation reports shall be submitted no later than 30 days after the end of each reporting period.

(D) Reporting in accordance with §101.6 and §101.7 of this title (relating to Upset Reporting and Recordkeeping Requirements and Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements) does not substitute for reporting deviations under this paragraph.

§122.146. Compliance Certification Terms and Conditions.

Unless otherwise specified in the permit, the following compliance certification requirements shall become terms and conditions of the permit.

(1) The permit holder shall certify compliance with the terms and conditions of the permit for at least each 12-month period following initial permit issuance.

(2) The certification shall be submitted to the executive director and the EPA administrator no later than 30 days after the end of the certification period.

(3) The executive director shall make a copy of the compliance certification accessible to the EPA.

(4) The certification shall be based on at a minimum, but not limited to, the monitoring method (or recordkeeping method, if appropriate) required by the permit to be used to assess compliance. If necessary, the permit holder shall identify any other material information that must be included in the certification to comply with FCAA, §113(c)(2), which prohibits knowingly making a false certification or omitting material information.

(5) The annual compliance certification shall include or reference the following information:

(A) the identification of each term or condition of the permit for which the permit holder is certifying compliance, the method used for determining the compliance status of each emission unit, and whether such method provides continuous or intermittent data;

(B) for emission units addressed in the permit for which no deviations have occurred over the certification period, a statement that the emission units were in continuous compliance over the certification period;

(C) for any emission unit addressed in the permit for which one or more deviations occurred over the certification period, the following information indicating the potentially intermittent compliance status of the emission unit:

(i) the identification of the emission unit;

(ii) the applicable requirement for which a deviation occurred;

(iii) the monitoring method (or recordkeeping method, if appropriate) used to assess compliance;

(iv) the frequency with which sampling, monitoring, or recordkeeping was required to be conducted by the monitoring or recordkeeping requirement of the permit; and

(v) the total number of times that the assessment required by the monitoring or recordkeeping method specified in the permit indicated that a deviation had occurred;

(D) the identification of all other terms and conditions of the permit for which compliance was not achieved; and

(E) the annual compliance certification does not need to include any information regarding facilities identified as de minimis under §116.119 of this title (relating to De Minimis Facilities or Sources) unless the facilities or sources are subject to an applicable requirement.

(6) The executive director may request additional information if necessary to determine the compliance status of an emission unit.

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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Texas Natural Resource Conservation Commission
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SUBCHAPTER C. INITIAL PERMIT ISSUANCES, REVISIONS, REOPENINGS, AND RENEWALS

DIVISION 2. PERMIT REVISIONS

30 TAC §§122.210 - 122.213, 122.215 - 122.219, 122.221, 122.222

STATUTORY AUTHORITY

The amendments and new sections are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.210. General Requirements for Revisions.

(a) The permit holder shall submit an application to the executive director for a revision to a permit for those activities at a site which change, add, or remove one or more permit terms or conditions.

(b) The executive director shall make a copy of the permit application, the permit, and any required notices accessible to the EPA.

(c) Provisional terms and conditions are not eligible for a permit shield.

(d) The permit holder may be subject to enforcement action if the change to the permit is later determined not to qualify for the type of permit revision submitted.

(e) Changes qualifying as administrative permit revisions may be processed as minor or significant permit revisions at the permit holder's discretion.

(f) Changes qualifying as minor permit revisions may be processed as significant permit revisions at the permit holder's discretion.

(g) General operating permits and authorizations to operate under general operating permits are not subject to the permit revision requirements of this subchapter, but instead are subject to the requirements of Subchapter F of this chapter (relating to General Operating Permits).

§122.211. Administrative Permit Revisions.

A change to a permit may qualify as an administrative permit revision if the change satisfies one or more of the following:

(1) corrects typographical errors;

(2) identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar administrative change at the site;

(3) increases the frequency of monitoring or reporting requirements without changing any existing emission limitations or standards;

(4) changes the permit identification of ownership or operational control of a site where the executive director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the old and new permit holder is maintained with the permit;

(5) incorporates the requirements from preconstruction authorizations under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to those of Subchapters C and D of this chapter that would be applicable to the change if it were subject to review as a permit revision, and compliance requirements substantially equivalent to those contained in §§122.143, 122.145, and 122.146 of this title (relating to General Terms and Conditions, Reporting Terms and Conditions, and Compliance Certification Terms and Conditions, respectively);

(6) affects or adds a state-only requirement; or

(7) is similar to those in paragraphs (1) - (6) of this section and approved by EPA.

§122.213. Procedures for Administrative Permit Revisions.

(a) If the following requirements are met, changes at a site listed in §122.211 of this title (relating to Administrative Permit Revisions) requiring an administrative permit revision may be operated before issuance of the revision:

(1) the permit holder records the information required in §122.212 of this title (relating to Applications for Administrative Permit Revisions) before the change is operated; and

(2) the permit holder maintains the information required by §122.212 of this title with the permit until the permit is revised.

(b) In every case, the applicable requirements and state-only requirements are always enforceable.

(c) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal.

(d) The permit holder shall submit an application for an administrative permit revision to the executive director no later than 30 days after each permit anniversary.

(e) An administrative permit revision may be issued by the executive director provided the following:

(1) the change meets the criteria for an administrative permit revision;

(2) the executive director has received an application; and

(3) the conditions of the permit provide for compliance with the requirements of this chapter.

(f) The executive director shall take final action on an administrative permit revision no later than 60 days after receipt of the application.

§122.215. Minor Permit Revisions.

Minor permit revisions include any change that satisfies the following:

(1) does not violate any applicable requirement;

(2) does not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

(3) does not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(4) does not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(A) a federally enforceable emissions cap assumed to avoid classification as a modification under any provision of the FCAA, Title I; and

(B) an alternative emissions limit approved pursuant to regulations promulgated under the FCAA, §112(i)(5); and

(5) is not a modification under any provision of FCAA, Title I.

§122.216. Applications for Minor Permit Revisions.

An application for a minor permit revision must include, at a minimum, the following:

(1) a description of each change;

(2) a description of the emission units affected;

(3) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) that codify the new applicable requirements;

(4) a statement that the change qualifies for a minor permit revision;

(5) a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official); and

(6) the emissions resulting from the change.

§122.217. Procedures for Minor Permit Revisions.

(a) If the following requirements are met, changes at a site requiring a minor permit revision may be operated before issuance of the revision:

(1) the permit holder complies with the following:

(A) all applicable requirements governing the change;

(B) all state-only requirements governing the change; and

(C) the provisional terms and conditions as defined in §122.10 of this title (relating to General Definitions) governing the change;

(2) the permit holder submits to the executive director an application containing the information required in §122.216 of this title (relating to Applications for Minor Permit Revisions) before the change is operated;

(3) the permit holder maintains the information required by §122.216 of this title with the permit until the permit is revised.

(b) For changes to a permit required as the result of the revision of a compliance assurance monitoring general operating permit or periodic monitoring general operating permit, the following requirements apply.

(1) The permit holder shall comply with the following:

(A) all applicable requirements governing the change;

(B) all state-only requirements governing the change; and

(C) the provisional terms and conditions as defined in §122.10 of this title governing the change.

(2) The information in §122.216(1) - (5) of this title shall be submitted no later than the compliance date of the new requirement or effective date of the repealed requirement, whichever is applicable.

(3) The permit holder shall maintain the information required in §122.216 (1) - (4) of this title with the permit until the permit revision is final.

(c) In every case, the applicable requirements are always enforceable.

(d) The permit holder need not comply with the original terms and conditions codified in the permit that have been replaced by provisional terms and conditions before issuance or denial of a revision or renewal.

(e) The executive director shall notify the EPA administrator and affected state(s) of the requested permit modification within five working days of receipt of a complete minor revision permit application.

(f) A minor permit revision may be issued by the executive director provided the following:

(1) the changes meet the criteria for a minor permit revision;

(2) the executive director has received a complete application;

(3) the conditions of the permit provide for compliance with the requirements of this chapter; and

(4) the requirements of this chapter for public announcement, affected state review, and EPA review have been satisfied.

(g) The executive director shall take final action on the permit revision application no later than 90 days after receipt of an application, or 15 days after the end of the EPA review period, whichever is later.

§122.218. Minor Permit Revision Procedures for Permit Revisions Involving the Use of Economic Incentives, Marketable Permits, and Emissions Trading.

Notwithstanding §122.215 of this title (relating to Minor Permit Revisions), minor permit revision procedures may be used for permit revisions involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit revision procedures are explicitly provided for in the Texas state implementation plan or in applicable requirements promulgated by the EPA.

§122.219. Significant Permit Revisions.

(a) Significant revision procedures shall be used for changes to the permit at a site that do not qualify as administrative or minor revisions.

(b) At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered a significant permit revision.

(c) A change to a permit shield or a new permit shield is a significant revision.

§122.222. Operational Flexibility and Off-Permit Changes.

(a) An owner or operator may make changes at a permitted site without applying for or obtaining a permit revision provided that the following conditions are met:

(1) the changes are not modifications under FCAA, Title I;

(2) the changes are allowed under FCAA, §502(b)(10);

(3) the changes do not exceed the emissions limitation under the permit; and

(4) the owner or operator has obtained any applicable preconstruction authorization. Such preconstruction authorization cannot be a modification under FCAA, Title I.

(b) When an owner or operator removes a unit from the site, the unit and its applicable requirements and any other associated permit terms and conditions may be removed from the permit when this removal does not result in changes to applicable requirements or permit terms and conditions for remaining units.

(c) The owner or operator shall provide the EPA and the executive director written notification for changes to the permit which qualify under this section. The written notification shall be submitted to the executive director and the EPA administrator at least seven days in advance of the proposed changes, except for an emergency. Notice may be provided within two working days of implementation of operational flexibility changes due to an emergency. Such notice shall also include an explanation of the emergency.

(d) For those cases where the permit does not already provide for emissions trading, an owner or operator may trade increases and

decreases in emissions without applying for or obtaining a permit revision and based on the seven-day notice prescribed in subsection (c) of this section.

(e) Upon request, the executive director shall issue permits that contain terms and conditions allowing for the trading of emissions increases and decreases solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements.

(f) Written notification shall include the following information:

(1) for changes specified in subsections (a) and (b) of this section, a description of the change, the date on which the change is proposed to occur, the emissions resulting from the change, and any permit term or condition that is no longer applicable as a result of the change; or

(2) for changes specified in subsection (d) of this section, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the SIP, the pollutants emitted subject to the emissions trade, and reference to the provisions in the SIP with which the source will comply and that provide for the emissions trade; or

(3) for changes specified in subsection (e) of this section, when the proposed change will occur, a description of the changes in emissions that will result, and how these increases and decreases in emissions will comply with the terms and conditions of the permit; and

(4) certification by a responsible official, consistent with §122.165 of this title (relating to Certification by a Responsible Official), that the proposed change meets the criteria for the use of operational flexibility under this section and a request that such procedures be used.

(g) The owner or operator, the executive director, and the EPA shall attach each such notice to their copy of the relevant permit.

(h) Changes that qualify under this section are not subject to the public notice, affected state review, notice and comment hearing, EPA review, and public petition requirements for permit revisions.

(i) Upon satisfying the requirements of this section, the owner or operator may begin operating the change at the expiration of the time period provided for in subsection (c) of this section.

(j) Except as provided in subsection (e) of this section, the permit shield described in §122.148 of this title (relating to Permit Shield) shall not apply to any change made pursuant to this section.

(k) An off-permit change may be made at a site, when the following conditions are met:

(1) The change shall meet all applicable requirements and shall not violate any existing permit term or condition;

(2) The permittee shall provide written notice to the executive director and the EPA administrator concurrent with each such change, except for changes that qualify as insignificant activities. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change;

(3) The change shall not qualify for the permit shield under §122.148; and

(4) The permittee shall keep a record of any off-permit changes with the permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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30 TAC §122.215, §122.219

STATUTORY AUTHORITY

The repeals are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

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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DIVISION 3. PERMIT REOPENINGS

30 TAC §122.231

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.231. Permit Reopenings.

(a) The executive director shall reopen a permit for cause. Cause shall be limited to one or more of the following:

(1) the promulgation or adoption of a new applicable requirement affecting emission units at the site, unless one of the following applies:

(A) the new requirement is incorporated into a permit which addresses the emission unit subject to the new requirement;

(B) the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to §§122.133 of this title (relating to Timely Application) or §122.134 of this title (relating to Complete Application); or

(C) the remaining permit term is less than three years;

(2) the executive director or the EPA administrator determines that the permit contains a material mistake;

(3) inaccurate statements were made in establishing the emissions standards or other terms and conditions of the permit;

(4) the executive director or the EPA administrator determines that the permit must be revised or terminated to assure compliance with the applicable requirements;

(5) a phased application schedule in the permit requires a reopening; or

(6) additional requirements, including excess emissions requirements, become applicable to an affected source under the acid rain program. Upon approval by the EPA administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(b) The following procedures shall apply if EPA initiates a reopening by notifying the executive director in writing that cause, as defined in this section, exists to terminate or revise a permit.

(1) The executive director shall submit a proposed determination regarding the reopening to the EPA no later than 90 days after receipt of the notification. If the EPA extends the period for response by the executive director, the executive director shall submit the proposed determination no later than 180 days after receipt of the notification.

(2) Upon receipt of the proposed determination, the EPA shall have 90 days to object, in writing, to the proposed determination.

(3) The executive director shall have 90 days from receipt of an EPA objection to resolve the objection and take action on the reopening.

(c) The executive director shall institute proceedings to reopen permits or authorizations to operate to incorporate requirements under Chapter 106, Subchapter A of this title (relating to General Requirements) or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or any term or condition of any preconstruction permit.

(1) Before December 1, 2001, the executive director will institute proceedings to reopen permits no later than renewal of the permit. Such reopenings need not follow full permit issuance procedures nor the notice requirement of subsection (e) of this section but may instead follow the permit revision procedure in effect under the State's approved Part 70 program for incorporation of minor NSR permits.

(2) Before December 1, 2001, the executive director will institute proceedings to reopen authorizations to operate.

(3) Requirements under Chapter 106, Subchapter A, or Chapter 116 of this title or any term or condition of any preconstruction permit will be incorporated no later than permit renewal for applications for which the executive director has authorized initiation of public notice by the effective date of this section.

(d) Except as provided in subsection (c) of this section, reopenings shall be made as soon as possible. Reopenings shall be completed and the permit issued by the executive director not later than 18 months after promulgation or adoption of the applicable requirement.

(e) The executive director shall provide a 30-day notice of intent to reopen, unless a shorter notice is authorized by the executive director due to an emergency.

(f) Reopenings shall be subject to the requirements of §122.201 of this title (relating to Initial Permit Issuance). These

procedures shall affect only those parts of the permit for which cause to reopen exists.

(g) The permit holder shall provide any information requested by the executive director to complete the reopening.

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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Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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SUBCHAPTER D. PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, AFFECTED STATE REVIEW, NOTICE AND COMMENT HEARING, NOTICE OF PROPOSED FINAL ACTION, EPA REVIEW, AND PUBLIC PETITION

30 TAC §§122.320, 122.330, 122.340, 122.350, 122.360

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.350. EPA Review.

(a) EPA review requirements apply to initial issuances, minor permit revisions, significant permit revisions, reopenings, and renewals.

(b) The executive director shall submit the proposed permit to the EPA.

(1) For initial issuances, significant permit revisions, reopenings, and renewals the proposed permit shall be submitted to the EPA. At the discretion of the executive director, the procedural requirements of §122.320 of this title (relating to Public Notice), §122.322 of this title (relating to Bilingual Notice), and the requirements for EPA Review under this section may run concurrently. If appropriate, the executive director may extend the EPA review period.

(2) For minor permit revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public announcement period.

(3) For general operating permit initial issuances and significant revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public comment period. For general operating permit minor permit revisions, the proposed permit shall be submitted to the EPA no earlier than the first day of the public announcement period.

(c) Upon receipt of the proposed permit, the EPA shall have 45 days to object, in writing, to the issuance of the proposed permit. The EPA may only object to the issuance of any proposed permit which is not in compliance with the applicable requirements or the requirements of this chapter.

(d) The executive director may issue the permit provided the following:

(1) the EPA does not object to the issuance of the proposed permit;

(2) the EPA notifies the executive director that the EPA will not object to the issuance of the permit; or

(3) the executive director resolves any objections received.

(e) If the executive director fails, within 90 days of receipt of an objection, to revise the proposed permit and submit a revised permit, if necessary, in response to the objection, the EPA will issue or deny the permit in accordance with the requirements of the federal program promulgated under FCAA, Title V (relating to Permit).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. PERIODIC MONITORING

30 TAC §122.608

STATUTORY AUTHORITY

The amendment is adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

§122.608. Procedures for Incorporating Periodic Monitoring Requirements.

(a) For permit holders applying for a periodic monitoring case-by-case determination, periodic monitoring requirements shall be initially incorporated into the permit in accordance with paragraph (1) or (2) of this subsection, except as in subsection (d) of this section.

(1) If the permit holder is authorized to operate under a general operating permit (GOP), the following requirements apply:

(A) the permit holder shall submit an application for a permit other than a GOP including the information specified in §122.606 of this title (relating to Applications for Periodic Monitoring); and

(B) the requirements of §122.201 of this title (relating to Initial Permit Issuance) shall be satisfied.

(2) If the permit holder is authorized under a permit other than a GOP, the following requirements for significant permit revisions apply:

(A) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(B) the requirements of §122.221(b) and (c) of this title (relating to Procedures for Significant Permit Revisions) shall be satisfied.

(b) For permit holders applying for a periodic monitoring GOP, periodic monitoring requirements shall be initially incorporated into a permit or GOP application in accordance with paragraph (1) or (2) of this subsection, except as in subsection (d) of this section.

(1) If the permit holder is authorized to operate under a GOP, the following requirements apply:

(A) the permit holder shall submit an application including the information in §122.606 of this title;

(B) the representations in the GOP application as specified in §122.140(3) of this title (relating to Representations in Application) shall provide for compliance with the requirements of this subchapter; and

(C) the executive director shall grant an authorization to operate provided the requirements of this paragraph are satisfied.

(2) If the permit holder is authorized under a permit other than a GOP, the following requirements for minor permit revision apply:

(A) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(B) the requirements of §122.217(f) and (g) of this title (relating to Procedures for Minor Permit Revision) shall be satisfied.

(c) Except as in subsection (d) of this section, periodic monitoring requirements implemented under §122.600(b) of this title (relating to Implementation of Periodic Monitoring) shall be initially incorporated into a permit or GOP application through the procedures in §122.201 of this title (relating to Initial Permit Issuance), the procedures in Subchapter F of this chapter (relating to General Operating Permits), or the following procedures for minor permit revision:

(1) the permit holder shall submit an application including the information specified in §122.606 of this title; and

(2) the requirements of §122.217(f) and (g) of this title shall be satisfied.

(d) If the periodic monitoring requirements are incorporated at the time of renewal, the requirements of §122.243 of this title (relating to Permit Renewal Procedures), or §122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating Permit) apply.

(e) After periodic monitoring requirements are incorporated into a permit or a new authorization to operate under a periodic monitoring GOP is granted, subsequent revisions to periodic monitoring requirements shall be governed by the requirements of Subchapter C of this chapter (relating to Initial Permit Issuances, Revisions, Reopenings, and Renewals) or Subchapter F of this chapter (relating to General Operating Permits), as appropriate. However, changes in deviation limits, other than changes required as the result of the promulgation or adoption of applicable requirement, shall not be operated before the permit or authorization to operate under a general operating permit is revised.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. COMPLIANCE ASSURANCE MONITORING

30 TAC §122.706, §122.708

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §§382.015 - 382.017, which provide for power to enter property; monitoring requirements; examination of records; and the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.021 and §382.022, which provide for sampling methods and procedures; and investigations; §382.032, which provides for appeal of commission actions; §382.040 and §382.041, which provide for public records and submission of confidential information; §382.051, which provides the commission authority to issue FOPs and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits; §§382.0513 - 382.0515 and 382.0517, which provide the commission authority to establish and enforce permit conditions; to require sampling, monitoring, and certification; to require permit applications; and to determine administrative completeness of applications; §§382.054 - 382.0543, which provide for FOPs; administration and enforcement of FOPs; issuance of FOPs and appeal of delays; and review and renewals of FOPs; §382.056, which provides for notice of intent to obtain a permit or permit review and provides for permit hearings for FOPs; §§382.0561 - 382.0564, which provide for FOP public hearings; notices of decision for FOPs; public petition of FOPs to the administrator; and notification to other governmental entities for FOPs; §382.061, which provides for delegation of powers and duties under §§382.051 - 382.0563 and 382.059, appeals of executive director decisions and petitions under §382.0563 and appeals under §382.056; and under TWC, including §5.103, which provides the commission authority to adopt rules consistent with the policy and purposes of the TCAA and other laws of this state; §5.105, which provides the commission authority to establish and approve commission policy; §5.122, which provides delegation of uncontested matters to the executive director; §5.351, which provides for judicial review of commission acts; §5.355, which provides for appeal of district court judgment; and §§7.001 - 7.358, which provide for enforcement.

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 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.1

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the amendment to §335.1, Definitions. Section 335.1 is adopted *with changes* to the proposed text as published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11889).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The amendment expands the number of exemptions from the definition of a solid waste currently allowed under Chapter 335. The amendment includes an exemption for the recycling of certain nonhazardous materials, and an exclusion for certain condensates as promulgated by the United States Environmental Protection Agency (EPA) in the April 15, 1998 *Federal Register* (63 FR 18504). The amendment also includes a change to conform to 40 Code of Federal Regulations (CFR) §261.2(a)(2)(iv) concerning military munitions and corrections to cross-references.

The adopted rule is designed to be protective of human health and the environment, while at the same time introducing greater flexibility to the commission's rules. The rule adds a self-implementing exemption from the definition of "solid waste" for certain recycling activities involving application of nonhazardous materials to the land or involving their use in materials which are applied to the land. The rule also eliminates the need to perform case-by-case determinations in every instance that such an exemption applies.

The rule, as adopted, applies only to materials that are legitimately and beneficially recycled. It does not apply to materials which are intended to be applied to the land (e.g., as fertilizers or soil amendments) at more than their maximum beneficial rates, nor does it apply to materials which, if applied to the land, would be subject to the Texas Commercial Fertilizer Act. The rule does not apply to materials which would constitute hazardous waste, but instead only applies to materials which would be nonhazardous industrial solid waste, if discarded. Finally, the rule does not apply to contaminated soils or other contaminated media.

SECTION BY SECTION DISCUSSION

Section 335.1(128)(H) is amended to specifically allow materials that are applied to the land or products produced from such materials to be excluded from being a "solid waste" if they meet the criteria under clauses (i) - (viii). Paragraph (124) has been changed to adopted paragraph (128) by an earlier adoption.

In response to public comment received on the proposed rule, §335.1(128)(H)(vii) is adopted with changes to the proposed text, as discussed in detail in the RESPONSE TO COMMENTS section of this preamble. The proposal contained language basically requiring that each constituent in the recycling material be normally found in the raw material that it is replacing in approximately the same concentrations, or that the material meet Class 3 waste criteria. The adopted language has more specificity,

including requirements to meet certain waste classifications or other specific commission standards.

Section 335.1(128)(H)(viii) is also adopted with changes to the proposed text, as discussed in detail in the RESPONSE TO COMMENTS section of this preamble. The requirements have been reworded for clarity to require 75% recycling on an annual or biennial basis, depending on type of storage, rather than requiring no more than 25% of the annual production be accumulated for a total of 365 days from the time of generation.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendment includes an exemption from the definition of a solid waste for certain nonhazardous materials that are recycled in a manner involving land application, and an exclusion for certain condensates. This rule does not authorize materials to be applied to the land that would otherwise be prohibited from land application. Therefore, the rule does 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.

Texas Government Code, §2001.0225, requires a state agency to prepare a regulatory analysis of a major environmental rule in certain circumstances. A regulatory analysis must be prepared if a rule will: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law.

As explained below, a regulatory analysis is not required for this rulemaking because this rule does not exceed a standard set by federal law, does not exceed an express requirement of state law, does not exceed a requirement of a delegation agreement or contract between the state and the federal government, and is not being adopted solely under the general powers of the agency.

The Rule Does Not Exceed a Standard Set by Federal Law

The requirements of this rule which provide an exemption from the definition of solid waste for land application of certain recycled nonhazardous materials are not subject to federal regulation. Accordingly, there are no applicable standards set by federal law that are exceeded by these requirements.

The requirements of this rule which relate to federal military munitions and the exclusion of certain condensates are being implemented to maintain equivalency with federal law and do not exceed any federal law standards.

The Rule Does Not Exceed an Express Requirement of State Law

The requirements of this rule (relating to recycled nonhazardous materials, excluded condensates, and military munitions) are being adopted pursuant to the commission's statutory responsibility under Texas Health and Safety Code (THSC), §361.017 (relating to Commission's Jurisdiction: Industrial Solid Waste and Hazardous Municipal Waste) and THSC, §361.024 (relating to Rules and Standards). The rule is consonant with state law and does not exceed it.

The Rule Does Not Exceed a Requirement of a Delegation Agreement

The commission is not a party to a delegation agreement with the federal government relating to the requirements set forth in the rule. Accordingly, there is no delegation agreement requirement exceeded by this rule.

The Rule is Not Being Adopted Solely Under the Agency's General Powers

The commission is adopting this rule under the specific statutory authority of THSC, §361.017 and THSC, §361.024, in addition to the general powers of Texas Water Code (TWC), §5.103 (relating to Rules) and TWC, §5.105 (relating to General Policy). Accordingly, this rule is not being adopted solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule pursuant to Texas Government Code, §2007.043. The specific purpose of the rule is to update the commission's rule to conform with certain federal regulations and to establish environmentally protective uniform and specific criteria by which materials which would otherwise be regulated as nonhazardous industrial wastes can be exempt from being regulated as such, including when such materials are recycled by being applied to the land or used as ingredients in materials which are applied to the land. The rule substantially advances this purpose by adopting changes conforming with certain federal regulations and by providing a set of environmentally protective criteria to be applied in the determination of whether a material meets the "land application" exemption. Promulgation and enforcement of this rule will not affect private real property because the proposed rule creates exemptions which allow greater flexibility in the recycling of certain materials, and otherwise conforms to federal regulations. The rule does not affect a landowner's right to property that would otherwise exist in the absence of the rule. Therefore, the rule does not constitute a takings under Texas Government Code, §2007.043.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed this rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) and must be consistent with all applicable goals and policies of the CMP. The commission has prepared a consistency determination for this rule pursuant to 31 Texas Administrative Code (TAC) §505.22 and has found that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goals applicable to the rulemaking are the goals to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies include the construction and operation of solid waste storage, processing, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases

of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act (the Act), 42 United States Code (USC), §§6901 *et seq*. Promulgation and enforcement of this rule will be consistent with the applicable CMP goals and policies because the rule will update the commission's requirements to conform to certain federal regulations and will establish environmentally protective uniform and specific criteria by which certain materials which are currently classified as nonhazardous industrial solid wastes can be exempted from being classified as such. Therefore, the rule will protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of CNRAs, and also serves to ensure that new solid waste facilities and areal expansions of existing solid waste facilities are sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Act, 42 USC, §§6901 *et seq*.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the proposed rule. The comment period for the proposal closed at 5:00 p.m., January 17, 2001. Written comments were submitted by: Alcoa, Inc.; Association of Electric Companies of Texas, Inc. (AECT); Association of General Contractors of Texas (AGC of Texas); Baker Botts, L.L.P. (Baker Botts) The Inland Group, L.L.C. (Inland); Reliant Energy; Texas Chemical Council (TCC); Texas Department of Transportation (TxDOT); Texas Mining and Reclamation Association (TMRA); TXU Electric Generation (TXU); and Vernor Material & Equipment Co., Inc. (Vernor).

RESPONSE TO COMMENTS

Comment

AGC of Texas requested that the commission not adopt these rules and instead continue to use current guidance. AGC of Texas commented that, if the commission proceeds with adoption, that Criteria VII of the proposed rule, §335.1(124)(H)(vii), is too inflexible and restrictive, and would stifle the innovations in the recycling of environmentally safe materials. Alcoa expressed general support for the rulemaking, but commented that Criteria VII of the proposed rule is overly restrictive and would therefore potentially inhibit the legitimate recycling of many materials. AECT, Reliant Energy and TXU expressed general support for the rulemaking, and submitted comments requesting a modification to the language of Criteria VII. AECT and Reliant Energy suggested that Criteria VII be changed to add specific concentration limits for certain constituents rather than requiring the material to meet Class 3 waste levels for these constituents. TXU suggested changes similar to those from AECT and Reliant Energy.

Response

In response to these comments, the commission is changing the language of proposed §335.1(124)(H)(vii), which is now adopted §335.1(128)(H)(vii), to approximate the suggested language. The proposal contained language basically requiring that each constituent in the recycling material be normally found in the raw material that it is replacing in approximately the same concentrations, or that the material meet Class 3 waste criteria. The adopted language has more specificity, and reads as follows: "(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land, and the material, as generated: (I) is a Class 3 waste under Chapter 335, Subchapter R of this title (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and (II) for the metals listed in subclause (I) of this clause: (-a-) is a Class 2 or Class 3 waste under Chapter 335, Subchapter R of this title (relating to Waste Classification); and (-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3; and."

The commission believes that this is protective of human health, the environment, and waters in the state, and is sufficiently flexible to allow a greater range of nonhazardous industrial materials to be exempt from being classified as a solid waste. The rule incorporates criteria, used to classify industrial solid wastes, in Chapter 335, Subchapter R, as well as land application standards located in §312.43(a)(2)(B).

Comment

Inland and Vernor expressed general support for the proposed rule. However, they commented that the rule should be broadened to exclude from regulation as a solid waste industrial materials which contain only minor amounts of total petroleum hydrocarbons (TPH), particularly when the materials are used as road-base materials. They suggested that this issue might be addressed by incorporating into the rule certain criteria from the Texas Risk Reduction Program (TRRP) relating to TPH levels.

Response

The commission considered referencing the TRRP rule in the adopted rule, but ultimately declined to for the following reasons. First, the TRRP rule applies to Chapter 335 closures of waste management units and remediation of contaminated media (affected property) containing releases of chemicals of concern, and does not apply to recycling materials. To this end, adopted §335.1(128)(H) expressly excepts from the rule contaminated soils which are being relocated for use in accordance with §350.36 and other contaminated media. Second, the TRRP risk evaluation utilizes a tiered approach to account for greater site specificity. The commission prefers the adopted revision to Criteria VII because it is a more straightforward approach.

The TPH limits included in the adopted rule will not unduly inhibit the legitimate recycling of TPH-containing materials. First, these materials are largely contaminated media, which may qualify to be relocated and reused under 30 TAC §350.36. Second, many nonhazardous industrial materials such as asphalt and solid asphaltic materials which are solids at standard temperature and pressure are not "petroleum substances" as defined by §335.1(67). Such materials are therefore excluded from the TPH limits included within the adopted rule. Third, many nonhazardous industrial materials may legitimately be recycled under §335.24. Fourth, the generator can petition the executive director for a case-by-case exemption from the requirements of clause (vii)(I) or (II)(a) under the variance provisions of §335.514. The commission is not making changes to the proposed rule in response to these comments.

Comment

Inland and Vernor also commented that Criteria VII of the proposed rule is too restrictive for constituents other than TPH and that it should be made more flexible.

Response

The commission notes, in response to suggestions made by AECT, Reliant Energy and TXU, that it has incorporated more flexible language into Criteria VII to deal with arsenic, cadmium, chromium, lead, mercury, nickel, and selenium as well as to deal

with total dissolved solids, by requiring that the metals concentrations meet Class 2 or Class 3 waste levels and certain Chapter 312 standards relating to land application for beneficial use, rather than Class 3 waste levels.

Comment

Vernor also commented that Criteria VI of the proposed rule which provides that, "The recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation," could be interpreted so as to cause certain materials to fail to meet Criteria VI simply because they are mixed with one or more other materials. Vernor gives an example in which a recycled material is mixed with raw materials such as sand or cement in order to create road base material.

Response

The commission notes that commercial products are commonly combined to form mixtures which are useable for various purposes (e.g., the creation of road base material). The fact that a recycled material is mixed with a commercial product such as sand or cement would not be sufficient to cause it to fail to meet Criteria VI of the adopted rule. The commission further notes that the point at which a material is to be evaluated to determine if it meets the criteria of the adopted rule is the point of generation, and not after the material is mixed with other materials. The commission is not making changes to the proposed rule in response to this comment.

Comment

Inland commented that the scope of the rule should be expanded to include recycled materials that are used as fill material or for land reclamation. Inland commented that 30 TAC §330.2 conditionally excludes from the definition of solid waste certain materials (soil, dirt, rock, sand, etc.) used as fill material.

Response

The commission disagrees with this comment. The proposed rule was not meant to include materials simply because they are recycled by being placed or put onto the land. Rather, it was meant to exempt certain industrial materials that closely resemble commercial products, and which would otherwise be regulated as solid wastes if recycled by being applied to the land or used in products applied to the land. The commission notes that there is an existing exclusion under §335.1(128)(A)(ii) for uncontaminated soil, dirt, rock, sand, and other natural or manmade inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements. The commission is not making changes to the proposed rule in response to this comment.

Comment

TCC commented that the agency has allowed several materials that are applied to the land or used as ingredients in products applied to the land to be exempt from the definition of solid waste by classifying them as co-products. The commenter stated that such determinations by the agency are spelled out in letters that contain complex and detailed risk evaluations based on use-specific conditions, and that the practice of issuing these letters is preferable because the rule would exempt generators from any reporting requirements and oversight by the commission. Alcoa, AGC of Texas, and TMRA submitted similar comments. AGC of Texas commented that relying on guidance allows flexibility and stimulates innovation to a greater degree than would the proposed rule. The TMRA commented that the proposed rule is not necessary given the sufficiency of existing co-product determinations based upon agency guidance.

Response

The commission agrees in part and disagrees in part with these comments. The commission believes that the practice of designating certain nonhazardous industrial materials as co-products is a legitimate exercise of the commission's authority. However, the adopted rule sets out certain criteria for beneficial recycling and provides the advantage of being a self-implementing exemption. With regard to lack of reporting and oversight, the commission notes that, since the mid 1980's, approximately 31 self-implementing exemptions from the definition of solid waste have been incorporated into commission rules (e.g., 30 TAC §335.1(128)(A)(i) - (iv), (D)(i)(II), (ii)(II), (iii), (iv), and (F)). The commission's experience with self-implementing exemptions has been that they work as intended and are not misused. Not only does a self-implementing exemption allow generators the flexibility to recycle materials that would otherwise be regulated as solid wastes, it also streamlines the process by eliminating unnecessary case-by-case reviews by the executive director. The criteria which otherwise would be utilized by the executive director in reviewing an exemption request have been clearly and prescriptively articulated in the adopted rule, and create the basis upon which an agency enforcement action could be based. The commission is not making changes to the proposed rule in response to this comment.

Comment

The TCC commented that Criteria VII of the proposed rule lists two ways that a generator can demonstrate that materials do not present an increased risk to human health, the environment, and waters in the state, and that the use of the word "can" does not limit generators to the specific requirements of Criteria VII to make such a demonstration.

Response

The commission agrees with this comment, and the changes made to Criteria VII remove the word "can."

Comment

The TCC commented that the proposed rule is based on the guidance in TNRCC Guidance Document RG-240 which was based on EPA guidance that EPA never formalized into regulatory language, and it is not appropriate for the commission to incorporate it into its rules.

Response

The commission disagrees with this comment. Over the past decade, the aforementioned EPA guidance has been very useful to the executive director in evaluating whether recycling activities are appropriate and legitimate. This EPA guidance forms a substantial portion of the criteria currently found in RG-240, which are essentially the same criteria that have been used by the executive director since April 1995 to evaluate whether certain nonhazardous industrial materials are legitimate co-products. No change to the proposed rule has been made as the result of this comment.

Comment

TCC commented that the non-waste criteria guidance found in RG-240 is already self- implementing. The commenter stated that producers and distributors will continue to seek agency concurrence with their determinations primarily as marketing tools.

Response

The commission disagrees with this comment for several reasons. First, experience with other self-implementing rule exemptions suggests that, while producers and distributors still seek commission concurrence, they are more likely to seek concurrence if a self-implementing rule did not exist. The commission believes that requests for concurrence will be minimized in the case of this adopted rule, particularly because it contains detailed criteria for determining whether a nonhazardous industrial material is exempt from being a solid waste. Second, given the detailed nature of the adopted rule (particularly with the incorporation of the adopted changes to Criteria VII), the commission anticipates that only a few requests for concurrence will be received. For these reasons, the commission is making no change to the proposed rule in response to this comment.

Comment

TxDOT commented that recycling material that meets the exemption should be considered a waste until the point at which it is recycled, that the commission should continue to require a generator to list all wastes on the generator's Notice of Registration (NOR), and that notifications of recycling should still be required. TxDOT also asked whether materials that exit the definition of solid waste would be audited by the agency.

Response

The commission agrees in part and disagrees in part with these comments. The commission agrees that generators should list their wastes on the generator's NOR, but disagrees that recycling material that meets the exemption should be classified as waste until the point at which it is recycled. As is the case with other self-implementing exemptions from the definition of a solid waste, generators would not be subject to the notification requirements of §335.6 and would therefore not be required to have a waste code on their NOR for materials excluded under the rule. The commission's response to the question regarding agency audits of materials that exit the definition of solid waste is that, under §335.1(128)(I), respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial. The commission believes it has sufficient authority to take all action necessary to protect human health, the environment, and the waters in the state, including taking appropriate enforcement action against those who do not comply with the exemptions. The commission has made no change to the proposed rule in response to this comment.

Comment

TxDOT commented that the proposed rule would allow all exempt material to exit all solid waste management controls, and that as a result, the end user (e.g., TxDOT) loses an opportunity to inquire about whether exempted materials are being legitimately and beneficially recycled.

Response

The commission disagrees with this comment. The rule has no bearing on TxDOT's opportunities or ability to inquire about materials or adopt standards for materials that are used in projects under its jurisdiction in order to determine their environmental impact. The commission has made no change to the proposed rule in response to this comment.

Comment

TxDOT commented that the commission should develop specific requirements for waste generators to follow to prove that their waste meets each of the eight criteria of the rule.

Response

The commission does not agree that the rule needs further requirements for waste generators to follow. The commission notes that the criteria of the adopted rule are very specific, particularly with the change made under adopted Criteria VII. The commission has made no change to the proposed rule in response to this comment.

Comment

Both TCC and TxDOT commented that the proposed rule would potentially exempt generators from oversight by the commission.

Response

The commission disagrees with this comment. Under §335.1(128)(I), respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial. The commission believes it has sufficient authority to take all action necessary to protect human health, the environment, and the waters in the State, up to and including taking appropriate enforcement action against those who do not comply with the exemptions. The commission has made no change to the proposed rule in response to this comment.

Comment

Alcoa commented that, by specifically mentioning the several materials to which the commission has previously granted "co-product" status (e.g., certain types of foundry sand, fly ash, bottom ash, and steel slag) in the December 1, 2000 issue of the Texas Register, the commission intended to document approval of existing, case-by-case demonstrations of co-products that have previously been granted by the executive director. TMRA commented that, if the proposed rule is adopted, the commission should more clearly recognize the sufficiency of existing co-product determinations.

Response

The commission agrees with these comments, subject to the following discussion. The intent of the commission in specifically mentioning certain industrial materials in the preamble language of the December 1, 2000 *Texas Register* was to acknowledge that "co- product" status has been granted to certain materials

by the executive director. The "co- product" status of those materials remains valid because the determinations were based on extensive evaluations which concluded that the uses of the materials as proposed are protective of human health and the environment. Accordingly, there is no need to revisit these determinations. However, any further solid waste determinations would need to be done under any applicable provisions of the adopted rule. No change to the proposed rule language has been made in response to these comments.

Comment

Both TMRA and Baker Botts commented that they had concerns about the accumulation limits found in Criteria VIII of the proposed rule. Baker Botts expressed concern that there is no definition of "protective storage" nor is there a reference to any regulatory or other guidance regarding what the term means. Baker Botts queried whether there are: 1.) acceptable forms of storage based on the material being stored (in other words, whether there are differing types of protective storage required, depending on the type of material); and 2.) will all recycling materials require such protective storage or will certain materials not require such storage at all?

Response

The commission responds that there are several ways recycling materials can be stored in a protective manner. These include, but are not limited to, silos, tanks or tank-like devices, permanent coverings such as roofs, temporary coverings such as secured tarps, storage bunkers, berms, or secure pits. All of these structures are designed to prevent the material from entering the environment in an uncontrolled and unauthorized manner. The commission believes that measures which accomplish this would be sufficient to satisfy the protective storage requirements of Criteria VIII. It is up to the person storing the material to decide whether to use protective storage, as it is but one of two options under adopted Criteria VIII. The commission has made no change to the proposed rule in response to this comment.

Comment

TMRA commented that there should be more flexibility introduced into Criteria VIII of the proposed rule. TMRA indicated that the 25% annual maximum is too restrictive on industrial generators because of year-to-year fluctuations in the market for many materials, and that if the commission does decide to adopt the 25% annual maximum, then it should allow industrial generators to use an average of accumulation rates over a period of several years, and in any case, no less than five years.

Response

The commission agrees in part and disagrees in part with these comments. The commission notes that the period of one-year, and the percentage of 25%, are based upon language in §335.17(a)(8). The commission has long used this standard for determining whether a material is being accumulated speculatively. This is also the standard used by the EPA for the same purpose. The commission believes that it should be well within a generator's means to recycle at least 75% of a material for which there is a significant and legitimate market within a one- or two-year period of time, depending on the type of storage. The commission believes that materials for which this is not the case much more closely resemble wastes, as opposed to materials which have some demonstrable recycling value, and should be regulated as wastes rather than recycling materials. The commission has reworded the proposed language for clarification and to provide additional flexibility by stating that at least 75% of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a one- or two-year basis, depending on the type of storage.

Comment

TMRA commented that additional record keeping and tracking requirements are not warranted or appropriate for legitimate co-products, and that any such additional requirements would defeat the purpose of both the rule and the previous "co-product" designations granted by the executive director.

Response

The commission agrees with the comment. Industrial materials that are exempt from being solid wastes should not be subject to additional record keeping requirements and tracking requirements under the commission's rules, assuming there is no ongoing enforcement action. The commission has made no change to the proposed rule in response to this comment.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rule necessary to carry out its powers and duties under the provisions of TWC or other laws of this state; and under the Act, THSC, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

§335.1. Definitions.

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

(1) Aboveground tank - A device meeting the definition of tank in this section and that is situated in such a way that the entire surface area of the tank is completely above the plane of the adjacent surrounding surface and the entire surface area of the tank (including the tank bottom) is able to be visually inspected.

(2) Act--The Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361 (Vernon Pamphlet 1992).

(3) Active life--The period from the initial receipt of hazardous waste at the facility until the executive director receives certification of final closure.

(4) Active portion--That portion of a facility where processing, storage, or disposal operations are being or have been conducted after November 19, 1980, and which is not a closed portion. (See also "closed portion" and "inactive portion.")

(5) Activities associated with the exploration, development, and protection of oil or gas or geothermal resources--Activities associated with:

(A) the drilling of exploratory wells, oil wells, gas wells, or geothermal resource wells;

(B) the production of oil or gas or geothermal resources, including:

(i) activities associated with the drilling of injection water source wells that penetrate the base of usable quality water;

(ii) activities associated with the drilling of cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the commission to regulate the production of oil or gas or geothermal resources;

(iii) activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;

(iv) activities associated with any underground natural gas storage facility, provided the terms "natural gas" and "storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173;

(v) activities associated with any underground hydrocarbon storage facility, provided the terms "hydrocarbons" and "underground hydrocarbon storage facility" shall have the meanings set out in the Texas Natural Resources Code, §91.173; and

(vi) activities associated with the storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

(C) the operation, abandonment, and proper plugging of wells subject to the jurisdiction of the commission to regulate the exploration, development, and production of oil or gas or geothermal resources; and

(D) the discharge, storage, handling, transportation, reclamation, or disposal of waste or any other substance or material associated with any activity listed in subparagraphs (A) - (C) of this paragraph, except for waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants if that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency (EPA) pursuant to the Federal Solid Waste Disposal Act, as amended (42 United States Code, §§6901 *et seq*.).

(6) Administrator--The administrator of the United States Environmental Protection Agency or his designee.

(7) Ancillary equipment--Any device including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps, that is used to distribute, meter, or control the flow of hazardous waste from its point of generation to a storage or processing tank(s), between hazardous waste storage and processing tanks to a point of disposal on-site, or to a point of shipment for disposal off-site.

(8) Aquifer--A geologic formation, group of formations, or part of a formation capable of yielding a significant amount of groundwater to wells or springs.

(9) Authorized representative--The person responsible for the overall operation of a facility or an operation unit (i.e., part of a facility), e.g., the plant manager, superintendent, or person of equivalent responsibility.

(10) Battery--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(11) Boiler--An enclosed device using controlled flame combustion and having the following characteristics:

(A) the unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(B) the units's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design:

(i) process heaters (units that transfer energy directly to a process stream), and

(ii) fluidized bed combustion units; and

(C) while in operation, the unit must maintain a thermal energy recovery efficiency of at least 60%, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(D) the unit must export and utilize at least 75% of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(E) the unit is one which the executive director has determined, on a case-by-case basis, to be a boiler, after considering the standards in §335.20 of this title (relating to Variance to be Classified as a Boiler).

(12) Carbon regeneration unit--Any enclosed thermal treatment device used to regenerate spent activated carbon.

(13) Certification--A statement of professional opinion based upon knowledge and belief.

(14) Class 1 wastes--Any industrial solid waste or mixture of industrial solid wastes which because of its concentration, or physical or chemical characteristics, is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, or may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or disposed of or otherwise managed, as further defined in §335.505 of this title (relating to Class 1 Waste Determination). Class 1 waste is also referred to throughout this chapter as Class I waste.

(15) Class 2 wastes--Any individual solid waste or combination of industrial solid waste which cannot be described as Hazardous, Class 1 or Class 3 as defined in §335.506 of this title (relating to Class 2 Waste Determination). Class 2 waste is also referred to throughout this chapter as Class II waste.

(16) Class 3 wastes--Inert and essentially insoluble industrial solid waste, usually including, but not limited to, materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable, as further defined in §335.507 of this title (relating to Class 3 Waste Determination). Class 3 waste is also referred to throughout this chapter as Class III waste.

(17) Closed portion--That portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion.")

(18) Closure--The act of permanently taking a waste management unit or facility out of service.

(19) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or PCBs for a charge, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person, where "captured facility" means a manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a

shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(20) Component--Either the tank or ancillary equipment of a tank system.

(21) Confined aquifer--An aquifer bounded above and below by impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined groundwater.

(22) Consignee--The ultimate treatment, storage, or disposal facility in a receiving country to which the hazardous waste will be sent.

(23) Container--Any portable device in which a material is stored, transported, processed, or disposed of, or otherwise handled.

(24) Containment building--A hazardous waste management unit that is used to store or treat hazardous waste under the provisions of §335.152(a)(19) or §335.112(a)(21) of this title (relating to Standards).

(25) Contaminant--Includes, but is not limited to, "solid waste," "hazardous waste," and "hazardous waste constituent" as defined in this subchapter, "pollutant" as defined in the Texas Water Code, §26.001, and Texas Health and Safety Code, §361.431, "hazardous substance" as defined in the Texas Health and Safety Code, §361.003, and other substances that are subject to the Texas Hazardous Substances Spill Prevention and Control Act, Texas Water Code, §§26.261 - 26.268.

(26) Contaminated medium/media--A portion or portions of the physical environment to include soil, sediment, surface water, ground water or air, that contain contaminants at levels that pose a substantial present or future threat to human health and the environment.

(27) Contingency plan--A document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(28) Control--To apply engineering measures such as capping or reversible treatment methods and/or institutional measures such as deed restrictions to facilities or areas with wastes or contaminated media which result in remedies that are protective of human health and the environment when combined with appropriate maintenance, monitoring, and any necessary further corrective action.

(29) Corrective action management unit or CAMU--An area within a facility that is designated by the commission under 40 Code of Federal Regulations (CFR) Part 264, Subpart S, for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (concerning Corrective Action). A CAMU shall only be used for the management of remediation wastes pursuant to implementing such corrective action requirements at the facility.

(30) Corrosion expert--A person who, by reason of his knowledge of the physical sciences and the principles of engineering and mathematics, acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be certified as being qualified by the National Association of Corrosion Engineers (NACE) or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control on buried or submerged metal piping systems and metal tanks.

(31) Decontaminate--To apply a treatment process(es) to wastes or contaminated media whereby the substantial present or future threat to human health and the environment is eliminated.

(32) Designated facility--A Class I or hazardous waste storage, processing, or disposal facility which has received an EPA permit (or a facility with interim status) in accordance with the requirements of 40 Code of Federal Regulations, Parts 270 and 124; a permit from a state authorized in accordance with 40 Code of Federal Regulations Part 271 (in the case of hazardous waste); a permit issued pursuant to §335.2 of this title (relating to Permit Required) (in the case of non-hazardous waste); or that is regulated under §335.24(f), (g), or (h) of this title (relating to Requirements for Recyclable Materials and Non-hazardous Recyclable Materials) or §335.241 of this title (relating to Applicability and Requirements) and that has been designated on the manifest by the generator pursuant to §335.10 of this title (relating to Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class I Waste and Primary Exporters of Hazardous Waste). If a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste.

(33) Destination facility--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(34) Dike--An embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(35) Discharge or hazardous waste discharge--The accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water.

(36) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

(37) Disposal facility--A facility or part of a facility at which solid waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(38) Drip pad--An engineered structure consisting of a curbed, free-draining base, constructed of a non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(39) Elementary neutralization unit--A device which:

(A) is used for neutralizing wastes which are hazardous only because they exhibit the corrosivity characteristic defined in 40 CFR §261.22, or are listed in 40 CFR Part 261, Subpart D, only for this reason; or is used for neutralizing the pH of non-hazardous industrial solid waste; and

(B) meets the definition of tank, tank system, container, transport vehicle, or vessel as defined in this section.

(40) Environmental Protection Agency acknowledgment of consent--The cable sent to EPA from the United States Embassy in a receiving country that acknowledges the written consent of the receiving country to accept the hazardous waste and describes the terms and conditions of the receiving country's consent to the shipment.

(41) Environmental Protection Agency hazardous waste number--The number assigned by the EPA to each hazardous waste listed in 40 Code of Federal Regulations, Part 26l, Subpart D and to each characteristic identified in 40 Code of Federal Regulations, Part 26l, Subpart C.

(42) Environmental Protection Agency identification number--The number assigned by the EPA or the commission to each generator, transporter, and processing, storage, or disposal facility.

(43) Essentially insoluble--Any material, which if representatively sampled and placed in static or dynamic contact with deionized water at ambient temperature for seven days, will not leach any quantity of any constituent of the material into the water in excess of current United States Public Health Service or EPA limits for drinking water as published in the *Federal Register*.

(44) Equivalent method--Any testing or analytical method approved by the administrator under 40 Code of Federal Regulations §260.20 and §260.21.

(45) Existing portion--That land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit.

(46) Existing tank system or existing component--A tank system or component that is used for the storage or processing of hazardous waste and that is in operation, or for which installation has commenced on or prior to July 14, 1986. Installation will be considered to have commenced if the owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system and if either:

(A) a continuous on-site physical construction or installation program has begun; or

(B) the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss for physical construction of the site or installation of the tank system to be completed within a reasonable time.

(47) Explosives or munitions emergency--A situation involving the suspected or detected presence of unexploded ordnance (UXO), damaged or deteriorated explosives or munitions, an improvised explosive device (IED), other potentially explosive material or device, or other potentially harmful military chemical munitions or device, that creates an actual or potential imminent threat to human health, including safety, or the environment, including property, as determined by an explosives or munitions emergency response specialist. These situations may require immediate and expeditious action by an explosives or munitions emergency response specialist to control, mitigate, or eliminate the threat.

(48) Explosives or munitions emergency response--All immediate response activities by an explosives and munitions emergency response specialist to control, mitigate, or eliminate the actual or potential threat encountered during an explosives or munitions emergency, subject to the following:

(A) an explosives or munitions emergency response includes in-place render-safe procedures, treatment or destruction of the explosives or munitions and/or transporting those items to another location to be rendered safe, treated, or destroyed;

(B) any reasonable delay in the completion of an explosives or munitions emergency response caused by a necessary, unforeseen, or uncontrollable circumstance will not terminate the explosives or munitions emergency; and

(C) explosives and munitions emergency responses can occur on either public or private lands and are not limited to responses at hazardous waste facilities.

(49) Explosives or munitions emergency response specialist--An individual trained in chemical or conventional munitions or explosives handling, transportation, render-safe procedures, or destruction techniques, including United States Department of Defense (DOD) emergency explosive ordnance disposal (EOD), technical escort unit (TEU), and DOD-certified civilian or contractor personnel; and, other federal, state, or local government, or civilian personnel similarly trained in explosives or munitions emergency responses.

(50) Extrusion--A process using pressure to force ground poultry carcasses through a decreasing- diameter barrel or nozzle, causing the generation of heat sufficient to kill pathogens, and resulting in an extruded product acceptable as a feed ingredient.

(51) Facility--Includes:

(A) all contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, processing, or disposing of municipal hazardous waste or industrial solid waste. A facility may consist of several storage, processing, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them);

(B) for the purpose of implementing corrective action under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units), all contiguous property under the control of the owner or operator seeking a permit for the storage, processing, and/or disposal of hazardous waste. This definition also applies to facilities implementing corrective action under the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (Corrective Action).

(52) Final closure--The closure of all hazardous waste management units at the facility in accordance with all applicable closure requirements so that hazardous waste management activities under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities) are no longer conducted at the facility unless subject to the provisions in §335.69 of this title (relating to Accumulation Time).

(53) Food-chain crops--Tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(54) Freeboard--The vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(55) Free liquids--Liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(56) Generator--Any person, by site, who produces municipal hazardous waste or industrial solid waste; any person who possesses municipal hazardous waste or industrial solid waste to be shipped to any other person; or any person whose act first causes the solid waste to become subject to regulation under this chapter. For the purposes of this regulation, a person who generates or possesses Class III wastes only shall not be considered a generator.

(57) Groundwater--Water below the land surface in a zone of saturation.

(58) Hazardous industrial waste--Any industrial solid waste or combination of industrial solid wastes identified or listed as a hazardous waste by the administrator of the EPA pursuant to the Resource Conservation and Recovery Act of 1976, §3001. The administrator has identified the characteristics of hazardous wastes and listed certain wastes as hazardous in 40 Code of Federal Regulations Part 26l. The executive director will maintain in the offices of the commission a current list of hazardous wastes, a current set of characteristics of hazardous waste, and applicable appendices, as promulgated by the administrator.

(59) Hazardous substance--Any substance designated as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 40 Code of Federal Regulations, Part 302.

(60) Hazardous waste--Any solid waste identified or listed as a hazardous waste by the administrator of the EPA pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*., as amended.

(61) Hazardous waste constituent--A constituent that caused the administrator to list the hazardous waste in 40 Code of Federal Regulations Part 261, Subpart D or a constituent listed in Table 1 of 40 Code of Federal Regulations §261.24.

(62) Hazardous waste management facility--All contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of hazardous waste. The term includes a publicly or privately owned hazardous waste management facility consisting of processing, storage, or disposal operational hazardous waste management units such as one or more landfills, surface impoundments, waste piles, incinerators, boilers, and industrial furnaces, including cement kilns, injection wells, salt dome waste containment caverns, land treatment facilities, or a combination of units.

(63) Hazardous waste management unit--A landfill, surface impoundment, waste pile, industrial furnace, incinerator, cement kiln, injection well, container, drum, salt dome waste containment cavern, or land treatment unit, or any other structure, vessel, appurtenance, or other improvement on land used to manage hazardous waste.

(64) In operation--Refers to a facility which is processing, storing, or disposing of hazardous waste.

(65) Inactive portion--That portion of a facility which is not operated after November 19, 1980. (See also "active portion" and "closed portion.")

(66) Incinerator--Any enclosed device that:

(A) uses controlled flame combustion and neither meets the criteria for classification as a boiler, sludge dryer, or carbon regeneration unit, nor is listed as an industrial furnace; or

(B) meets the definition of infrared incinerator or plasma arc incinerator.

(67) Incompatible waste--A hazardous waste which is unsuitable for:

(A) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(B) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.

(68) Individual generation site--The contiguous site at or on which one or more hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of hazardous waste but is considered a single or individual generation site if the site or property is contiguous.

(69) Industrial furnace--Includes any of the following enclosed devices that use thermal treatment to accomplish recovery of materials or energy:

(A) cement kilns;

(B) lime kilns;

(C) aggregate kilns;

(D) phosphate kilns;

(E) coke ovens;

(F) blast furnaces;

(G) smelting, melting, and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, and foundry furnaces);

(H) titanium dioxide chloride process oxidation reactors;

(I) methane reforming furnaces;

(J) pulping liquor recovery furnaces;

(K) combustion devices used in the recovery of sulfur values from spent sulfuric acid;

(L) halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3.0%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as generated; and

(M) other devices the commission may list, after the opportunity for notice and comment is afforded to the public.

(70) Industrial solid waste--Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

(71) Infrared incinerator--Any enclosed device that uses electric powered resistance heaters as a source of radiant heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(72) Inground tank--A device meeting the definition of tank in this section whereby a portion of the tank wall is situated to any degree within the ground, thereby preventing visual inspection of that external surface area of the tank that is in the ground.

(73) Injection well--A well into which fluids are injected. (See also "underground injection.")

(74) Inner liner--A continuous layer of material placed inside a tank or container which protects the construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(75) Installation inspector--A person who, by reason of his knowledge of the physical sciences and the principles of engineering, acquired by a professional education and related practical experience, is qualified to supervise the installation of tank systems.

(76) International shipment--The transportation of hazardous waste into or out of the jurisdiction of the United States.

(77) Lamp--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(78) Land treatment facility--A facility or part of a facility at which hazardous waste is applied onto or incorporated into the soil surface and that is not a corrective action management unit; such facilities are disposal facilities if the waste will remain after closure.

(79) Landfill--A disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

(80) Landfill cell--A discrete volume of a hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(81) Leachate--Any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

(82) Leak-detection system--A system capable of detecting the failure of either the primary or secondary containment structure or the presence of a release of hazardous waste or accumulated liquid in the secondary containment structure. Such a system must employ operational controls (e.g., daily visual inspections for releases into the secondary containment system of aboveground tanks) or consist of an interstitial monitoring device designed to detect continuously and automatically the failure of the primary or secondary containment structure or the presence of a release of hazardous waste into the secondary containment structure.

(83) Liner--A continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of hazardous waste, hazardous waste constituents, or leachate.

(84) Management or hazardous waste management--The systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.

(85) Manifest--The waste shipping document which accompanies and is used for tracking the transportation, disposal, treatment, storage, or recycling of shipments of hazardous wastes or Class 1 industrial solid wastes. The form used for this purpose is TNRCC-0311 (Uniform Hazardous Waste Manifest) which is furnished by the executive director or may be printed through the agency's "Print Your Own Manifest Program."

(86) Manifest document number--A number assigned to the manifest by the commission for reporting and recordkeeping purposes.

(87) Military munitions--All ammunition products and components produced or used by or for the DOD or the United States Armed Services for national defense and security, including military munitions under the control of the DOD, the United States Coast Guard, the United States Department of Energy (DOE), and National Guard personnel. The term "military munitions":

(A) includes confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof; and

(B) includes non-nuclear components of nuclear devices, managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, have been completed; but

(C) does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components thereof.

(88) Miscellaneous unit--A hazardous waste management unit where hazardous waste is stored, processed, or disposed of and that is not a container, tank, surface impoundment, pile, land treatment unit, landfill, incinerator, boiler, industrial furnace, underground injection well with appropriate technical standards under Chapter 331 of this title (relating to Underground Injection Control), corrective action management unit, containment building, or unit eligible for a research, development, and demonstration permit or under Chapter 305, Subchapter K of this title (relating to Research Development and Demonstration Permits).

(89) Movement--That hazardous waste transported to a facility in an individual vehicle.

(90) Municipal hazardous waste--A municipal solid waste or mixture of municipal solid wastes which has been identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency.

(91) Municipal solid waste--Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities; including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial waste.

(92) New tank system or new tank component--A tank system or component that will be used for the storage or processing of hazardous waste and for which installation has commenced after July 14, 1986; except, however, for purposes of 40 Code of Federal Regulations §264.193(g)(2) (incorporated by reference at §335.152(a)(8) of this title (relating to Standards)) and 40 Code of Federal Regulations §265.193(g)(2) (incorporated by reference at §335.112(a)(9) of this title (relating to Standards)), a new tank system is one for which construction commences after July 14, 1986 (see also "existing tank system.")

(93) Off-site--Property which cannot be characterized as on-site.

(94) Onground tank--A device meeting the definition of tank in this section and that is situated in such a way that the bottom of the tank is on the same level as the adjacent surrounding surface so that the external tank bottom cannot be visually inspected.

(95) On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(96) Open burning--The combustion of any material without the following characteristics:

(A) control of combustion air to maintain adequate temperature for efficient combustion;

(B) containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and

(C) control of emission of the gaseous combustion products. (See also "incineration" and "thermal treatment.")

(97) Operator--The person responsible for the overall operation of a facility.

(98) Owner--The person who owns a facility or part of a facility.

(99) Partial closure--The closure of a hazardous waste management unit in accordance with the applicable closure requirements of Subchapters E and F of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; and Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing or Disposal Facilities) at a facility that contains other active hazardous waste management units. For example, partial closure may include the closure of a tank (including its associated piping and underlying containment systems), landfill cell, surface impoundment, waste pile, or other hazardous waste management unit, while other units of the same facility continue to operate.

(100) PCBs or polychlorinated biphenyl compounds--Compounds subject to Title 40, Code of Federal Regulations, Part 761.

(101) Permit--A written permit issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify or operate a specified municipal hazardous waste or industrial solid waste storage, processing, or disposal facility in accordance with specified limitations.

(102) Person--Any individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association or any other legal entity.

(103) Personnel or facility personnel--All persons who work at, or oversee the operations of, a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter.

(104) Pesticide--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(105) Petroleum substance--A crude oil or any refined or unrefined fraction or derivative of crude oil which is a liquid at standard conditions of temperature and pressure.

(A) Except as provided in subparagraph (C) of this paragraph for the purposes of this chapter, a "petroleum substance" shall be limited to a substance in or a combination or mixture of substances within the following list (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code, §§6921 *et seq.*)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere):

(i) basic petroleum substances--i.e., crude oils, crude oil fractions, petroleum feedstocks, and petroleum fractions;

(ii) motor fuels--a petroleum substance which is typically used for the operation of internal combustion engines and/or motors (which includes but is not limited to stationary engines and engines used in transportation vehicles and marine vessels);

(iii) aviation gasolines--i.e., Grade 80, Grade 100, and Grade 100-LL;

(iv) aviation jet fuels--i.e., Jet A, Jet A-1, Jet B, JP-4, JP-5, and JP-8;

(v) distillate fuel oils--i.e., Number 1-D, Number 1, Number 2-D, and Number 2;

(vi) residual fuel oils--i.e., Number 4-D, Number 4-light, Number 4, Number 5-light, Number 5- heavy, and Number 6;

(vii) gas-turbine fuel oils--i.e., Grade O-GT, Grade 1-GT, Grade 2-GT, Grade 3-GT, and Grade 4- GT;

(viii) illuminating oils--i.e., kerosene, mineral seal oil, long-time burning oils, 300 oil, and mineral colza oil;

(ix) lubricants--i.e., automotive and industrial lubricants;

(x) building materials--i.e., liquid asphalt and dust-laying oils;

(xi) insulating and waterproofing materials--i.e., transformer oils and cable oils;

(xii) used oils--(See definition for "used oil" in this section); and

(B) For the purposes of this chapter, a "petroleum substance" shall include solvents or a combination or mixture of solvents (except for any listed substance regulated as a hazardous waste under the federal Solid Waste Disposal Act, Subtitle C (42 United States Code, §§6921 *et seq.*)) and which is liquid at standard conditions of temperature (20 degrees Centigrade) and pressure (1 atmosphere) i.e., Stoddard solvent, petroleum spirits, mineral spirits, petroleum ether, varnish makers' and painters' naphthas, petroleum extender oils, and commercial hexane.

(C) The following materials are not considered petroleum substances:

(i) polymerized materials, i.e., plastics, synthetic rubber, polystyrene, high and low density polyethylene;

(ii) animal, microbial, and vegetable fats;

(iii) food grade oils;

(iv) hardened asphalt and solid asphaltic materials i.e., roofing shingles, roofing felt, hot mix (and cold mix); and

(v) cosmetics.

(106) Pile--Any noncontainerized accumulation of solid, nonflowing hazardous waste that is used for processing or storage, and that is not a corrective action management unit or a containment building.

(107) Plasma arc incinerator--Any enclosed device using a high intensity electrical discharge or arc as a source of heat followed by an afterburner using controlled flame combustion and which is not listed as an industrial furnace.

(108) Poultry--Chickens or ducks being raised or kept on any premises in the state for profit.

(109) Poultry carcass--The carcass, or part of a carcass of poultry that died as a result of a cause other than intentional slaughter for use for human consumption.

(110) Poultry facility--A facility that:

(A) is used to raise, grow, feed, or otherwise produce poultry for commercial purposes; or

(B) is a commercial poultry hatchery that is used to produce chicks or ducklings.

(111) Primary exporter--Any person who is required to originate the manifest for a shipment of hazardous waste in accordance with the regulations contained in 40 Code of Federal Regulations, Part 262, Subpart B, which are in effect as of November 8, 1986, or equivalent state provision, which specifies a treatment, storage, or disposal facility in a receiving country as the facility to which the hazardous waste will be sent and any intermediary arranging for the export.

(112) Processing--The extraction of materials, transfer, volume reduction, conversion to energy, or other separation and preparation of solid waste for reuse or disposal, including the treatment or neutralization of hazardous waste, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material from the waste or so as to render such waste nonhazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume. The transfer of solid waste for reuse or disposal as used in this definition does not include the actions of a transporter in conveying or transporting solid waste by truck, ship, pipeline, or other means. Unless the executive director determines that regulation of such activity is necessary to protect human health or the environment, the definition of processing does not include activities relating to those materials exempted by the administrator of the Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*., as amended.

(113) Publicly-owned treatment works (POTW)--Any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a state or municipality (as defined by the Clean Water Act, §502(4)). The definition includes sewers, pipes or other conveyances only if they convey wastewater to a POTW providing treatment.

(114) Qualified groundwater scientist--A scientist or engineer who has received a baccalaureate or post-graduate degree in the natural sciences or engineering, and has sufficient training and experience in groundwater hydrology and related fields as may be demonstrated by state registration, professional certifications, or completion of accredited university courses that enable that individual to make sound professional judgments regarding groundwater monitoring and contaminant fate and transport.

(115) Receiving country--A foreign country to which a hazardous waste is sent for the purpose of treatment, storage, or disposal (except short-term storage incidental to transportation).

(116) Regional administrator--The regional administrator for the Environmental Protection Agency region in which the facility is located, or his designee.

(117) Remediation--The act of eliminating or reducing the concentration of contaminants in contaminated media.

(118) Remediation waste--All solid and hazardous wastes, and all media (including groundwater, surface water, soils, and sediments) and debris, which contain listed hazardous wastes or which themselves exhibit a hazardous waste characteristic, that are managed for the purpose of implementing corrective action requirements under §335.167 of this title (relating to Corrective Action for Solid Waste Management Units) and the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (Corrective Action). For a given facility, remediation wastes may originate only from within the facility boundary, but may include waste managed in implementing corrective action for releases beyond the facility boundary under the Texas Solid Waste Disposal Act, Texas Health and Safety Code Annotated (Vernon Pamphlet 1993), §361.303 (Corrective Action), §335.166(5) of this title (relating to Corrective Action Program), or §335.167(c) of this title (relating to Corrective Action for Solid Waste Management Units).

(119) Remove--To take waste, contaminated design or operating system components, or contaminated media away from a waste management unit, facility, or area to another location for storage, processing, or disposal.

(120) Replacement unit--A landfill, surface impoundment, or waste pile unit:

(A) from which all or substantially all the waste is removed; and

(B) that is subsequently reused to treat, store, or dispose of hazardous waste. "Replacement unit" does not apply to a unit from which waste is removed during closure, if the subsequent reuse solely involves the disposal of waste from that unit and other closing units or corrective action areas at the facility, in accordance with an approved closure plan or EPA or state approved corrective action.

(121) Representative sample--A sample of a universe or whole (e.g., waste pile, lagoon, groundwater) which can be expected to exhibit the average properties of the universe or whole.

(122) Run-off--Any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(123) Run-on--Any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(124) Saturated zone or zone of saturation--That part of the earth's crust in which all voids are filled with water.

(125) Shipment--Any action involving the conveyance of municipal hazardous waste or industrial solid waste by any means offsite.

(126) Sludge dryer--Any enclosed thermal treatment device that is used to dehydrate sludge and that has a maximum total thermal input, excluding the heating valve of the sludge itself, of 2,500 Btu/lb of sludge treated on a wet-weight basis.

(127) Small quantity generator--A generator who generates less than 1,000 kg of hazardous waste in a calendar month.

(128) Solid Waste--

(A) Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities, but does not include:

(i) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued pursuant to the Texas Water Code, Chapter 26 (an exclusion applicable only to the actual point source discharge that does not exclude industrial wastewaters while they are being collected, stored or processed before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment);

(ii) uncontaminated soil, dirt, rock, sand and other natural or man-made inert solid materials used to fill land if the object

of the fill is to make the land suitable for the construction of surface improvements. The material serving as fill may also serve as a surface improvement such as a structure foundation, a road, soil erosion control, and flood protection. Man-made materials exempted under this provision shall only be deposited at sites where the construction is in progress or imminent such that rights to the land are secured and engineering, architectural, or other necessary planning have been initiated. Waste disposal shall be considered to have occurred on any land which has been filled with man-made inert materials under this provision if the land is sold, leased, or otherwise conveyed prior to the completion of construction of the surface improvement. Under such conditions, deed recordation shall be required. The deed recordation shall include the information required under §335.5(a) of this title (relating to Deed Recordation), prior to sale or other conveyance of the property;

(iii) waste materials which result from activities associated with the exploration, development, or production of oil or gas or geothermal resources, as those activities are defined in this section, and any other substance or material regulated by the Railroad Commission of Texas pursuant to the Natural Resources Code, §91.101, unless such waste, substance, or material results from activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq*., as amended; or

(iv) a material excluded by 40 Code of Federal Regulations (CFR) §261.4(a)(1) - (19) as amended May 11, 1999 in 64 FedReg 25408, subject to the changes in this clause, or by variance granted under §335.18 of this title (relating to Variances from Classification as a Solid Waste) and §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste). For the purposes of the exclusion under 40 CFR §261.4(a)(16), as amended June 19, 1998 at 63 FedReg 33782, 40 CFR §261.38 is revised as follows, with "30 TAC §335.1(123)(A)(iv)" meaning "§335.1(123)(A)(iv) of this title (relating to Definitions)":

(I) in the certification statement under 40 CFR §261.38(c)(1)(i)(C)(4), the reference to "40 CFR §261.38" is changed to "40 CFR §261.38, as revised under 30 TAC §335.1(123)(A)(iv)," and the reference to "40 CFR §261.28(c)(10)" is changed to "40 CFR §261.38(c)(10)";

(II) in 40 CFR §261.38(c)(2), the references to "§260.10 of this chapter" are changed to "§335.1 of this title (relating to Definitions)," and the reference to "parts 264 or 265 of this chapter" is changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) or Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities)";

(III) in 40 CFR §261.38(c)(3), (4), and (5), the references to "parts 264 and 265, or §262.34 of this chapter" are changed to "Chapter 335, Subchapter E of this title (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) and Chapter 335, Subchapter F of this title (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities), or §335.69 of this title (relating to Accumulation Time)";

(IV) in 40 CFR §261.38(c)(5), the reference to "§261.6(c) of this chapter" is changed to "§335.24(e) and (f) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials)";

(V) in 40 CFR §261.38(c)(7), the references to "appropriate regulatory authority" and "regulatory authority" are changed to "executive director";

(VI) in 40 CFR §261.38(c)(8), the reference to "§262.11 of this chapter" is changed to "§335.62 of this title (relating to Hazardous Waste Determination and Waste Classification)";

(VII) in 40 CFR §261.38(c)(9), the reference to "§261.2(c)(4) of this chapter" is changed to "§335.1(123)(D)(iv) of this title (relating to Definitions)"; and

(VIII) in 40 CFR §261.38(c)(10), the reference to "implementing authority" is changed to "executive director."

(B) A discarded material is any material which is:

(i) abandoned, as explained in subparagraph (C) of this paragraph;

(ii) recycled, as explained in subparagraph (D) of this paragraph;

(iii) considered inherently waste-like, as explained in subparagraph (E) of this paragraph; or

(iv) a military munition identified as a solid waste in 40 CFR §266.202.

(C) Materials are solid wastes if they are abandoned by being:

(i) disposed of;

(ii) burned or incinerated; or

(iii) accumulated, stored, or processed (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(D) Except for materials described in subparagraph (H) of this paragraph, materials are solid wastes if they are "recycled" or accumulated, stored, or processed before recycling as specified in this subparagraph. The chart referred to as Table 1 indicates only which materials are considered to be solid wastes when they are recycled and is not intended to supersede the definition of solid waste provided in subparagraph (A) of this paragraph.

(i) Used in a manner constituting disposal. Materials noted with an asterisk in Column 1 of Table 1 are solid wastes when they are:

(I) applied to or placed on the land in a manner that constitutes disposal; or

(II) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste). However, commercial chemical products listed in 40 CFR §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(ii) Burning for energy recovery. Materials noted with an asterisk in Column 2 of Table 1 are solid wastes when they are:

(I) burned to recover energy; or

(II) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste). However, commercial chemical products, which are listed in 40 CFR §261.33, not listed in §261.33 but that exhibit one or more of the hazardous waste characteristics, or would be considered nonhazardous

waste if disposed, are not solid wastes if they are fuels themselves and burned for energy recovery.

(iii) Reclaimed. Materials noted with an asterisk in Column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)). Materials without an asterisk in Column 3 of Table 1 are not solid wastes when reclaimed (except as provided under 40 CFR §261.4(a)(17)).

(iv) Accumulated speculatively. Materials noted with an asterisk in Column 4 of Table 1 are solid wastes when accumulated speculatively.
Figure 1: 30 TAC §335.1(128)(D)(iv)

(E) Materials that are identified by the administrator of the EPA as inherently waste-like materials under 40 CFR §261.2(d) are solid wastes when they are recycled in any manner.

(F) Materials are not solid wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products;

(iii) returned to the original process from which they were generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at 40 CFR §261.4(a)(17) apply rather than this provision; or

(iv) secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(I) only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(II) reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(III) the secondary materials are never accumulated in such tanks for over 12 months without being reclaimed; and

(IV) the reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(G) Except for materials described in subparagraph (H) of this paragraph, the following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process, as described in subparagraph (F) of this paragraph:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials deemed to be inherently waste-like by the administrator of the Environmental Protection Agency, as described in 40 CFR §261.2(d)(1) - §261.2(d)(2).

(H) With the exception of contaminated soils which are being relocated for use under §350.36 of this title (relating to Relocation of Soils Containing Chemicals of Concern for Reuse Purposes) and other contaminated media, materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the following criteria:

(i) a legitimate market exists for the recycling material as well as its products;

(ii) the recycling material is managed and protected from loss as would be raw materials or ingredients or products;

(iii) the quality of the product is not degraded by substitution of raw material/product with the recycling material;

(iv) the use of the recycling material is an ordinary use and it meets or exceeds the specifications of the product it is replacing without treatment or reclamation, or if the recycling material is not replacing a product, the recycling material is a legitimate ingredient in a production process and meets or exceeds raw material specifications without treatment or reclamation;

(v) the recycling material is not burned for energy recovery, used to produce a fuel or contained in a fuel;

(vi) the recycling material can be used as a product itself or to produce products as it is generated without treatment or reclamation;

(vii) the recycling material must not present an increased risk to human health, the environment, or waters in the state when applied to the land or used in products which are applied to the land, and the material, as generated:

(I) is a Class 3 waste under Chapter 335, Subchapter R of this title (relating to Waste Classification), except for arsenic, cadmium, chromium, lead, mercury, nickel, selenium, and total dissolved solids; and

(II) for the metals listed in subclause (I) of this clause:

(-a-) is a Class 2 or Class 3 waste under Chapter 335, Subchapter R of this title (relating to Waste Classification); and

(-b-) does not exceed a concentration limit under §312.43(b)(3), Table 3; and

(viii) notwithstanding the requirements under §335.17(a)(8) of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials):

(I) at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on an annual basis; and

(II) if the recycling material is placed in protective storage, such as a silo or other protective enclosure, at least 75% (by weight or volume) of the annual production of the recycling material must be recycled or transferred to a different site and recycled on a biennial basis.

(I) Respondents in actions to enforce the industrial solid waste regulations who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that

they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so and that the recycling activity is legitimate and beneficial.

(J) Materials that are reclaimed from solid wastes and that are used beneficially are not solid wastes and hence are not hazardous wastes under 40 CFR §261.3(c) unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.

(K) Other portions of this chapter that relate to solid wastes that are recycled include §335.6 of this title (relating to Notification Requirements), §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), §335.24 of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials), and Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Materials).

(129) Sorbent--A material that is used to soak up free liquids by either adsorption or absorption, or both. Sorb means to either adsorb or absorb, or both.

(130) Spill--The accidental spilling, leaking, pumping, emitting, emptying, or dumping of hazardous wastes or materials which, when spilled, become hazardous wastes into or on any land or water.

(131) Storage--The holding of solid waste for a temporary period, at the end of which the waste is processed, disposed of, recycled or stored elsewhere.

(132) Sump--Any pit or reservoir that meets the definition of tank in this section and those troughs/trenches connected to it that serve to collect hazardous waste for transport to hazardous waste storage, processing, or disposal facilities; except that as used in the landfill, surface impoundment, and waste pile rules, "sump" means any lined pit or reservoir that serves to collect liquids drained from a leachate collection and removal system or leak detection system for subsequent removal from the system.

(133) Surface impoundment or impoundment--A facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well or a corrective action management unit. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons.

(134) Tank--A stationary device, designed to contain an accumulation of solid waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(135) Tank system--A hazardous waste storage or processing tank and its associated ancillary equipment and containment system.

(136) Thermal processing--The processing of hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the hazardous waste. Examples of thermal processing are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning."

(137) Thermostat--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(138) Totally enclosed treatment facility--A facility for the processing of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during processing. An example is a pipe in which acid waste is neutralized.

(139) Transfer facility--Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

(140) Transit country--Any foreign country, other than a receiving country, through which a hazardous waste is transported.

(141) Transport vehicle--A motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle. Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

(142) Transporter--Any person who conveys or transports municipal hazardous waste or industrial solid waste by truck, ship, pipeline, or other means.

(143) Treatability study--A study in which a hazardous or industrial solid waste is subjected to a treatment process to determine:

(A) whether the waste is amenable to the treatment process;

(B) what pretreatment (if any) is required;

(C) the optimal process conditions needed to achieve the desired treatment;

(D) the efficiency of a treatment process for a specific waste or wastes; or

(E) the characteristics and volumes of residuals from a particular treatment process. Also included in this definition for the purpose of 40 CFR §261.4(e) and (f) (§§335.2, 335.69, and 335.78 of this title (relating to Permit Required; Accumulation Time; and Special Requirements for Hazardous Waste Generated by Conditionally Exempt Small Quantity Generators)) exemptions are liner compatibility, corrosion, and other material compatibility studies and toxicological and health effects studies. A treatability study is not a means to commercially treat or dispose of hazardous or industrial solid waste.

(144) Treatment--To apply a physical, biological, or chemical process(es) to wastes and contaminated media which significantly reduces the toxicity, volume, or mobility of contaminants and which, depending on the process(es) used, achieves varying degrees of long-term effectiveness.

(145) Treatment zone--A soil area of the unsaturated zone of a land treatment unit within which hazardous constituents are degraded, transferred, or immobilized.

(146) Underground injection--The subsurface emplacement of fluids through a bored, drilled, or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well.")

(147) Underground tank--A device meeting the definition of tank in this section whose entire surface area is totally below the surface of and covered by the ground.

(148) Unfit-for-use tank system--A tank system that has been determined through an integrity assessment or other inspection to be no longer capable of storing or processing hazardous waste without posing a threat of release of hazardous waste to the environment. Waste and Municipal Hazardous Waste except as otherwise specified in §335.261 of this title.

(149) Universal waste--Any of the hazardous wastes defined as universal waste under §335.261(b)(13)(F) that are managed under the universal waste requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(150) Universal waste handler--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(151) Universal waste transporter--Has the definition adopted under §335.261 of this title (relating to Universal Waste Rule).

(152) Unsaturated zone or zone of aeration--The zone between the land surface and the water table.

(153) Uppermost aquifer--The geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected within the facility's property boundary.

(154) Used oil--Any oil that has been refined from crude oil, or any synthetic oil, that has been used, and, as a result of such use, is contaminated by physical or chemical impurities. Used oil fuel includes any fuel produced from used oil by processing, blending, or other treatment. Rules applicable to nonhazardous used oil, oil characteristically hazardous from use versus mixing, Conditionally Exempt Small Quantity Generator (CESQG) hazardous used oil, and household used oil after collection that will be recycled are found in Chapter 324 of this title (relating to Used Oil) and 40 CFR Part 279 (Standards for Management of Used Oil).

(155) Wastewater treatment unit--A device which:

(A) is part of a wastewater treatment facility subject to regulation under either the Federal Water Pollution Control Act (Clean Water Act), 33 United States Code, §§466 *et seq.*, §402 or §307(b), as amended;

(B) receives and processes or stores an influent wastewater which is a hazardous or industrial solid waste, or generates and accumulates a wastewater treatment sludge which is a hazardous or industrial solid waste, or processes or stores a wastewater treatment sludge which is a hazardous or industrial solid waste; and

(C) meets the definition of tank or tank system as defined in this section.

(156) Water (bulk shipment)--The bulk transportation of municipal hazardous waste or Class I industrial solid waste which is loaded or carried on board a vessel without containers or labels.

(157) Well--Any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(158) Zone of engineering control--An area under the control of the owner/operator that, upon detection of a hazardous waste release, can be readily cleaned up prior to the release of hazardous waste or hazardous constituents to groundwater or surface water.

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 May 10, 2001.

TRD-200102626
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: May 30, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.325

The Comptroller of Public Accounts adopts an amendment to §3.325, concerning refunds, interest, and payments under protest, without changes to the proposed text as published in the February 2, 2001, issue of the *Texas Register* (26 TexReg 1115).

Subsection (c) of this section is amended to provide for the payment of interest on a claim for refund or in an audit as directed under Senate Bill 1321, 76th Legislature, 1999. Amendments to this section for interest paid on a claim for refund or as the result of an audit are effective for reports due on or after January 1, 2000. Subsection (b) is amended to allow purchasers, who paid sales or use tax to a vendor in error, to request a refund directly from the state, pursuant to the decision in *Fleming Foods of Texas v. Rylander*. Subsections (c) and (d) were also amended to delete obsolete language. Nonsubstantive grammatical corrections are made to subsection (a).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §111.064.

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 May 8, 2001.

TRD-200102593

Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: May 28, 2001
Proposal publication date: February 2, 2001
For further information, please call: (512) 463-3699

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts an amendment to §19.101, concerning definitions, and §19.802, concerning comprehensive care plans, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. The amendments are adopted without changes to the proposed text in the March 23, 2001 issue of the *Texas Register* (26 TexReg 2329) and will not be republished.

Justification for the amendments is to allow providers the option of including a palliative plan of care in the comprehensive care plan at the request of residents of nursing facilities with terminal conditions, end stage diseases or other conditions. This part of the plan of care may be developed when curative care is no longer warranted.

The department received no comments regarding adoption of the amendments.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, 242.001- 242.268.

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 May 10, 2001.

TRD-200102627
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: June 1, 2001
Proposal publication date: March 23, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER I. RESIDENT ASSESSMENT

40 TAC §19.802

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, 242.001- 242.268.

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 May 10, 2001.

TRD-200102628
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: June 1, 2001
Proposal publication date: March 23, 2001
For further information, please call: (512) 438-3108

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) adopts amendments to §19.215, concerning informal reconsideration; §19.403, concerning notice of rights and services; §19.2008, concerning investigations of incidents and complaints; §19.2106, concerning revocation of a license; and §19.2301; concerning conditions for participation as a Medicaid-certified facility in its Nursing Facility Licensure Application Process chapter. The amendments are adopted without changes to the proposed text in the March 9, 2001, issue of the *Texas Register* (26 TexReg 2009) and will not be republished.

Justification for the amendments is to provide consistent requirements in the rules governing the notice given to the license holder and facility when DHS proposes to revoke or suspend a license or deny a license application. The amendments also assure compliance with the notice requirement in §2001.054 of the Government Code. Since the conditions for a facility to participate in the Medicaid program include a requirement that the facility is licensed, it is not necessary to state this as an independent requirement in the rules. References to a rule and statute in these rules were updated to cite the current rule or statute.

The department received no comments regarding adoption of the amendments.

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.215

The amendment is adopted under the Human Resources Code, Title 2, Chapter 22, and the Health and Safety Code, Chapter 242, which authorizes the department to license nursing facilities.

The amendment implements the Human Resources Code, §§22.001 - 22.030; Health and Safety Code, Chapter 242; and Government Code §2001.054

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 May 11, 2001.

TRD-200102649
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: July 1, 2001
Proposal publication date: March 9, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §19.403

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs.

The amendment implements the Human Resources Code, §§22.001 - 22.030 and §§32.001 - 32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2001.

TRD-200102650
Paul Leche
General Counsel
Texas Department of Human Services
Effective date: July 1, 2001
Proposal publication date: March 9, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER U. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §19.2008

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs; and Health and Safety Code, Chapter 242, which authorizes the department to investigate nursing facilities.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042; and Health and Safety Code, Chapter 242.

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 May 11, 2001.

TRD-200102651
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: July 1, 2001
Proposal publication date: March 9, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER V. ENFORCEMENT DIVISION 2. LICENSING REMEDIES

40 TAC §19.2106

The amendment is adopted under the Human Resources Code, Title 2, Chapter 22; and the Health and Safety Code, Chapter 242, which authorizes the department to license nursing facilities.

The amendment implements the Human Resources Code, §§22.001- 22.030; Health and Safety Code, Chapter 242; and Government Code §2001.054.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200102652
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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Proposal publication date: March 9, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2301

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: July 1, 2001
Proposal publication date: March 9, 2001
For further information, please call: (512) 438-3108

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PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 159. ADMINISTRATIVE RULES AND PROCEDURES

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §159.6

The Texas Commission for the Blind adopts amendments to §159.6, pertaining to rates for medical services with changes to the text proposed in the November 24, 2000, issue of the *Texas Register* (25 TexReg 11639). This rule is adopted as amended to satisfy the agency's statutory responsibility to adopt a rate schedule based on standards. The Board is not adopting subparagraphs (G)-(Z) and (BB)-(CC) of (b)(6) of the proposed text. The remaining paragraphs have been renumbered accordingly in this adoption. The changes are being made because subsequent to the proposal, rates already established by HCFA/Medicare were located for the services listed in these proposed subparagraphs and there is no longer a need for the Commission to establish a separate rate. The agency is also changing two rates that were based on Medicare 2000 rates instead of 2001 rates. Instead of paying a rate of $28 for "psychological service, group counseling, per hour, Ph.D. level of academic training and current licensure in accordance with requirements of the licensing entity" proposed in (b)(6)(DD), the rate has been corrected to $30.85. Instead of paying a rate of $25 for "psychological service, group counseling per hour, Master's level of academic training and current certification in accordance with requirements of the certifying entity" the rate has been corrected to $23.14.

The rate schedule as adopted contains the amounts the Commission will pay for medical services purchased for consumers. Subsection (c) contains the conditions under which payments for medical services may be negotiated. Subsection (d) advises the public of the means by which to view a complete compilation of all individual rates.

No comments were received on the proposal.

The amendments are adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.029, which authorizes the Commission to adopt rates the Commission will pay for medical services.

§159.6. Rates for Medical Services.

(a) Pursuant to Human Resources Code §91.029, the following rules and standards shall govern the rates the commission will pay for medical services:

(1) Subject to any limitations and exceptions specified in this section, eye-medical and related services purchased by the commission for consumers served by its various programs shall be paid for at rates not to exceed rates established by Health Care Finance Administration's (HCFA) relative value units (RVUs) adjusted by the Medicare conversion factor as applied to the Current Procedural Terminology (CPT). Where no HCFA RVU exists, a maximum payment shall be set that represents best value based upon factors that include reasonable and customary industry standards for each specific service. Subject to the same limitations and exceptions, noneye-medical and related services shall be paid at the rates established by the Texas Rehabilitation Commission.

(2) Rates for eye-medical and related services shall be established at a level adequate to insure availability of qualified providers in adequate numbers to provide assessment and treatment within a geographic distribution that mirrors consumer distribution.

(3) Rates for eye-medical and related services shall be adopted after comparing proposed rates to other cost-based rates for medical services, including Medicaid and Medicare rates. The commission shall document the reasons that any adopted rate exceeds the Medicaid or Medicare rate for the same service.

(4) Rates for eye-medical and related services shall be administered uniformly in all commission programs in accordance with federal regulations governing payment for vocational rehabilitation services, which allows the agency to establish and maintain written policies to govern the rates of payment for all purchased services insofar as the schedule:

(A) is not so low as to effectively deny an individual a necessary service;

(B) permits exceptions so that individual needs can be addressed; and

(C) takes into consideration the consumer's informed choice.

(5) The Board shall review its rate schedule for eye-medical and related services annually after a public hearing to consider whether adjustments are necessary. If between annual reviews it becomes necessary to set the amount of payment for a medical service because a payment rate is not established in these rules or is not otherwise available, the Executive Director is authorized to set the amount on an individual basis with the advice of the agency's medical and optometric consultants. The interim amounts shall be presented to the Board at the next scheduled annual review of all rates.

(6) Until rates are adopted pursuant to this section, the commission shall pay for medical services using amounts contained in the agency's Maximum Affordable Payment Schedule (MAPS). The MAPS shall continue to be maintained in its present form for public inspection at the commission's main office at 4800 North Lamar, Austin, Texas, 78756, until superseded.

(b) Rate schedule. Based on the standards set forth in subsection (a) of this section, the Commission shall pay for medical services according to the following:

(1) The Commission shall pay for eye-medical and related services according to the Health Care Financing Administration's (HCFA) Relative Value Units (RVU) base rate adjusted by the Medicare conversion factor if a rate for the service has been established.

(2) When there are no HCFA RVU rates established for eye-prosthetics and related items, the Commission shall pay the rates established by Medicare for durable medical equipment, prosthetics, orthotics, and supplies, if a rate for the service has been established.

(3) When there is no HCFA RVU and no established Medicare rate for eye-prosthetics and related items, the Commission shall pay the rates established by Medicaid for durable medical equipment, prosthetics, orthotics, and supplies, if a rate for the service has been established.

(4) When there is no rate established by Medicare and Medicaid for optical low-vision devices, the Commission shall purchase these from national suppliers at the lowest available catalog price.

(5) The Commission shall pay for noneye-medical and related services that are not unique to persons with visual disabilities according to the Texas Rehabilitation Commission's medical payment rates.

(6) For services and items for which there is neither a rate nor an industry standard that takes into consideration the unique needs of persons with vision loss, the Commission shall pay according to the following:

(A) Low vision evaluation: $226.92;

(B) Hand-held and other nonspectacle-mounted optical low vision devices: national supplier catalog price with an add-on of a 15% processing fee when purchased through a low vision specialist;

(C) Spectacle-mounted optical low vision devices: national supplier catalog price, with an add-on of a 25% prescriptive/processing fee when purchased through a low vision specialist;

(D) Telescopic and other compound optical low vision device systems, including distance vision telescopes, near vision telescopes and compound microscopic lens systems: national supplier catalog price, with an add-on of a 40% prescriptive processing fee when purchased through a low vision specialist;

(E) Poly carbon safety lens: base prescription, with a $15.32 per lens add-on;

(F) Deluxe frames (heavy duty; to support optical low vision lens(es), at or above plus or minus 8D, or spectacle mounted optical devices; not for use with lens(es) of less than 8D): $100.00;

(G) Psychological service, Comprehensive Vocational Evaluation System (CVES) used as Vocational Evaluation: $500.00;

(H) Psychological service, group counseling, per hour, Ph.D. level of academic training and current licensure in accordance with requirements of the licensing entity: $30.85;

(I) Psychological service, group counseling, per hour, Master's level of academic training and current certification in accordance with requirements of the certifying entity: $23.14.

(c) The executive director or the executive director's designee may establish procedures for and may negotiate payments for medical services under the following conditions:

(1) when a consumer's eye-medical condition requires medical services or a combination of eye-medical services unique to the consumer and rates adopted under subsection (b) of this section are not applicable or do not sufficiently describe the needed service; and

(2) when the service or combination of services is not expected to reoccur because of its uniqueness and adopting a standard rate serves no useful future purpose.

(3) when a new medical service or procedure has become FDA approved or when a related service or procedure has become available, and for which there are no established rates yet in any other payment systems.

(d) Maximum Affordable Payment Schedule (MAPS). A compilation of rates and detailed descriptions of the services are contained in the Maximum Affordable Payment Schedule (MAPS), which is available for viewing according to agency rules on access to public information. Because the compilation contains copyrighted information, the MAPS may not be duplicated for public use.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 7, 2001.

TRD-200102574

Terrell I. Murphy

Executive Director

Texas Commission for the Blind

Effective date: May 27, 2001

Proposal publication date: November 24, 2000

For further information, please call: (512) 377-0611

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40 TAC §159.8

The Texas Commission for the Blind adopts new §159.8, pertaining to Commission vehicle use without changes to the text published in the February 23, 2001, issue of the *Texas Register* (26 TexReg 1685). The rule is adopted to satisfy the requirements of Government Code §2171.1045 and is consistent with the General Services Commission's State Vehicle Fleet management Plan. The adopted rules specifically address the requirements that: (1) vehicles are assigned to the agency's motor pool and may be available for checkout; and (2) the agency may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if there is a documented finding that the assignment is critical to the needs and mission of the agency.

No comments were received on the proposal.

The rule is adopted under Human Resources Code §91.011, which authorizes the Commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs, as well as Texas Government Code §2171.1045, which requires the rule.

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 May 7, 2001.

TRD-200102573

Terrell I. Murphy

Executive Director

Texas Commission for the Blind

Effective date: May 27, 2001

Proposal publication date: February 23, 2001

For further information, please call: (512) 377-0611

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PART 9. TEXAS DEPARTMENT ON AGING

CHAPTER 254. OPERATION OF THE TEXAS DEPARTMENT ON AGING

40 TAC §254.24, §254.35

The Texas Department on Aging adopts new §254.24 and §254.35 concerning Agency Training Plan and Historically Underutilized Business Program. Section 254.24 is adopted with non substantive changes to the proposed text as published in the March 2, 2001, issue of the *Texas Register* (26 TexReg 1830). The text will be republished. Section 254.35 is adopted without changes to the proposed text as published in the March 2, 2001, issue of the *Texas Register* (26 TexReg 1830) and will not be republished.

Section 254.24 is adopted in order to conform to Texas Government Code, Chapter 656, Subchapter C, which directs state agencies to provide training and educational opportunities to its employees.

Section 254.24 will become effective 20 days after the final adopted rule was filed with *Texas Register* or on the day the rule is approved by the Governor, whichever is later.

As identified in §254.24(c)(2)(B) (relating to eligibility), the department may provide training for an employee if such training is directly related to the employee's current job duty. This is to further enhance their job performance.

The requirement under §254.24(d)(1)(A) (relating to employee training), is to encourage employees to acquire the full benefit of training they may receive. Section 254.24(d)(1)(B) is included to provide the department administrative control over employee training.

Section 254.35 is adopted in order to conform to Texas Government Code, §2161.003, which directs state agencies to adopt the rules of the General Services Commission (GSC) regarding historically underutilized businesses (HUBs) as the agency's own rules. Those rules apply to the Board's purchase of goods and services paid for with appropriated money. The GSC rules the Board will adopt by reference provide for a policy and a purpose for the rules, definitions applicable to the HUB rules, annual procurement HUB utilization goals, subcontracting requirements, agency planning responsibilities, state agency reporting requirements, A HUB certification process, protests from denial of HUB applications, a HUB recertification process, revocation provisions, certification and compliance reviews, compilation of a HUB directory, HUB graduation procedures, review and revision of GSC's HUB program, a memorandum of understanding between GSC and the Texas Department of Economic Development concerning technical assistance and budgeting for the HUB program, HUB coordinator responsibilities, HUB forum programs for state agencies, and a mentor-protégé program.

No comments were received regarding adoption of the new rules.

The new rules are adopted under Texas Government Code, §2161.003, which provides the Texas Department on Aging with the authority to promulgate rules governing the operation of the Department.

§254.24. Agency Training Plan.

(a) Purpose. In accordance with the State Employees Training Act, Government Code, Chapter 656, Subchapter C, it is the policy of the Texas Department on Aging (TDoA) to provide training and educational opportunities to its employees. This program is designed to help employees gain knowledge about general subjects required by the agency and to allow employees to participate in job related professional development opportunities that will increase an employee's job potential. This subchapter prescribes the policies governing employee eligibility for participation in TDoA's Staff Training and Development program and the obligations of the employees upon receiving education.

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

(1) Academic Training--Any subject offered through an accredited college or university.

(2) Department--The Texas Department on Aging.

(3) Employee--An individual employed with TDoA in either a full-time or part-time position, not including contract employees.

(4) Hardship--A serious or catastrophic illness, family emergency, or extenuating circumstance beyond the control of the student that precludes the student from being reasonably expected to comply with the terms of an education assistance agreement.

(5) Institution of higher education--A public or private technical institute, junior college, senior college, university, medical or dental unit, or other institution offering an associate's, baccalaureate, master's, or doctoral degree program.

(6) Part-time employee--An individual employed with TDoA and working less than 40 hours per week.

(7) Professional development--Educational, academic or technical training used to improve an employee's professional or technical knowledge and skills or to maintain license requirements.

(8) Reimburse--To repay monies spent for the cost of public college or university's tuition fees and books.

(9) TDoA--The Texas Department on Aging.

(10) Training--Planned, structured activities designed to improve employee job performance and job related skills by achieving specific, measurable, and predetermined learning objectives.

(c) Employee Training.

(1) Purpose. TDoA provides employees with a program which allows employees to gain knowledge about general subjects and encourages employees to participate in job related professional development opportunities that will help each employee to achieve his or her highest potential for the job they hold. This section establishes eligibility criteria for employee participation in TDoA training opportunities.

(2) Eligibility. TDoA may provide training for an employee if such training is:

(A) designed to increase the employee's competency through an objective, systematic program of teaching and/or self-study and is utilized to improve an employee's professional or technical knowledge and skills, or to maintain license requirements;

(B) directly related to the employee's current job duties, or for the purpose of upward mobility into a position currently available within the employee's career path; or

(C) designed to increase an employee's awareness of State or Federal laws regarding equal opportunity, non-discrimination, Drug-Free workplace, AIDS/HIV, workplace safety and other relevant topics.

(d) Employee Training Obligations.

(1) Obligation. Employee training under this section is conditional upon:

(A) the employee attending and satisfactorily completing the training, including passing tests or other types of performance measures where required; and

(B) as required by the TDoA, the employee completing and filing with TDoA, on forms prescribed by TDoA, an employee training agreement that sets forth the terms and conditions of the training assistance.

(2) Waiver. For training covered by Texas Government Code, Chapter 656, Subchapter D, the Texas Board on Aging has the discretion to waive an employee's obligation to abide by the terms of the agreement if the Board finds that a waiver is in the best interest

of TDoA or is warranted because of an extreme personal hardship suffered by the employee.

(e) Academic Training Program.

(1) Purpose. The Texas Department on Aging (TDoA) encourages employees to participate in job related professional development opportunities that will help each employee to achieve his or her highest potential for the job they hold or allow upward mobility into a position within their career path. This section establishes eligibility criteria for participation in the program.

(2) Eligibility. To qualify for the academic training program, the employee:

(A) must currently meet or exceed performance standards in job performance;

(B) must not be on probation of any kind;

(C) must seek enrollment in a field of study where:

(i) course content is related to the employee's present job duties, or the course is taken for the purpose of upward mobility into a position available within the agency; and

(ii) the course will equip the employee with skills and knowledge needed to work efficiently and improve the employee's job effectiveness;

(3) Type of Institution. An employee who participates in the Academic Training Program must attend a public institution in the State of Texas, unless:

(A) no accredited public institution offers program courses that can reasonably be attended by an employee;

(B) a public institution does not offer the approved courses or degree program;

(C) the admission requirements of the public institution are so restrictive as to preclude the employee's qualifications for the program;

(D) the completion of the course at a private institution costs less than a public institution; or

(E) Waiver.

(i) The Executive Director has the authority to approve a waiver to allow an employee to attend a private institution to complete coursework when similar coursework is offered in a public institution.

(ii) The Department will provide financial assistance up to the amount of what the coursework would cost in a public institution.

(4) Eligible Expenses. Financial assistance may be awarded for tuition fees and books.

(f) Academic Training Program Obligations.

(1) Obligation. Academic training under this section is conditional upon:

(A) the course must be taken after working hours or, if the course is taken during working hours, accrued leave is taken to attend class;

(B) the employee having continued employment in good standing for the entirety of the course;

(C) the employee completed the course with a grade of "C" or above; and

(D) as required by the Texas Department on Aging (TDoA), the employee completing and filing with TDoA, on forms prescribed by TDoA, an employee training agreement that sets forth the terms and conditions of the training assistance.

(2) Waiver. For training covered by Texas Government Code, Chapter 656, Subchapter D, the Texas Board on Aging has the discretion to waive an employee's obligation to abide by the terms of the agreement if the Board finds that a waiver is in the best interest of TDoA or is warranted because of an extreme personal hardship suffered by the employee.

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 May 14, 2001.

TRD-200102676
Gary Jessee
Aging Network Policy Coordinator
Texas Department on Aging
Effective date: June 3, 2001
Proposal publication date: March 2, 2001
For further information, please call: (512) 424-6857

PART 15. TEXAS VETERANS COMMISSION

CHAPTER 453. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

40 TAC §453.1

The Texas Veterans Commission adopts new §453.1 concerning Historically Underutilized Businesses without changes to the proposed text as published in the February 2, 2001, issue of the *Texas Register* (26 TexReg 1126).

The new rule will incorporate by reference the rules adopted by the General Services Commission (GSC) for Historically Underutilized Businesses. The new rule conforms with Texas Government Code, §2161.003 which directed state agencies to adopt the GSC rules regarding Historically Underutilized Businesses (HUB) as the agencies own rules. The GSC rules appear in 1 TAC §§111.11-111.27. The Commission's adopted rule adopts by reference GSC's rules.

There were no comments received concerning the new section.

The new section is adopted under §434.010 of the Government Code, which provides that the Texas Veterans Commission may adopt rules that it considers necessary for its administration.

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 May 8, 2001.

TRD-200102587

James E. Nier
Executive Director
Texas Veterans Commission
Effective date: May 28, 2001
Proposal publication date: February 2, 2001
For further information, please call: (512) 463-5538

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action

The Commissioner of Insurance ("Commissioner") at a public hearing under Docket No. 2485 on May 15, 2001, held at 9:30 a.m., in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, adopted amendments to the Texas Statistical Plan For Residential Risks ("Stat Plan") as proposed by the staff of the Texas Department of Insurance ("TDI').

The amendments proposed by TDI staff are necessary in order to collect experience to support the adjustment of rates for newly adopted Law and Ordinance endorsements. TDI staff proposed amendments to add options to the Law and Ordinance field of the statistical plan. The proposed options for this field are:

0--No Additional Law and Ordinance Coverage is attached to policy (other than the mandatory $5,000 provided in the policy).

1--10% Additional Law and Ordinance Coverage Purchased.

2--15% Additional Law and Ordinance Coverage Purchased.

3--25% Additional Law and Ordinance Coverage Purchased.

4--Other Approved Limits Purchased.

Staff's petition (Ref. P-0301-05-I) proposing the amendments was filed with the TDI Chief Clerk on March 16, 2001, and notice of the filing was published in the March 30, 2001 issue of the *Texas Register* (26 TexReg 2545).

The Commissioner adopted all of the amendments described herein at the May 15, 2001 public hearing.

The Commissioner has jurisdiction over this matter pursuant to the Insurance Code, Articles 5.05 and 5.96 and §38.202. Article 5.05 authorizes the Commissioner to promulgate and modify statistical plans which shall be used by each insurer in the recording and reporting of its loss experience and such other data as may be required. Article 5.96 authorizes the Commissioner to prescribe, promulgate, adopt, approve, amend, or repeal standard and uniform manual rules, rating plans, classification plans, statistical plans and policy and endorsement forms for homeowners and dwellings insurance. Section 38.202 authorizes the Commissioner to contract with or designate a statistical agent to gather data from reporting insurers under a statistical plan and to adopt rules necessary to accomplish the purposes of that article.

The amendments as adopted by the Commissioner are filed with the TDI Chief Clerk under Ref. No. P-0301-05-I and are incorporated by reference by Commissioner's Order 01-0456.

Consistent with the Insurance Code, Article 5.96(h), prior to the effective date of this action, TDI will notify all insurers writing the affected lines of insurance in this state of this action. This notification is made pursuant to the Insurance Code, Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, ch. 2001).

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

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the amendments to the Texas Statistical Plan for Residential Risks as described herein, be adopted to be effective for reporting for all affected insurers on July 1, 2001.

TRD-200102748
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: May 16, 2001

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by 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 Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 111, Control of Air Pollution from Visible Emissions and Particulate Matter. This review of Chapter 111 is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9- 10.13, 76th Legislature, 1999, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 111 regulates air pollution from visible emissions and particulate matter and establishes emission limits and requirements, prescribes monitoring and sampling methods, and provides for exemptions. These emissions are associated with outdoor burning, incineration, abrasive blasting, materials handling, construction and demolition, and nonagricultural and agricultural processes. This chapter has been revised 17 times since its original adoption and contains two subchapters: Subchapter A, Visible Emissions and Particulate Matter, and Subchapter B, Outdoor Burning. Subchapter A contains seven divisions.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review of the rules in Chapter 111 and determined that the reasons for adopting these rules continue to exist. These rules are needed to accomplish the purposes and implement provisions of the Federal Clean Air Act as codified in 42 United States Code (USC) and the Texas Clean Air Act (TCAA). Generally, the Chapter 111 rules implement Texas Health and Safety Code, TCAA, §382.011, which requires the commission to control the quality of the state's air, and §382.012, State Air Control Plan, which requires the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air.

Title 42 USC, §7409, requires the United States Environmental Protection Agency (EPA) to prescribe national ambient air quality standards (NAAQS) and §7410 requires each state to adopt and submit a plan which provides for implementation, maintenance, and enforcement of such primary air quality standards. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established those standards. Under 42 USC, §7410 and related provisions, the states must submit a state implementation plan (SIP) for EPA approval that provides for the attainment and maintenance of NAAQS through control programs directed to sources of the pollution involved. The rules in Chapter 111 meet this federal requirement. The rules in Chapter 111 are part of the plans required in 42 USC, §7410 and TCAA, §382.012. Divisions are discussed more specifically in the following paragraphs.

Division 1, Visible Emissions, establishes standards, test methods, and alternate opacity limitations for stationary vents, gas flares, motor vehicles, railroad locomotives or ships, structures, and other sources. Division 1 requires continuous emissions monitoring for certain steam generators and catalyst regenerators for fluid bed catalytic cracking units. Initially developed under TCAA, §382.012, these provisions were added to the SIP (42 USC, §7409 and §7410) in 1972. Division 1 also contains operating restrictions for solid fuel heating devices (wood-burning stoves) in the City of El Paso. These requirements were developed specifically as part of the SIP (42 USC, §7409 and §7410) to control particulate emissions.

Division 2, Incineration, establishes requirements for single-, dual-, and multiple-chamber incinerators and commercial facilities burning hazardous waste fuels and includes testing, monitoring, recordkeeping, and operating requirements. These rules were developed under TCAA, §382.012, to control emissions from incinerators. Requirements for medical waste incinerators were moved from Chapter 111 to Chapter 113, Subchapter D (§§113.2070 - 113.2079) in 2000 as part of a federal requirement, 42 USC, 7411(d), that supercedes the state requirement. All of the incinerator rules in this division will be moved to Chapter 113 as EPA adopts other rules under 42 USC, 7411(d).

Division 3, Abrasive Blasting of Water Storage Tanks Performed by Portable Operations, was developed under TCAA, §382.012, to control airborne lead and particulate matter and establishes definitions, testing and control requirements for surfaces with coatings containing lead, and exemptions.

Division 4, Materials Handling, Construction, Roads, Streets, Alleys, and Parking Lots, was developed specifically as part of the SIP (42

USC, §7409 and §7410) to control total suspended particulate and inhalable particulate matter in specified geographic areas.

Division 5, Emissions Limits on Nonagricultural Processes, was developed under TCAA, §382.012, to control particulate emissions and establishes allowable emissions limits for nonagricultural processes, allowable emissions limits for steam generators, and limits for ground level concentrations from nonagricultural processes.

Division 6, Emissions Limits on Agricultural Processes, was developed under TCAA, §382.012, to control emissions of particulate matter and establishes emission limits for persons affected by TCAA, §382.020, based on the process weight method or if requested, an alternate method with equivalent emission control efficiency, and exemptions.

Division 7, Exemptions for Portable or Transient Operations, developed under TCAA, §382.012, establishes an exemption policy and requirements for exemptions.

Subchapter B, Outdoor Burning, was developed under TCAA, §382.018, to control emissions of particulate matter. It contains a general prohibition against outdoor burning and prohibits disposal of material capable of igniting spontaneously, except as provided in the subchapter. It also includes definitions and exemptions.

The commission's review of Chapter 111 also revealed necessary corrections. For example, compliance provisions contain deadlines that have passed, the EPA determined some of the monitoring requirements to be insufficient, and there are out-of-date references which need to be deleted or corrected. The commission intends to consider correction of these items during future rulemaking actions.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The commission invites comments on whether the reasons for the rules in Chapter 111 continue to exist. The commission also invites comments on any corrections or other revisions that should be considered in the previously mentioned future rulemaking. Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-063-111-AI. Comments must be received by 5:00 p.m., June 25, 2001. For further information or questions concerning this proposal, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

TRD-200102699
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: May 14, 2001

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Texas Workers' Compensation Commission

Title 28, Part 2

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 166 concerning Workers' Health & Safety - Accident Prevention Services. 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 agency's reason for adopting the rules contained in these chapters continues to exist and it proposes to readopt these rules.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on July 2, 2001, and submitted to Nell Cheslock, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH 35, Austin, Texas 78704-7491.

CHAPTER 166. WORKERS' HEALTH & SAFETY - ACCIDENT PREVENTION SERVICES: §166.1. Definitions of Terms. §166.2. Initial Licensing and Resumption of Writing of Workers' Compensation Insurance. §166.3. Annual Report to the Commission. §166.4. Required Accident Prevention Services. §166.5. Required Periodic Inspections of Accident Prevention Services and Site of Inspection. §166.6. Exchange of Information for the Inspection. §166.7. Inspection of Accident Prevention Services: Conducting and Reporting. §166.8. Qualification of Field Safety Representatives. §166.9. Approval of Occupational Health and Safety Education Programs.

TRD-200102728
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: May 15, 2001

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Texas Workforce Commission

Title 40, Part 20

The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 800, Subchapter D, Incentive Award Rules, Subchapter E, Sanctions Rules, Subchapter F, Interagency Matters, and Subchapter G, Petition for Adoption of Rules in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102713
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 803, relating to the Skills Development Fund in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule

reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102714
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 813 relating to Food Stamp Employment and Training in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102715
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 817 relating to Child Labor in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102716
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 823 relating to General Hearings in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102717
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 835 relating to the Self-Sufficiency Fund in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102718
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

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The Texas Workforce Commission (Commission) files this notice of its intent to review Chapter 839, Subchapter A. General Provisions and Subchapter B. Nondiscrimination and Equal Opportunity in accordance with Texas Government Code §2001.039.

An assessment will be made by the Commission as to whether the reasons for adopting or readopting the rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the Commission.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to John Moore, Assistant General Counsel, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas, 78778-0001; via facsimile at (512) 463-2220; or via e-mail at john.moore@twc.state.tx.us.

For information about the Commission, please visit our web page at www.texasworkforce.org.

TRD-200102719
John Moore
Assistant General Counsel
Texas Workforce Commission
Filed: May 15, 2001

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC 105.10(c)(1)

MSRP	$20,000
Less Dealer Discount	1,000
Sale Price	$19,000

Figure: 16 TAC 105.10(c)(2)

MSRP	$18,000
Less Dealer Discount	500
Sale Price	$17,500

Figure: 16 TAC 105.10(c)(3)

MSRP	$20,000
Less Rebate	500
Less Dealer Discount	500
Sale Price	$19,000

Figure: 16 TAC 105.10(d)

Total Vehicle Plus Options	$10,995.00
Option Package Discount	1,000.00
MSRP	9,995.00
Less Rebate	500.00
Less Dealer Discount	500.00
Sale Price	$8,995.00

Figure: 16 TAC 105.10(e)

MSRP	$9,995.00
Less Rebate	500.00
Less Dealer Discount	500.00
Sale Price	$8,995.00

FIRST TIME BUYERS RECEIVE ADDITIONAL $500.00 OFF

Figure: 22 TAC §75.7(a)

FEE	BOARD FEE	§153(b)	TOTAL FEE
(1) License Renewal--Active	$125	$200	$325
(2) Jurisprudence Examination/Re-examination	$125	$200	$325
(3) License--Provisional (reciprocal)	$125	$200	$325
(4) License--New	$125		
(5) License Replacement	$ 25		
(6) Annual Certificate Replacement	$ 10		
(7) Certification of License	$ 25		
(8) Continuing Education Course Registration (yearly fee per course)	$ 25		
(9) Radiologic Technologist Registration Application or Annual Renewal	$ 35		
(10) Facility License or Annual Renewal	$ 40		
(11) Verification of Educational Courses/Grades	$ 50		
(12) Verification of Texas Licensure (per request per chiropractor) plus $1 for postage and handling	$ 1		
(13) Returned Check	$ 25		

Figure : 22 TAC §75.11(b)

MAXIMUM SANCTIONS TABLE

CATEGORY I. 1st Offense: $1000* 2nd Offense: $1000* 3rd Offense: $1000* *and/or revocation	
Violation	Reference:
Practicing without a chiropractic license	22 TAC §75.10(d) CA §§201.301
Practicing with an expired license (nonrenewal due to default student loan)	22 TAC §§73.2(c)(6) & (e) CA §§201.301, .351, .354(f)
Practicing with an expired license (nonrenewal)	22 TAC §73.2(e) CA §§201.301, .351,.354(f)
Practicing while on inactive status	22 TAC §73.4(f) CA §§201.301, .311(b)(2)
Practicing in non-compliance with continuing education requirements	22 TAC §§73.3, 73.5(g) CA §§201.301, .354(f)
Improper control of patient care and treatment	22 TAC §74.5(c)
Grossly unprofessional conduct	22 TAC §75.1 CA §§201.502(a)(7)
Lack of diligence/gross inefficient practice	22 TAC §75.2 CA §§201.502(a)(18)
Performing radiologic procedures without registering, with an expired registration, or without TDH approval; failure to renew (including non-payment of fees)	22 TAC §§78.1(a), (d), (h)
MRTCA, TDH rules or order	22 TAC §§78.1(h), (j), (o)
Performing (1) radiologic procedures without supervision, or (2) cineradiography or other restricted procedure	22 TAC §§78.1(g), (k), (l), (m)
Permitting a non-registered or non-TDH approved person to perform radiologic procedures or CRT to perform procedures without supervision	22 TAC §§78.1(k), (n)
Delegating to a non-licensee authority to perform adjustments or manipulations	22 TAC §80.1(a)
Failure to supervise a student	22 TAC §80.1(b)
Delegating authority to a licensee whose license has	22 TAC §80.1(d)

been suspended or revoked	
Failure to comply with the CA, other law or a board order or rule	22 TAC §75.10(c) CA §§201.501, .502(a)(1)
Failure to comply with down-time restrictions	22 TAC §75.10(f)
Medicaid fraud	CA §§201.502(a)(2), (7); HRC §36.002, .005
Solicitation	Occ. Code §§102.001, .006
Other statutory violations	CA §§201.502(a)(2)-(8), (10), (12)-(17), (19)-(20)
CATEGORY II. 1st Offense: $500 2nd Offense: $750* 3rd Offense: $1000* *and/or suspension	
Violation	Reference
Submitting an untrue continuing education certification	22 TAC §73.3(1)(E) CA §§201.502(a)(2)
Operating a facility without a license or with an expired license or practicing in a facility with an expired license	22 TAC §§74.2(a), 74.3(e), 74.5 CA §201.301
Unauthorized disclosure of patient records	22 TAC §80.3 CA §§201.402, .405
Overtreating/overcharging a patient	22 TAC §75.1(a)(4) HPCA §101.203
Deceptive advertising & other prohibited advertising	22 TAC §77.2 CA §§201.502(a)(2), (9), (11); HPCA §101.201
CATEGORY III. 1st Offense: $250 2nd Offense: $500* 3rd Offense: $1000* *and/or suspension	
Violation	Reference
Failure to furnish patient records Overcharging for copies of patient records	22 TAC §80.3 CA §§201.405(f)
Failure to disclose charges to patient	22 TAC §§75.1(a)(6), 77.3(a) HPCA §101.202
Failure to submit to medical examination	22 TAC §80.3(h)
Failure to maintain patient records	22 TAC §80.5
CATEGORY IV. 1st Offense: $250 2nd Offense: $500 3rd Offense: $1000	
Violation	Reference

Figure : 22 TAC §75.11(b)

Failure to respond to board inquiries	22 TAC §§73.3(1)(C), 75.3(h), 75.6, 80.3(g)
Failure to display public interest information Displaying an invalid license or renewal card	22 TAC §§75.7(d), (e), 75.8 CA §§201.502(a)(2), (9)
Failure to complete CRT continuing education	22 TAC §§78.1(i)
CATEGORY V. 1st Offense: $250 2nd Offense: $400 3rd Offense: $500	
Violation	Reference
Failure to report change of address	22 TAC §73.1
Failure to report change of facility address/ownership	22 TAC §§74.5(d)
Failure to report *locum tenens* information	22 TAC § 73.2(b)
Failure to report criminal conviction	22 TAC §75.3(f)
Use of the term "physician," "chiropractic physician"	CA §201.502(a)(22)
Failure to use "chiropractic," "D.C." in advertising	22 TAC §75.1(a)(2)

Figure 1: 30 TAC §335.1(128)(D)(iv)

TABLE 1

	Use Constituting Disposal S.W. Def. (D)(i)(1)	Energy Recovery/Fuel S.W. Def. (D)(ii)(2)	Reclamation S.W. Def. (D)(iii)(3)[2]	Speculative Accumulation S.W. Def. (D)(iv)(4)
Spent materials (listed hazardous & not listed characteristically hazardous)	*	*	*	*
Spent materials (nonhazardous)[1]	*	*	*	*
Sludges (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
Sludges (not listed characteristically hazardous)	*	*		*
Sludges (nonhazardous)[1]	*	*		*
By-products (listed hazardous in 40 CFR §261.31 or §261.32)	*	*	*	*
By-products (not listed characteristically hazardous)	*	*		*
By-products (nonhazardous)[1]	*	*		*
Commercial chemical products (listed, not listed characteristically hazardous, and nonhazardous)	*	*		
Scrap metal other than excluded scrap metal (see §335.17(9)) (hazardous)	*	*	*	*
Scrap metal other than excluded scrap metal (see §335.17(9)) (nonhazardous)[1]	*	*	*	*

NOTE: The terms "spent materials", "sludges", "by-products", "scrap metal" and "excluded scrap metal" are defined in §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials).

[1] These materials are governed by the provisions of §335.24(h) only.
[2]Except as provided in 40 CFR §261.4(a)(17) for mineral processing secondary materials

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Office of the Attorney General

Texas Clean Air Act, Texas Solid Waste Disposal Act and the Texas Water Code Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Clean Air Act, Texas Solid Waste Disposal Act and the Texas Water Code. Before the State may settle a judicial enforcement action under the Health and Safety 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 Code.

Case Title and Court: Harris County, Texas and the State of Texas v. Slay Transportation Co., Inc., Case No. 2000-42605, in the 113th District Court of Harris County, Texas.

Nature of Defendant's Operations: Defendant allegedly engaged in illegal air emissions at its tank washing facility located at 16643 Jacintoport Boulevard in Harris County, Texas, in violation of its air permit, of the Texas Clean Air Act, Texas Solid Waste Disposal Act and the Texas Water Code. Remediation of the violations is the subject of this litigation and proposed settlement.

Proposed Agreed Judgment: The judgment enjoins Defendant to comply with state law and to make additional improvements to reduce air pollution. The judgment requires Defendant to pay $95,000 in civil penalties, $6,000 in attorney's fees, plus costs of court. Additionally, the judgment requires Defendant to fund an ozone monitoring program in Harris County, Texas; in the total amount of $150,000.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Terry N. Peterson, 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, please call A.G. Younger at (512) 463-2110.

TRD-200102624
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: May 10, 2001

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State Auditor's Office

Request for Offer

Notice of Invitation for Offer: The State Auditor's Office (SAO) invites offers of auditing services for the purposes of performing the federal portion of the Texas State Single Audit (Single Audit), as described in more detail below.

General Information: The Single Audit is an annual audit for the State of Texas. It is conducted in order that the State may comply with the Single Audit Act Amendments of 1996 (Act) and *Office of Management and Budget (OMB) Circular A-133*. The Single Audit scope includes the State's Comprehensive Annual Financial Report, the "Schedule of Expenditures of Federal Awards," controls, compliance, and the submission of the data collection form, as described in *OMB Circular A-133*.

Offers submitted in response to this Request for Offer (RFO) will be evaluated by SAO to determine whether to enter into a contract to perform the federal portion of the Single Audit, as described in more detail below. All terms of an offer, specifically including price, are subject to negotiation by SAO. SAO expressly reserves the right to continue to perform the federal portion of the Single Audit if, in its sole discretion, SAO determines that it would be more effective and efficient to do so, price and other factors being considered.

An Offeror selected for this engagement would be expected to conduct the federal portion of the Single Audit in accordance with requirements as set forth in the Act and all applicable rules and regulations. SAO will continue to perform the audit work related to financial reporting. For purposes of the Single Audit, the State of Texas is defined as all agencies; departments; colleges and universities; and other entities of the executive, legislative, and judicial branches of the Texas state government (state entities).

Although most state entities are headquartered in Austin, Texas, the requirements of the engagement will require a certain amount of travel to state agencies' offices and universities at various locations in the State. Additional information concerning the amount of travel historically required to perform the requested services will be available at the Information Conference described below.

Summary of the Audit Deliverables: An Offeror selected for this engagement would be responsible for planning, conducting, and reporting the federal portion of the Single Audit, and for providing the following:

1. *The Schedule of Expenditures of Federal Awards* with the Auditor's Opinion including reconciliation to federal revenues as reported in the Comprehensive Annual Financial Report.

2. The following Single Audit Reporting Requirements:

a) Auditor's report on Compliance with Requirements Applicable to each Major Program and on Internal Control over Compliance in Accordance with *OMB Circular A-133*.

b) Federal awards portion of Section 1, Summary of Auditor's Results for Federal Awards, and Section 3, Federal Award Findings and Questioned Costs of the Schedule of Findings and Questioned Costs.

c) Schedule of Prior Year Audit Findings.

d) Management's Corrective Action Plan for federal findings.

e) Part III of the Data Collection Form.

3. A summary of federal schedule audit adjustments by agency name and number, state fund name and number, Catalog of Federal Domestic Assistance (CFDA) number, and by account number using the Comptroller's statewide consolidation chart of accounts.

4. A summary of any contingent liabilities related to federal awards existing as of August 31 for each period audited.

5. Subsequent events related to federal awards between August 31 and the opinion date of the Schedule of Expenditures of Federal Awards.

Deliverables must be furnished by February 20 of each year of the contract period. A more complete description of the audit engagement and deliverables will be included in the Offer Preparation Instructions described below.

Information Conference: Prospective Offerors are encouraged to attend the Information Conference. The purpose of this conference will be to provide an overview of the audit engagement and to respond to questions from prospective Offerors.

Date: June 6, 2001

Time: 9 a.m. - Noon

Number of attendees per Offeror: Maximum of three

Location:

Robert E. Johnson Conference Center

1501 North Congress Avenue

Austin, Texas

Parking is available in the Capitol Visitor's Parking Garage (San Jacinto and 12th Street)

Additional Information Concerning the Requested Services: In order to ensure that all Offerors have the same information and instructions concerning the preparation of offers, with the exception of the Information Conference, all communications between Offerors and SAO prior to the closing date of receipt of offers must be in writing.

All questions or requests for additional information should be in written form and directed to the Contract Liaison by mailing to:

SINGLE AUDIT QUESTION/REQUEST - TO BE OPENED BY AUDIT PERSONNEL ONLY Susan Riley State Auditor's Office P.O. Box 12067 Austin, Texas 78711-2067

Or by e-mailing to sriley@sao.state.tx.us with "Single Audit Question/Request (Date)" in the subject line.

All questions or requests must be received no later than 5 p.m. (CDT) on June 27, 2001. If SAO determines that a response is warranted, the question received and SAO's written response will be transmitted to each Offeror documented as having received the Offer Preparation Instructions from SAO.

If SAO considers it necessary or advisable, Offerors will be required to make oral presentations to SAO or will otherwise be required to respond to specific questions concerning offer design and content. An Offeror's preparation and submittal of an offer or subsequent participation in presentations or contract negotiations creates no obligation to award a contract or to pay any associated costs.

Offer Preparation Instructions: A more complete description of the terms and conditions of the engagement will be included in the Offer Preparation Instructions, copies of which will be available on or after May 29, 2001, at the State Auditor's Office in the Robert E. Johnson State Office Building, 15th Street and Congress Avenue, 4th floor reception area, Austin, Texas, between the hours of 8 a.m. and 5 p.m., Monday through Friday. A copy may also be obtained by submitting a written request to: Texas Single Audit Offer, State Auditor's Office, P.O. Box 12067, Austin, Texas, 78711-2067, Attention: Susan Riley. Written requests may be submitted by letter (sent to the above address), by FAX (512-936-9400), or by e-mail (sriley@sao.state.tx.us), and should include specific information (contact person, street and e-mail address, and telephone number) to enable SAO to make follow-up contacts as necessary.

Closing Date of Receipt of Proposals: Offers to provide the requested audit services may be hand-delivered to the State Auditor's Office at the Robert E. Johnson State Office Building, 15th Street and Congress Avenue, 4th floor reception area, Austin, Texas, between the hours of 8 a.m. and 5 p.m., Monday through Friday, or sent by commercial carrier to the address specified above. Only those offers documented as being received prior to 5 p.m. on July 5, 2001, will be considered. It shall be the Offeror's responsibility to ensure that appropriate documentation of receipt is obtained.

Selection Process: In evaluating offers, SAO will consider:

* The demonstrated competence, knowledge, and qualifications of the Offeror as a whole and of the professional staff who will work on the engagement.

* The Offeror's experience and technical expertise in performing the Single Audit.

* The extent to which the offer accomplishes the purpose and specifications of this Request for Offer and Preparation Instructions.

* The reasonableness of costs for the services offered.

* When other considerations are equal, an Offeror whose principal place of business is within the State of Texas, or who will manage the engagement within the State of Texas, will be given preference.

* Historically underutilized businesses are encouraged to submit or participate in the submission of an offer.

Project Timing: Contingent upon the successful negotiation of a contract, the selected Offeror will conduct the federal portion of the State's

Single Audit for the fiscal years ending August 31, 2001 and August 31, 2002, and at SAO's option, August 31, 2003. As noted above, contract deliverables must be furnished by February 20 of each year of the contract period.

General Terms and Conditions: SAO reserves the right to accept or reject any (or all) offers submitted and to negotiate on all terms of an offer, including price. The information contained in this RFO is intended to serve only as a general description of the services desired. Additional terms and conditions relating to this RFO will be provided in the Offer Preparation Instructions. The responses hereto will be used as a basis for further negotiation of specific details with Offerors. Issuance of this RFO creates no obligation to award a contract or to pay any costs incurred in the preparation of a proposal.

TRD-200102740
Douglas C. Brown
General Counsel
State Auditor's Office
Filed: May 16, 2001

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Texas Bond Review Board

Biweekly Report of the 2001 Private Activity Bond Allocation Program

The information that follows is a report of the 2001 Private Activity Bond Allocation Program for the period of April 28, 2001 through May 11, 2001.

Total amount of state ceiling remaining unreserved for the $325,809,688 subceiling for qualified mortgage bonds under the Act as of May 11, 2001: $112,841,994.50

Total amount of state ceiling remaining unreserved for the $143,356,262 subceiling for state-voted issue bonds under the Act as of May 11, 2001: $143,356,262

Total amount of state ceiling remaining unreserved for the $97,742,906 subceiling for qualified small issue bonds under the Act as of May 11, 2001: $94,742,906

Total amount of state ceiling remaining unreserved for the $215,034,394 subceiling for residential rental project bonds under the Act as of May 11, 2001: $17,239,394

Total amount of state ceiling remaining unreserved for the $136,840,069 subceiling for student loans bonds under the Act as of May 11, 2001: $31,840,069

Total amount of state ceiling remaining unreserved for the $384,455,431 subceiling for all other issue bonds under the Act as of May 11, 2001: $23,855,431

Total amount of the $1,303,238,750 state ceiling remaining unreserved under the Act as of May 11, 2001: $421,849,056.50

Following is a comprehensive listing of applications, which have received a Certificate of Reservation pursuant to the Act from April 28, 2001 through May 11, 2001:

1) Issuer: Austin HFC

User: TWC Housing, LLC

Description: Multifamily Residential Rental Project--Blunn Creek Apts.

Amount: $15,000,000

2) Issuer: TDHCA

User: Quebec One Apartments LP

Description: Multifamily Residential Rental Project--Quebec One Apts.

Amount: $11,500,000

3) Issuer: Houston HFC

User: MV2000, Ltd

Description: Multifamily Residential Rental Project--Maxey Village Apts.

Amount: $8,800,000

4) Issuer: Hillsboro IDC

User: L. B. Foster Co.

Description: Small Issue IDB

Amount: $2,000,000

5) Issuer: Harris County IDC

User: Deer Park Refining LP

Description: All Other Issue--Deer Park, Texas

Amount: $25,000,000

Following is a comprehensive listing of applications, which have issued and delivered the bonds and received a Certificate of Allocation pursuant to the Act from April 28, 2001 through May 11, 2001:

1) Issuer: Housing Option, Inc.

User: Roseland Fellowship, LP

Description: Multifamily Residential Rental Project--Roseland Gardens

Amount: $6,425,000

2) Issuer: Gulf Coast Waste Disposal Authority

User: Republic Waste Services of Texas Ltd

Description: All Other Issue--League City, Texas

Amount: $3,500,000

3) Issuer: Colorado River Municipal Water District

User: Republic Waste Services of Texas Ltd

Description: All Other Issue--Odessa, Texas

Amount: $4,000,000

4) Issuer: Trinity River Authority

User: Community Waste Disposal, Inc.

Description: All Other Issue--Dallas, Texas

Amount: $20,000,000

5) Issuer: Port Arthur Navigation District IDC

User: Air Products and Chemical, Inc.

Description: All Other Issue--Port Arthur, Texas

Amount: $25,000,000

6) Issuer: Calhoun County Navigation District

User: Formosa Plastics Corp.

Description: All Other Issue--Point Comfort, Texas

Amount: $25,000,000

7) Issuer: Houston HFC

User: Houston Bellfort Pines Apts.

Description: Multifamily Residential Rental Project--Bellfort Pines Apts.

Amount: $10,000,000

8) Issuer: Panhandle-Plains Higher Education Authority, Inc.

User: Eligible Borrowers

Description: Student Loan Bonds

Amount: $35,000,000

9) Issuer: Montgomery County HFC

User: Montgomery Trace Apts.

Description: Multifamily Residential Rental Project--Montgomery Trace Apts.

Amount: $7,500,000

10) Issuer: TDHCA

User: Knollwood Villas

Description: Multifamily Residential Rental Project--Knollwood Villas

Amount: $13,750,000

11) Issuer: TDHCA

User: Texas Bluffview Housing

Description: Multifamily Residential Rental Project--Bluffview Senior Apts.

Amount: $10,700,000

12) Issuer: Brazos River Harbor Navigation District of Brazoria County, Texas

User: The Dow Chemical Co.

Description: All Other Issue--Freeport, Texas

Amount: $25,000,000

13) Issuer: North Central Texas HFC

User: One Bent Tree Ltd

Description: Multifamily Residential Rental Project--Bent Tree Town Homes

Amount: $12,400,000

14) Issuer: North Central Texas HFC

User: Ranch View Ltd

Description: Multifamily Residential Rental Project--Ranch View Town Homes

Amount: $12,000,000

15) Issuer: North Central Texas HFC

User: Silverton Ltd

Description: Multifamily Residential Rental Project--Silverton Town Homes

Amount: $12,400,000

16) Issuer: Harris County IDC

User: L. Bentley Sanford Investments

Description: Small Issue IDB

Amount: $3,000,000

17) Issuer: South Texas Higher Education Authority, Inc.

User: Eligible Borrowers

Description: Student Loan Bonds

Amount: $35,000,000

18) Issuer: Brazos River Harbor Navigation District of Brazoria County, Texas

User: BASF Corp.

Description: All Other Issue--Freeport, Texas

Amount: $25,000,000

Following is a comprehensive listing of applications, which were either withdrawn or cancelled pursuant to the Act from April 28, 2001 through May 11, 2001:

1) Issuer: TDHCA

User: Texas Bluffview Villas

Description: Multifamily Residential Rental Project--Bluffview Villas

Amount: $14,100,000

2) Issuer: TDHCA

User: Mesquite Affordable Housing

Description: Multifamily Residential Rental Project--Oakwood Village

Amount: $10,600,000

3) Issuer: Bexar County HFC

User: MAGI Management

Description: Multifamily Residential Rental Project--Swan's Landing

Amount: $8,700,000

4) Issuer: Port Arthur Navigation District IDC

User: The Premcor Refining Group Inc.

Description: All Other Issue--Port Arthur, Texas

Amount: $25,000,000

5) Issuer: Travis County HFC

User: Stonebridge Park

Description: Multifamily Residential Rental Project--Stonebridge Apts.

Amount: $15,000,000

For a more comprehensive and up-to-date summary of the 2001 Private Activity Bond Allocation Program, please visit the website (www.brb.state.tx.us). If you have any questions or comments, please contact Steve Alvarez, Program Administrator, at 512/475-4803 or via email at alvarez@brb.state.tx.us.

TRD-200102707

Steve Alvarez

Program Administrator

Texas Bond Review Board

Filed: May 14, 2001

Brazos Valley Workforce Development Board

Correction of Error and Amendment of Response Deadline for Notice of Request for Written Quotes for Legal Services

The Brazos Valley Workforce Development Board (BVWDB) is issuing a correction of error notice and amending the response deadline for the Notice of Request for Written Quotes for Legal Services issued May 4, 2001. The BVWDB seeks Written Quotes from administrative law attorneys to provide legal services to the BVWDB. The Brazos Valley region encompasses Brazos, Burleson, Grimes, Leon, Madison, Robertson, and Washington Counties. The entire Correction of Error and Amendment of Response Deadline for Notice of Request for Written Quotes may be downloaded at: www.bvjobs.org or requested via telephone at (979) 775-4244 or by writing to P.O. Box 4128, Bryan, Texas 77805, Attention: Request for Legal Services Quote.

All quotes must be received by 4:00 p.m. on Monday, June 25, 2001 at the Brazos Valley Workforce Development Board, 1706 East 29th Street, Bryan, Texas 77802 in accordance with the specifications of the Correction of Error and Amendment of Response Date for Notice of Request for Written Quotes.

For more information regarding completion of this Request for Written Quotes, contact Patricia Buck (979) 775-4244. Ms. Buck will also respond to written requests for assistance. Written requests for technical assistance may be addressed to BVWDB at P.O. Drawer 4128, Bryan, Texas 77805-4128.

TRD-200102746
Tom Wilkinson
Executive Director
Brazos Valley Workforce Development Board
Filed: May 16, 2001

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of April 4, 2001, through April 26, 2001. The public comment period for these projects will close at 5:00 p.m. on May 28, 2001.

FEDERAL AGENCY ACTIONS

Applicant: State Natural Resource Trustees; Location: The project is located at the Smith Bluff Cutoff UNOCAL Corporation facility located in Port Neches on the Lower Neches River. CCC Project Number: 01-0143-F2; Description of Proposed Action: The Natural Resource Trustees and UNOCAL entered into a Consent Decree that required UNOCAL to pay $200,000 to compensate the public for natural resources injured or lost as a result of an unauthorized discharge of oil into the Lower Neches River on April, 20, 1993. This settlement will partially fund the creation and enhancement of approximately 220 acres of coastal wetlands in the Lower Neches Wildlife Management Area of Bessie Heights Marsh, Orange County. Currently, the Bessie Heights marsh is primarily an open water system that has lost its emergent marsh characteristics through historical anthropogenic impacts associated with the dredging of the Neches River and extensive oil and gas extraction in the marsh. The marsh restoration will employ the method of terracing, which is the construction of an array of emergent soil cells that are planted with a combination of native estuarine grasses and plants. Terracing promotes the deposition and retention of suspended sediments, allowing for continued natural expansion of marsh habitat. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: Reliant Exploration, Ltd.; Location: The project site is located in State Tract No. 48, Well No. 2 in Trinity Bay approximately 2 miles northeast of Beach City, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Umbrella Point, Texas. Approximate UTM Coordinates: Zone 15; Easting: 323307; Northing: 3284066. CCC Project Number: 01-0144-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of typical marine barges and keyways, shell gravel pads, production structures with attendant facilities, and flowlines. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: Martin M. Sneed; Location: The project is located north of the Cow Bayou and Round Bunch Road intersection, east of Bridge City, in Orange County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Orangefield, Texas. Approximate UTM Coordinates: Zone 15; Easting: 423240; Northing: 3323140. CCC Project Number: 01-0150-F1; Description of Proposed Action: The applicant requests an after-the-fact permit to retain the fill material placed in 4.79 acres of jurisdictional wetlands without Department of the Army authorization. Furthermore, the applicant proposes to fill an additional 2.73 acres of jurisdictional wetlands to construct a family recreational center. The project site is a 10-acre tract of land consisting of 7.76 acres of jurisdictional wetlands and 2.24 acres of upland. The applicant will avoid 0.24 acre of tidal wetlands to minimize impacts to the project area. The recreation center will consist of a small marina and associated restaurant; a boat ramp; a dry boat storage area; storage building; green space for weekend camping; areas for RV's, boat trailers, jet ski and other small personal water craft parking; a day visitor parking area; a delicatessen for snacks and refreshments; and open space for recreational activities such as picnics and barbecues. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899.

Applicant: Reliant Exploration, Ltd.; Location: The project is located in State Tract No. 53 in Trinity Bay approximately 2 miles northeast of Beach City, Chambers County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Umbrella Point, Texas. Approximate UTM Coordinates: Zone 15; Easting: 323080; Northing: 3283781. CCC Project Number: 01-0156-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of typical marine barges and keyways, shell and gravel pads, production structures with attendant facilities, and flowlines. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: Cowboy Pipeline Service Company; Location: The project is located in the western portion of Galveston Bay, Galveston County, Texas. The project originates in the Upper San Jacinto Bay, Texas, and Bayport, Texas, areas and terminates in Texas City, Texas, and traverses Harris, Chambers, and Galveston counties, Texas. The site can be located on the U.S.G.S. quadrangle map entitled La Porte, Bacliff, League City, Texas City, and Virginia Point, Texas. Approximate UTM Coordinates: Zone 15; Easting: 311953; Northing: 3271195. CCC Project Number: 01-0166-F1; Description of Proposed Action: The applicant proposes to install two 10.75-inch pipelines. The first pipeline would originate from Millennium Petro Chemicals, 11603 Strang Road, La Porte, Texas, and terminate at Sterling Chemicals, Inc., 201 Bay Street South, Texas City, Texas. The second pipeline would originate at Celanese Chemical Bayport Terminal, 11807 Port Road, Houston, Texas, join the first pipeline in Galveston Bay near a point due east of Seabrook, and share the same trench until terminating at Valero Refining Company, 1301 Loop 197 South, Texas City, Texas. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information for the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at (512) 475-0680.

TRD-200102751
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: May 16, 2001

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapters 403, 2305, and 2156, Sections 2156.121 and 2156.122, Texas Government Code, the Comptroller of Public Accounts (Comptroller) State Energy Conservation Office (SECO) announces the issuance of its Request for Proposals (RFP) from qualified individuals, public-private partnerships, non-profit agencies, firms and institutions of higher education to provide for the design, purchase, installation, and maintenance of renewable energy-powered water purification systems in selected colonias and disaster relief areas throughout the state. Successful respondent will also assist Comptroller in securing additional funding from local utilities, financial institutions and local professionals, to supplement additional equipment and other costs, as necessary, and assist in developing a related renewable energy education curriculum. Successful respondent(s) will be expected to begin performance of any contract(s) resulting from this RFP on or about August 1, 2001.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. The RFP will be available for pick-up at the above-referenced address on Friday, May 25, 2001, between 2:00 p.m. and 5:00 p.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also plans to place the RFP on the Texas Marketplace after Friday, May 25, 2001, 2:00 p.m. (CZT). All written inquiries and Mandatory Letters of Intent must be received at the above-referenced address no later than 2:00 p.m. (CZT) on Wednesday, June 20, 2001. Letters of Intent must be addressed to Clay Harris, Assistant General Counsel, Contracts, and must be signed by an authorized representative of each entity. All responses to questions will be posted electronically on Friday, June 22, 2001, on the Texas Marketplace at: http://www.texasmarketplace.state.tx.us. Prospective respondents are encouraged to fax the Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. Letters of Intent received after the deadline will not be considered.

Pre-Proposal Conference: All potential respondents are encouraged to attend a pre-proposal conference beginning at 10:30 a.m. on Friday, June 15, 2001 at Comptroller's SECO Office, 111 East 17th Street, 11th Floor, Room 1114, Austin, Texas 78774. The meeting will be informational and intended to answer any questions regarding the RFP, the required format, the selection criteria or the evaluation process. The pre-proposal conference is not mandatory; however, attendance is highly recommended.

Closing Date: Proposals must be received in the Assistant General Counsel, Contracts Office at the location specified above (ROOM G-24) no later than 2:00 p.m. (CZT), on Friday, June 29, 2001. Proposals received after this time and proposals submitted by facsimile will not be considered.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision. Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall pay for no costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - Friday, May 25, 2001, 2:00 p.m. CZT; Non-Mandatory Pre-Proposal Conference - Friday, June 15, 2001 (10:30 a.m.); Mandatory Letters of Intent and Questions Due - Wednesday, June 20, 2001, 2:00 p.m. CZT; Posting of Official Responses to Questions - Friday, June 22, 2001; Proposals Due - Friday, June 29, 2001, 2:00 p.m. CZT; Contract Execution - July 20, 2001, or as soon thereafter as practical; Commencement of Project Activities - Wednesday, August 1, 2001 or as soon thereafter as practical.

TRD-200102738
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: May 16, 2001

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 05/21/01 - 05/27/01 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 05/21/01 - 05/27/01 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200102710
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 15, 2001

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Credit Union Department

Application(s) for Foreign Credit Union to Operate a Branch Office

Notice is given that the following application has been filed with the Credit Union Department and is under consideration:

An application was received from Premier America Credit Union, Chatsworth, California to operate a Foreign (out-of-state) Branch Office at 17015 Aldine Westfield, Houston, Texas.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200102745
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 2001

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Application(s) to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Port of Houston Credit Union, Houston, Texas to expand its field of membership. The proposal would permit the employees of Pacific Gulf Marine, Inc. who work in or are paid from Houston, Texas, and their families to be eligible for membership in the credit union.

An application was received from San Jacinto Area, Pasadena, Texas to expand its field of membership. The proposal would permit the employees of Safway Steel who work in or are paid from Pasadena, Texas to be eligible for membership in the credit union.

An application was received from San Jacinto Area, Pasadena, Texas to expand its field of membership. The proposal would permit persons who live or work in the area bounded by the Houston Ship Channel on the North and East, Loop 610 and Interstate 45 on the West, and Clear Lake and Clear Lake Creek on the South, excluding persons eligible for primary membership in an occupation-based credit union that has less than 7,000 members at the time the application is sought to be eligible for membership in the credit union.

An application was received from OmniAmerican Credit Union, Fort Worth, Texas to expand its field of membership. The proposal would remove the wording "and are receiving" from item number 8 of their current field of membership relating to members of the U.S. Armed Forces.

An application was received from OmniAmerican Credit Union, Fort Worth, Texas to expand its field of membership. The proposal would permit persons who live, work, attend school in, are paid from, business and non-business entities, organizations and associations located within Tarrant County, Texas to be eligible for membership in the credit union.

An application was received from Cameron Credit Union, Houston, Texas to expand its field of membership. The proposal would permit the employees of Corporate Express who work in or are paid from Houston, Texas to be eligible for membership in the credit union.

An application was received from Galleria Credit Union, Dallas, Texas to expand its field of membership. The proposal would permit the employees of CompuCom Systems who work in or are paid from Dallas, Texas to be eligible for membership in the credit union.

An application was received from Energy Capital Credit Union, Houston, Texas to expand its field of membership. The proposal would permit contractors of ExxonMobil who work at ExxonMobil facilities in Texas to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200102744
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 2001

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

GPS Community Credit Union, Houston, Texas - See *Texas Register* issue dated March 30, 2001

MCT Credit Union, Port Neches, Texas (2 Applications) - See *Texas Register* issue dated March 30, 2001

Texas Employees Credit Union, Dallas, Texas - See *Texas Register* issue dated March 30, 2001

Houston Postal Credit Union, Houston, Texas - See *Texas Register* issue dated March 30, 2001

Application(s) to Amend Articles of Incorporation - Approved

Koch-Glitsch Credit Union, Dallas, Texas - See *Texas Register* issue dated March 30, 2001

Dallas Postal Credit Union, Dallas, Texas - See *Texas Register* issue dated March 30, 2001

TRD-200102743
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 2001

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Texas Department of Criminal Justice

Notice of Cancellation

The Texas Department of Criminal Justice hereby gives notice of cancellation for the West Texas State School Improvements - Request for Bids, Solicitation Number: 696-TY-1-B025.

TRD-200102712
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: May 15, 2001

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Notice to Bidders

The Texas Youth Commission invites bids for the expansion of Sheffield Boot Camp. The project consists of new construction to expand the current facility to accommodate a total of 128 students, a 12 bed Administrative Segregation unit, modifications of existing gatehouse, and construction of 4 duplex's for employee housing at the existing Sheffield Boot Camp Unit, P.O. Box 510, Sheffield, Texas 79781. The work includes civil, mechanical, electrical, plumbing, security electronics, structural, concrete, and steel, pre-engineered metal building as further shown in the Contract Documents prepared by: Graeber, Simmons & Cowan.

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have a minimum of five consecutive years of experience as a General Contractor and provide references for at least three projects within the last five years that have been completed of a dollar value and complexity equal to or greater than the proposed project.

B. Contractor must be bondable and insurable at the levels required.

All Bid must be accompanied by a Bid Guarantee in the amount of 5.0% of greatest amount bid. Bid Guarantee may be in the form of a Bid Bond or Certified Check. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from the Architect/Engineer at a cost of $125 (non-refundable) per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to the Architect/Engineer: Graber, Simmons & Cowan, 400 Bowie, Austin, Texas 78703, Attention: Cathleen Martin; Phone: (512) 433-2589, FAX: (512) 477-6975.

A Pre-Bid conference will be held at 11 AM on June 14, 2001, at the Sheffield Boot Camp Unit, Sheffield Texas, followed by a site-visit. ATTENDANCE IS MANDATORY.

Bids will be publicly opened and read at 2 PM on June 26, 2001, in the Conference Room at the Purchasing and Leases/ Contracts Office located in the West Hill Mall, 2 Financial Plaza, Suite 525 Huntsville, Texas 77340.

The Texas Youth Commission requires the Contractor to make a good faith effort to include Historically Underutilized Businesses (HUB's) in at least 26.1% of the total value of this construction contract award. Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-200102753
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: May 16, 2001

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Texas Council for Developmental Disabilities

Intent to Award Funds - Housing Assistance

The Texas Council for Developmental Disabilities announces it's intention to award funds to the UCPA/Texas, to continue support to the Home of Your Own (HOYO) Project that assists individuals with disabilities to become home owners through continued development, implementation and replication of a best practices home ownership project.

Background: The UCPA/Texas submitted a proposal in response to a Request for Proposals posted in the Texas Register on August, 1996, and was awarded funds to develop, demonstrate and implement activities to assist individuals with disabilities to purchase homes in Texas. The Council voted to approve funding for an additional two years at its May 1998 Council Meeting. In May 2001 the Council approved funding UCPA/Texas to continue their support of the HOYO activity for an additional two years because of their experience and contributions towards the success of that project.

Description of Project: The project will provide support and coordination to the HOYO coalition activities, with an additional focus around families with children with disabilities leaving institutional settings.

Terms and Funding. Funding for this grant will be made available in two one-year grant awards beginning September 1, 2001. The final grant year will end August 31, 2003. Estimated funding will not exceed $185,000 per year for each annual grant award. Continuation funding for year two will be contingent upon annual performance reviews and submission of approved continuation funding workplans. The Texas Council for Developmental Disabilities reserves the right to discontinue funding if grant performance criteria are not met or funds are not available due to changes in Council grant funding priorities.

Information: For information on any aspect of this announcement, contact Carl Risinger, Texas Council for Developmental Disabilities, 4900 North Lamar Boulevard, Austin, Texas 78751-2399, (512) 424-4084.

TRD-200102731
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: May 16, 2001

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Intent to Award Funds - Inclusive Education Practices

The Texas Council for Developmental Disabilities announces its intention to award grant funds to the Arc of Texas to continue activities to

provide training and technical assistance to parents and school personnel concerning best practice strategies and approaches for including students with disabilities in regular education classrooms with necessary supports.

Background: The Council funded the Arc of Texas project for five years ending in September 1997. Arc of Texas coordinated the Inclusion Works Conference as part of the grant and has continued the conference since the grant concluded. Recent conferences have drawn 1200 to 1800 participants, primarily teachers and school administrators.

Description of Project: The Arc of Texas' Inclusion Works Conference will provide participants with learning experiences designed to increase their ability to ensure that students with disabilities and other diverse learners are involved in and making progress in the general curriculum, and improve their skills in planning and collaboration. This proposal builds on the existing expertise and statewide reputation of the Arc of Texas Inclusion Works Conference by adding local and regional training activities to expand the impact of the event to parents and families often unable to attend. This proposal also adds components that allow web-based learning and instruction and satellite interactive training methods.

Terms and Funds: Funding for this grant will be made available in three one-year grant awards beginning July 1, 2001. The final grant year will end June 30, 2004. Estimated funding will not exceed $150,000 per year for each of the three grant awards. Continuation funding for years two and three will be contingent upon satisfactory annual review of performance and submission of approved continuation funding workplans. The Texas Council for Developmental Disabilities reserves the right to discontinue funding if grant performance criteria are not met or funds are not available due to changes in Council grant funding priorities.

Information: For information regarding this announcement, please contact Carl Risinger, Grants Management Director, and Texas Council for Developmental Disabilities, (512) 424-4084.

TRD-200102733
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: May 16, 2001

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Intent to Award Funds - Transportation Public Awareness Activities

The Texas Council for Developmental Disabilities announces its intention to award a grant to the Texas Citizen Fund to expand activities focused on transportation issues for Texans with disabilities.

Background: The Texas Citizen fund submitted a proposal in response to a Request for Proposals posted in the Texas Register in March 2000 and was approved for funding for a project to coordinate advocacy efforts focused on community transportation. That RFP invited proposals for a grant project that would demonstrate the effectiveness of statewide advocacy networks focused on accessing transportation systems at the local and state level for Texans with disabilities.

Description of Project: The Texas Council for Developmental Disabilities intends to award additional funds to the Texas Citizen Fund to develop public awareness materials and activities that promote affordable, accessible transportation.

Terms and Funds: Funding for this project will begin June 1, 2001 and end May 31, 2002. Estimated funding will not exceed $50,000 during this period for these activities.

Information: For information regarding this announcement, please contact Carl Risinger, Grants Management Director, and Texas Council for Developmental Disabilities, (512) 424-4084.

TRD-200102732
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: May 16, 2001

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Texas Education Agency

Request for Applications Concerning Career and Technology Education for State Programs: Leadership Activity Projects in Secondary Vocational and Technical Education 2001-2002

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-01-008 from public school districts, regional education service centers, and colleges and universities that have the capacity and resources to provide improvement of Career and Technology Education programs.

Description. The objectives of the Career and Technology Education for State Programs are to provide: 1) statewide activities that assist Career and Technology Education teachers in meeting the educational needs of students and the skill needs of employers through the continuous improvement, delivery, and implementation of Texas Essential Knowledge and Skills (TEKS) curricula; and 2) research and professional development activities to Career and Technology teachers, including those seeking certification, in planning and implementing quality instruction to students.

Dates of Project. The TEKS Implementation Support Systems and Research and Professional Developments projects will be implemented during the 2001-2002 school year. Applicants should plan for a starting date of no earlier than September 1, 2001, and an ending date of no later than August 31, 2002.

Project Amount. A total of 26 statewide projects are available for funding. A separate application must be submitted for each project if an applicant wishes to apply for more than one project. Projects must be designed to support activities that benefit organizations across the state. The total amount of the Career and Technology projects for the 2001-2002 fiscal year is $2,201,568. Project funding in the second year will be based on satisfactory progress of the first-year objectives and activities and on federal funding. This project is funded 100% from The Carl D. Perkins Vocational and Technical Education Act of 1998, Public Law 101-392.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant program and the extent to which the application addresses the primary objective(s) and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA

does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-01-008 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and telephone number including area code. This announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Liz Haywood, Division of Career and Technology Education, TEA, (512) 463-9499.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, July 24, 2001, to be considered for funding.

TRD-200102737
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Filed: May 16, 2001

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General Services Commission

Notice of Contract Airline Fares Request for Proposal

The General Services Commission (GSC) announces a Request for Proposal (RFP) for Contract Airline Fares (RFP #11-0501AF) to be provided to the State of Texas pursuant to the Texas Government Code, Section 2171.052. Any contract which results from this RFP shall be for the term of September 1, 2001, through August 31, 2002.

Preproposal Conference: A preproposal conference will be held on Monday, May 14, 2001, in Austin, Texas. The conference is scheduled from 1:30 p.m. to 3:30 p.m. at the following address: General Services Commission, Central Services Building, Room 402, 1711 San Jacinto Blvd., Austin, Texas 78701. The purpose of the conference is to review the content of this RFP and to answer attendees' questions.

Submission of Response to the RFP: Responses to the RFP shall be submitted to and received by the GSC Bid Services Department on or before 3:00 p.m., Central Daylight Time, on June 4, 2001, and shall be delivered or sent to: The General Services Commission, Attn: Bid Services, RFP #11-0501AF, 1711 San Jacinto Blvd., Room 180, Austin, Texas 78701, or P.O. Box 13047, Austin, Texas 78711-3047.

Evaluation Criteria: Evaluation of Proposals will be based on the criteria listed in the Request for Proposal. Evaluation will be performed by an evaluation team composed of persons designated by GSC. The evaluation team will make a recommendation to the Division Director who shall determine and recommend to the Executive Director the proposer(s) chosen for contract award. Proposer(s) to whom contracts are awarded will be notified by mail.

Copies of RFP: If you are interested in receiving a copy of the RFP, contact Ms. Gerry Pavelka, Program Director, at (512) 463-3435 to request a copy.

TRD-200102654
Cynthia J. Hill
Acting General Counsel
General Services Commission
Filed: May 11, 2001

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Texas Department of Health

Notice of Uranium Byproduct Material License Amendment to Intercontinental Energy Corporation, dba IEC Corporation

The Texas Department of Health (department) gives notice that it has amended uranium by- product material license L02538 issued to Intercontinental Energy Corporation, doing business as IEC Corporation in Texas (mailing address: IEC Corporation, 6085 Alton Way, Englewood, Colorado 80111). Amendment 38 changes the mailing address only.

The department's Bureau of Radiation Control, Division of Licensing, Registration and Standards has determined, pursuant to 25 Texas Administrative Code (TAC), Chapter 289, that the licensee has met the standards appropriate to this amendment.

This notice affords the opportunity for a public hearing upon written request by a person affected by the amendment of this license. A written hearing request must be received, from a person affected, within 30 days from the date of publication of this notice in the *Texas Register*. A person affected is defined as a person who demonstrates that the person has suffered or will suffer 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, P.E., Chief, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756- 3189. Any request for a hearing must contain the name and address of the person who considers himself affected by agency action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is to be represented by an attorney, the name and address of the attorney also must be stated. Should no request for a public hearing be timely filed, the license amendment will remain in effect.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 Texas Administrative Code §1.21. et seq.), and the procedures of the State Office of Administrative Hearings (1 Texas Administrative Code Chapter 155).

Copies of all relevant material are available for public inspection and copying at the Bureau of Radiation Control, Texas Department of Health, 8407 Wall Street, Austin, Texas. Information relative to the amendment of this specific radioactive material license may be obtained by contacting Chrissie Toungate, Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189; E-mail: Chrissie.Toungate@tdh.state.tx.us; by calling (512) 834-6688; or by visiting 8407 Wall Street, Austin, Texas.

TRD-200102665
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: May 14, 2001

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Texas Department of Housing and Community Affairs

Comment Period Extended for the System Benefit Fund Plan 2002-2003 to June 1, 2001

The Texas Department of Housing and Community Affairs (TDHCA) announces that an extension to the comment period deadline for the draft System Benefit Fund Plan 2002-2003 has been granted. The comment period has been extended from May 18, 2001 to June 1, 2001. A public hearing notice was previously published in the May 11, 2001, issue of the *Texas Register* (26 TexReg 3534), which included the deadline for submitting comments.

Local officials and citizens are encouraged to participate in the public comment process. Comments received will be used to finalize the TDHCA System Benefit Fund Plan 2002-2003. Written comments may be provided by the close of business at 5:00 p.m. on Friday, June 1, 2001, to Ms. Lolly Caballero, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 600, Austin, Texas 78701 or by electronic mail to lcaballe@tdhca.state.tx.us or by fax to (512) 475-3935. A copy of the proposed state plan may be requested by calling Ms. Caballero at (512) 475-0471 or by writing Ms. Caballero at the TDHCA address given above. The proposed draft plan is also available through TDHCA's world wide web site at http://www.tdhca.state.tx.us/ea.htm.

TRD-200102770
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affiars
Filed: May 17, 2001

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Multifamily Housing Revenue Bonds (Cobb Park Town Homes) Series 2001

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the East Regional Library, 6301 Bridge Street, Fort Worth, Tarrant County, Texas 76112 at 1 p.m. on, June 7, 2001 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $7,500,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Texas Department of Housing and Community Affairs (the "Issuer"). The proceeds of the Bonds will be loaned to Cobb Park Townhomes, L.P., (or a related person or affiliate thereof) (the "Borrower") a limited partnership, to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 172-unit multifamily residential rental development to be constructed on approximately 14.43 acres of land located at the 2400 block of East Berry Street South approximately 150 feet west of Mitchell Boulevard, Fort Worth, Tarrant County, Texas 76105. The Project will be initially owned and operated by Cobb Park Townhomes, L.P. (or a related person or affiliate thereof). The Project will be initially managed by Picerne Management Corporation.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robert Onion at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-3872 and/or ronion@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robert Onion in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robert Onion prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 800 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200102739
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: May 16, 2001

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Notice of Public Hearing

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS MULTIFAMILY HOUSING REVENUE BONDS (SKYWAY VILLAS APARTMENTS) SERIES 2001

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at the Wilson Creek Banking Center, 2800 Virginia Parkway, McKinney, Texas 75070 at 6 p.m. on June 6, 2001 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $13,250,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Texas Department of Housing and Community Affairs (the "Issuer"). The proceeds of the Bonds will be loaned to Hemma Ltd, (or a related person or affiliate thereof) (the "Borrower") a limited partnership, to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 232 unit multifamily residential rental development to be constructed on approximately 13 acres of land located approximately 920 feet north of Highway 380 in the 2000 block of Skyline Drive, McKinney, Collin County, Texas 75070. The Project will be initially owned and operated by Hemma Ltd. (or a related person or affiliate thereof). The Project will be initially managed by Hunt Building Corporation.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robert Onion at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-3872 and/or ronion@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robert Onion in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robert Onion prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 800 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200102742
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: May 16, 2001

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Texas Department of Human Services

Correction of Error

The Texas Department of Human Services adopted new 40 TAC §30.90 concerning medical review and re-evaluation. The rule appeared in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1555).

On page 1556, there is a typographical error in subsection (c). The word "Evaluation" should be "Re-Evaluation". The subsection should read as follows.

"(c) Subchapter I, Medical Review and Re-Evaluation, will go into effect on June 1, 2001."

TRD-200102772

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Notice of Proposed Amendment concerning Attendant Compensation Rate Enhancement

In the May 18, 2001, issue of the *Texas Register*, the Texas Department of Human Services (DHS) proposed an amendment to §20.112 concerning attendant compensation rate enhancement, in its Cost Determination Process chapter. The purpose of the proposal is to clarify the definition of "attendant", add the Deaf-Blind Multiple Disabilities waiver program, and clarify the enrollment process. The amendment also revises the enrollment process to allow enrollments to "roll over" unchanged to the following year, unless the provider changes its enrollment status during the open enrollment period and revises the procedures for enrolling new facilities. The proposal states that if a provider fails to submit an accountability report within 60 calendar days following the imposition of the vendor hold, the provider will become a nonparticipant in the enhancement rate program. The ineligibility will continue until the report is submitted and recoupments (if any) are made. Detail was added to the description of the calculation of the attendant compensation rate component to better describe the actual calculation. The proposal clarifies that, when a provider serves clients in both the Residential Care and the Community Based Alternatives Assisted Living/Residential Care program in a single facility, the spending requirement is determined for both programs together and not separately. The proposal also clarifies the effective date for contractors who voluntarily withdraw contracts from being participants or requests to reduce the enhancement levels and clarifies the group or individual status of a provider that acquires a participating contract through a contract assignment.

For further information regarding the proposal or to make the proposal available for public review, contact local offices of DHS or Alisa Jacquet at (512) 438-4952 in DHS's Rate Analysis Department.

TRD-200102725
Paul Leche
General Counsel
Texas Department of Human Services
Filed: May 15, 2001

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Texas Health and Human Services Commission

Notice of Proposed Amendment concerning Attendant Compensation Rate Enhancement

In the May 18, 2001 publication of the*Texas Register*, the Texas Health and Human Services Commission (HHSC) proposed an amendment to §355.112 concerning attendant compensation rate enhancement, in its Medicaid Reimbursement Rates chapter. The purpose of the proposal is to clarify the definition of "attendant", add the Deaf-Blind Multiple Disabilities waiver program, and clarify the enrollment process. The amendment also revises the enrollment process to allow enrollments to "roll over" unchanged to the following year, unless the provider changes its enrollment status during the open enrollment period and revises the procedures for enrolling new facilities. The proposal states that if a provider fails to submit an accountability report within 60 calendar days following the imposition of the vendor hold, the provider will become a nonparticipant in the enhancement rate program. The ineligibility will continue until the report is submitted and recoupments (if any) are made. Detail was added to the description of the calculation of the attendant compensation rate component to better describe the actual calculation. The proposal clarifies that, when a provider serves clients in both the Residential Care and the Community Based Alternatives Assisted Living/Residential Care program in a single facility, the spending requirement is determined for both programs together and not separately. The proposal also clarifies the effective date for contractors who voluntarily withdraw contracts from being participants or requests to reduce the enhancement levels and clarifies the group or individual status of a provider that acquires a participating contract through a contract assignment.

For further information regarding the proposal or to make the proposal available for public review, contact local offices of DHS or Alisa Jacquet at (512) 438-4952 in DHS's Rate Analysis Department.

TRD-200102726
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: May 15, 2001

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Texas Department of Insurance

Name Applications

Application for admission to the State of Texas by MGIC CREDIT ASSURANCE CORPORATION, a foreign fire and casualty company. The home office is in Milwaukee, Wisconsin.

Application for admission to the State of Texas by PREFERRED HEALTH SYSTEMS INSURANCE COMPANY, a foreign life company. The home office is in Wichita, Kansas.

Application to change the name of HEALTHSOURCE INSURANCE COMPANY to BERKSHIRE LIFE INSURANCE COMPANY OF AMERICA, a foreign life company. The home office is in Pittsfield, Massachusetts.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200102750
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: May 16, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by American International Insurance Company proposing to use rates for homeowners insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS.

CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percent of -40% to +30% range for HO-A, HO-B & HO-C coverage forms by territory and size of risk range. The company is requesting -15% to +30% range for HO-BT, HO-CT, HO-CON-B & HO-CON-C coverage forms by territory and size of risk range. This is a new program, so there is no rate change effect.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by June 7, 2001.

TRD-200102625
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: May 10, 2001

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by GEICO Indemnity Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEXAS INSURANCE CODE ANNOTATED, article 5.101, §3(g). The Company is requesting the following flex percent of +38.5% for Bodily Injury, +66.3% for Property Damage, +60.2% for Personal Injury Protection, +36.5% for UMBI, +387.5% for UMPD, +91.8% for Collision, +51.8% for Comprehensive, +160% for Rental Reimbursement, +25% for Emergency Road Service, and +30% for Medical Payments and CB Radio coverage. This overall rate change is +15.3%.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to article 5.101, §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by June 8, 2001.

TRD-200102646
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: May 11, 2001

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of GRI of Houston, LLC, a foreign third party administrator. The home office is Duluth, Georgia.

Application for admission to Texas of Group Resources of Texas, LLC, (using the assumed name of Group Resources-Texas), a foreign third party administrator. The home office is Duluth, Georgia.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200102645
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: May 11, 2001

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Cimarron Administrators, Inc., a domestic third party administrator. The home office is Dallas, Texas.

Application for incorporation in Texas of Highlander Financial Services, Inc., a domestic third party administrator. The home office is Spring, Texas.

Application for admission to Texas of CBCA, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200102749
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: May 16, 2001

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Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission proposed new sections for 30 TAC Chapter 106, concerning permits by rule. The rule was published in the May 4, 2001, issue of the *Texas Register* (26 TexReg 3351).

In the preamble under the subheading "SECTION BY SECTION DISCUSSION", in the paragraph that begins, "The commission reviewed all PBRs...", on page 3354, a reference was omitted from a list under "Exhibit B" for item number eight.

Item eight should include the reference to "§106.435, Classic or Antique Automobile Restoration Facility."

On the same page in the paragraph that begins, "Other PBRs have specific construction or operational restrictions..." under "Exhibit C", a list of 20 subchapters with the sections in each that are considered PBRs which contain specific emission, operational, or abatement conditions, but no record-keeping requirements. Item number nine of Exhibit C should not include the reference to "§106.317, Miscellaneous Metal Equipment". This reference was included in Exhibit A on page 3352.

TRD-200102773

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Notice of Non-Adjudicatory Public Hearing (TMDL)

The Texas Natural Resource Conservation Commission (TNRCC or commission) has made available for public comment a draft implementation plan concerning sulfate and total dissolved solids (TDS) in E.V. Spence Reservoir near Robert Lee, Texas in Coke County. The TNRCC will also conduct a non- adjudicatory public hearing to receive comments on the implementation plan.

The E.V. Spence Reservoir is included in the State of Texas Clean Water Act, §303(d), List of impaired water bodies. As required by §303(d) of the federal Clean Water Act, Total Maximum Daily Loads (TMDLs) were developed for sulfate and TDS. The TMDLs were adopted by the commission on November 17, 2000, as updates to the State Water Quality Management Plan. Upon adoption by the commission, the TMDLs were submitted to EPA for review and approval.

A non-adjudicatory public hearing will be held in Midland, on June 19, 2001, at 7:00 p.m., at the University of Texas of the Permian Basin, Center for Energy and Economic Diversification, located at 1400 North FM 1788, Room 1324. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the matter 30 minutes prior to the hearing and will answer questions before and after the hearing. The purpose of the public hearing is to provide the public an opportunity to comment on the proposed plan. The commission requests comment on each of the six major components of the implementation plan: Description of Control Actions and Management Measures, Legal Authority, Implementation Schedule, Follow-up Monitoring Plan, Reasonable Assurance, and Measurable Outcomes. After the public comment period, TNRCC staff may revise the implementation plan, if appropriate. The final implementation plan will then be considered for approval by the commission. Upon approval of the implementation plan by the commission, the final implementation plan and a response to public comments will be made available on the TNRCC web site at *http://www.tnrcc.state.tx.us/water/quality/tmdl*. The implementation plan is a flexible tool that the governmental and non-governmental agencies involved in TMDL implementation will use to guide their program management.

Written comments should be submitted to Joyce Spencer, Texas Natural Resource Conservation Commission, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m., June 25, 2001, and should reference 2001-0534-TML. For further information regarding this proposed TMDL implementation plan, please contact Clifton Wise, Office of Environmental Policy, Analysis, and Assessment, at (512) 239-2263. Copies of the document summarizing the proposed TMDL implementation plan can be obtained via the commission's web site or by calling Joyce Spencer at (512) 239-5017.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200102701
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: May 14, 2001

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Notice of a Non-Adjudicatory Public Hearing (TDML Implementation Plan)

The Texas Natural Resource Conservation Commission (TNRCC or commission) has made available for public comment a draft implementation plan concerning legacy pollutants, chlordane, DDT, DDD, DDE, dieldrin, heptachlor epoxide, and polychlorinated biphenyls (PCBs), in the Trinity River and one urban lake in Dallas and Tarrant Counties, Texas. The TNRCC will also conduct a non-adjudicatory public hearing to receive comments on the implementation plan.

Mountain Creek Lake and the Trinity River in Dallas and Tarrant Counties are included in the State of Texas Clean Water Act, §303(d), List of Impaired Water Bodies. As required by §303(d) of the federal Clean Water Act, total maximum daily loads (TMDLs) were developed for chlordane, DDT, DDD, DDE, dieldrin, heptachlor epoxide, and PCBs. The TMDLs were adopted by the commission on December 20, 2000, as updates to the State Water Quality Management Plan. Upon adoption by the commission, the TMDLs were submitted to the United States Environmental Protection Agency for review and approval.

A non-adjudicatory public hearing will be held at the City of Irving Central Library Auditorium, located on 801 West Irving Boulevard on June 20, 2001, at 7:00 p.m. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the matter 30 minutes prior to the hearing and will answer questions before and after the hearing. The purpose of the public hearing is to provide the public an opportunity to comment on the proposed plan. The commission requests comment on each of the six major components of the implementation plan: Description of Control Actions and Management Measures, Legal Authority, Implementation Schedule, Follow-up Monitoring Plan, Reasonable Assurance, and Measurable Outcomes. After the public comment period, TNRCC staff may revise the implementation plan, if appropriate. The final implementation plan will then be considered for approval by the commission. Upon approval of the implementation plan by the commission, the final implementation plan and a response to public comments will be made available on the TNRCC web site at *http://www.tnrcc.state.tx.us/water/quality/tmdl*. The implementation plan is a flexible tool that the governmental and non-governmental agencies involved in TMDL implementation will use to guide their program management.

Comments should be submitted to Angela Slupe, Texas Natural Resource Conservation Commission, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m., June 25, 2001, and should reference 2001-0535-TML. For further information regarding this proposed TMDL implementation plan, please contact John Mummert, Region 4 Office, at (817) 588-5879. Copies of the document summarizing the proposed TMDL implementation plan can be obtained via the commission's web site or by calling Angela Slupe at (512) 239-4712.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

TRD-200102702
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: May 14, 2001

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The TNRCC staff proposes a DO when the staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 2001**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that a proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed DOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the DO should be sent to the attorney designated for the DO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2001**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, comments on the DOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: Del Oil & Gas Company, Incorporated dba Bud's Quick Chek; DOCKET NUMBER: 2000-1238-PST-E; TNRCC ID NUMBER: 0030453; LOCATION: 5001 River Oaks Boulevard, River Oaks, Tarrant County, Texas; TYPE OF FACILITY: underground storage tanks (USTs); RULES VIOLATED: §115.246(6) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain a record of daily inspections; §115.248(1) and THSC, §382.085(b), by failing to ensure at least one Station representative receive training and instruction in the operation and maintenance of the Stage II vapor recovery system by successfully completing a training course approved by the Texas Natural Resource Conservation Commission; §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition, or within 30 days of the date on which the owner or operator first became aware of the change or condition; §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, an existing UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; §334.49(a) and TWC, §26.3475, by failing to have installed a method of corrosion protection for the tank system; §334.50(b)(1)(A) and TWC, §26.3475, by failing to ensure that all tanks are monitored for releases at a frequency of at least once every month; §334.51(b)(2)(C) and TWC, §26.3475, by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reaches no higher than 95% capacity; §334.93(a)(b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases; §334.22(a), by failing to pay annual Station fees for USTs; PENALTY: $16,500; STAFF ATTORNEY: Elisa Roberts, Litigation Division, MC R-4, (817) 588-5877; REGIONAL OFFICE: Arlington Regional Office, 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

TRD-200102708
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: May 15, 2001

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 2001**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2001**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: David H. Jones dba South Texas Tire Disposal; DOCKET NUMBER: 2000- 1179-MSW-E; TNRCC ID NUMBER: 25666; LOCATION: 1/2-mile east of Farm-to-Market Road 2556 on eastbound Expressway 83 (frontage road), La Feria, Cameron County, Texas; TYPE OF FACILITY: tire storage facility (facility); RULES VIOLATED: §328.60(a) and Texas Health and Safety Code (THSC), §361.112, by failing to obtain a scrap tire storage site registration for storage of more than 500 scrap tires on the ground; PENALTY: $9,000; STAFF ATTORNEY: Robert Hernandez, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Ave., Harlingen, Texas 78550-5247, (956) 425-6010.

(2) COMPANY: John Miller dba M & H Water Supply; DOCKET NUMBER: 1999-1400- PWS-E; TNRCC ID NUMBER: 1090061; LOCATION: Farm-to-Market Road 2114 and the Brazos River,

Aquilla, Hill County, Texas; TYPE OF FACILITY: public water supply (system); RULES VIOLATED: §290.46(v), by failing to provide securely mounted conduit for electrical wiring in compliance with a local or national electrical code; §290.46(i), by failing to provide chemicals in the treatment of water that conform to the American National Standards Institute/National Sanitation Foundation Standard 60 for direct additives; §290.46(h), by failing to have on hand a supply of calcium hypochlorite disinfectant for repairs; §290.46(n), by failing to provide an updated distribution map detailing the location of water values and mains; §290.39(d)(1), (d)(2), and (j), by failing to obtain the services of a registered professional engineer well versed in the design and construction of public water systems so that "as-built" plans and specifications could be prepared and submitted for TNRCC review and by failing to provide notification in writing of improvements which resulted in an increase in storage capacity; §290.46(j)(1), by failing to provide customer service inspection certification for any new construction; §290.43(e) and §290.41(c)(3)(O), by failing to provide an intruder-resistant fence for the ground storage and pressure tanks and for the well; §290.46(d)(2)(A), by failing to maintain a minimum free chlorine residual of 0.2 mg/1 in the distribution system at all times; §290.46(f)(3), by failing to provide documentation of chlorine residual tests taken at least once every seven days from various locations within the distribution system; §290.43(c)(1) and (2), by failing to provide proper venting for ground storage tanks and proper gasket material for prevention of entry to the water supply by insects and other possible contaminants and to provide locked access opening; §290.46(m)(1)(A) and (B), by failing to provide annual inspection documentation on the ground storage tanks and on the pressure tank; §290.43(d)(3), by failing to provide a sanitary means of determining air-to-water ratio on a pressure tank that has greater than a 1000-gallon capacity; §290.46(m)(1)(B), by failing to maintain water tight conditions on the pressure tank; §290.41(c)(1)(F), by failing to provide sanitary control easement documentation for the well; §290.41(c)(3)(J), (K), and (M), by failing to provide a proper concrete sealing block for the well, a properly sealed wellhead and a screened casing vent for the well casing, and a suitable sampling tap on the well discharge prior to disinfection or treatment; §290.41(c)(3)(N), by failing to provide a properly operating flow meter on the well pump discharge line; PENALTY: $13,125; STAFF ATTORNEY: James Biggins, Litigation Division, MC R-13, (210) 403-4017; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Ave., Ste. 2500, Waco, Texas 76710-7826, (254) 751- 0335.

(3) COMPANY: Kenneth Sanders dba Jerry's Quick Change; DOCKET NUMBER: 1999- 0267-PST-E; TNRCC ID NUMBER: 15240; LOCATION: 5123 69th Street, Lubbock, Lubbock County, Texas; TYPE OF FACILITY: underground storage tank (UST); RULES VIOLATED: §334.50(a)(1)(A) and TWC, §26.3475, by failing to provide a release detection method, or combination of methods, capable of detecting a release from any portion of the UST system which contains regulated substances including the tanks, piping, and other ancillary equipment; §334.49(a) and TWC, §26.3475, by failing to have corrosion protection for the UST system; §334.93(a) and (b), by failing to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition, or within 30 days of the date on which the owner or operator first became aware of the change or addition; PENALTY: $11,500; STAFF ATTORNEY: Darren Ream, Litigation Division, MC R-4, (817) 588-5878; REGIONAL OFFICE: Lubbock Regional Office, 4630 50th St., Ste. 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(4) COMPANY: Stan Trans, Inc.; DOCKET NUMBER: 1999-1475-AIR-E; TNRCC ID NUMBER: GB-0005-J; LOCATION: 201 Main Dock Road, Texas City, Galveston County, Texas; TYPE OF FACILITY: bulk liquid storage and transfer station (station); RULES VIOLATED: §116.115(c), THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 15(B), by failing to obtain prior approval before installing a carbon canister on Tank Number 1006; §116.115, THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 17(A), by failing to maintain accurate records for the control requirements for the tank truck or rail car loading of alkylate; §116.115(c), THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 16(B)(2), by failing to properly conduct quarterly monitoring of the carbon canisters for Tank Number 502; §111.111(a)(4)(A)(ii), 40 Code of Federal Regulations Part 60, Subpart A, Agreed Order (Docket Number: 1995-1142-AIR-E), and THSC, §382.085(b), by failing to maintain records of daily or operational visible emission observations of the flares; §101.6(a)(1)(B), THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 15(I), by failing to report a spill of polybutadiene as a result of loading and unloading operations; §101.6(a)(2)(E), THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 15(I), by failing to estimate and document the quantity of a release of dimethyl disulfide as a result of loading and unloading operations; §116.115(c), THSC, §382.085(b), and TNRCC Air Permit Number 1677, Special Condition 15(B), by failing to equip an internal floating roof tank with a capacity greater than 25,000 gallons and containing a compound with a vapor pressure of greater than 0.5 pounds per square inch with an approved seal design on Tank Number 5501; PENALTY: $19,000; STAFF ATTORNEY: Scott McDonald, Litigation Division, MC R-4, (817) 588-5888; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Ave., Ste. H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200102709
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: May 15, 2001

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 2001**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments

about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2001**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing**.

(1) COMPANY: AKZO Nobel Chemicals, Inc.; DOCKET NUMBER: 2001-0037-AIR-E; IDENTIFIER: Air Account Number HG-0717-K; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: industrial organic chemicals; RULE VIOLATED: 30 TAC §101.10(e) and the Code, §382.085(b), by failing to submit an emissions inventory questionnaire; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Ameri-Forge Corporation; DOCKET NUMBER: 2000-1076-IWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 03767; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: metal shaping; RULE VIOLATED: 30 TAC §§305.125(1) and (9), 319.1, 319.7(c), TPDES Permit Number 03767, and the Code, §26.121, by failing to comply with permitted effluent limitations, remove and properly dispose of contaminated soil, provide noncompliance notification reports for flow and effluent quality values, comply with the permitted daily average flow and permitted daily maximum flow limits, prevent an unauthorized waste stream, contact cooling water from entering the collect and treatment systems, maintain signed copies of the monthly effluent reports in the records, maintain and operate the collection and treatment system to prevent an oily emulsion from being discharged into the receiving stream, and correctly calculate and report daily average and maximum flows; PENALTY: $22,500; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: BASF Corporation; DOCKET NUMBER: 2001-0103-IHW-E; IDENTIFIER: Solid Waste Registration Number 30024; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: organic chemical manufacturing; RULE VIOLATED: 30 TAC §335.69(a)(1)(B), §335.112(a)(9), and 40 Code of Federal Regulations (CFR) §262.34(a)(1)(ii), and §265.193(b) and (f), by failing to provide secondary containment for ancillary piping with threaded connections for valves, gauges, and joints; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Baxter Oil Service, Inc.; DOCKET NUMBER: 2000-1302-MLM-E; IDENTIFIER: Used Oil Facility Identification Number A85204; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: used oil processing; RULE VIOLATED: 30 TAC §324.4(2)(C)(i), by allegedly having received non-hazardous spent parts-cleaning solvent and blended it with used oil; PENALTY: $800; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Dorothy Rolater and Athalea Lane dba Boyd Acres; DOCKET NUMBER: 2001-0036-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 0610051; LOCATION: The Colony, Denton County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.121(b), by failing to provide a sample siting plan; 30 TAC §290.46(i), (m)(1), (r), and (w), by failing to provide a service agreement or copy of adopted plumbing code, a record of annual ground storage tank inspections, a minimum operating pressure of 36 pounds per square inch (psi) throughout the distribution system, and a sign at well site; 30 TAC §290.41(c)(1) and (3)(K), and (n)(3), by failing to provide sanitary conditions, a sealed well head, properly installed casing vent, well completion data for well number one and accurate metering device; 30 TAC §290.43(c)(1) and (6), (d)(2), and (e), and §290.41(c)(3)(O), by failing to provide a properly screened vent on the ground storage tank, pressure tanks which are tight against leakage, accurate pressure gauges on either of the pressure tanks, and an intruder-resistant fence; and 30 TAC §290.45(b)(1)(F)(iii), by failing to provide service pump capacity; PENALTY: $5,188; ENFORCEMENT COORDINATOR: Melinda Houlihan, (817) 588-5868; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(6) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2000-1267- AIR-E; IDENTIFIER: Air Account Number HG-0566-H; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: the Code, §382.085(a), by failing to prevent unauthorized emissions; and 30 TAC §290.51, by failing to pay outstanding public health service fees; PENALTY: $4,400; ENFORCEMENT COORDINATOR: Faye Liu, (713) 767-3726; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Continental Cabinets Manufacturing, Inc.; DOCKET NUMBER: 2000-1117- AIR-E; IDENTIFIER: Air Account Number DB-0621-J; LOCATION: Lancaster, Dallas County, Texas; TYPE OF FACILITY: cabinet manufacturing; RULE VIOLATED: 30 TAC §116.115(c), Permit Number 18054, and the Code, §382.085(b), by failing to vent all emissions generated from production operations; 30 TAC §§113.100, 113.410, 116.115(c), Permit Number 18054, 40 CFR Part 63, §§63.6, 63.9, 63.804, and 63.807, and the Code, §382.085(b), by failing to submit an initial demonstration of compliance; and 30 TAC §113.410, §116.115(c), Permit Number 18054, 40 CFR §63.803, and the Code, §382.085(b), by failing to prepare a work practice implementation plan, operating training course, maintain a written leaking inspection and maintenance plan, a formulation assessment plan, and submit the required reports; PENALTY: $15,625; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(8) COMPANY: Entergy Gulf States, Inc.; DOCKET NUMBER: 2001-0025-AIR-E; IDENTIFIER: Air Account Number JE-0045-S; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: electric services; RULE VIOLATED: 30 TAC §122.146(2), §122.143(4), and the Code, §382.085(b), by failing to submit annual certificates of compliance; and 30 TAC §122.145(2), §122.143(4), and the Code, §382.085(b), by failing to submit deviation reports; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Laura Clark, (409) 899-8760; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: Excel Associates Freight Forwarders, Inc.; DOCKET NUMBER: 2000-0790- IHW-E; IDENTIFIER: Industrial and Hazardous Waste (IHW) Identification Number F0532; LOCATION: Hidalgo, Hidalgo County, Texas; TYPE OF FACILITY: freight forwarding; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121, by failing to ensure the proper handling of industrial solid waste and allowed its discharge; 30 TAC §335.262(c)(2)(B), (D), and (F), and 40 CFR §262.40(c), by failing to maintain paint and paint-related waste in containers that are structurally sound, document and maintain hazardous waste determinations, and label or clearly mark containers of paint and paint-related waste; 30 TAC §335.504 and 40 CFR

§262.11, by failing to determine if solid waste is hazardous; 40 CFR §273.32(a)(1) and §262.12(a), by failure of a large handler of universal waste to send written notification of universal waste management and receive an Environmental Protection Agency identification number; and 30 TAC §273.39(b), by failure of a large quantity handler of universal waste to keep a record of each shipment; PENALTY: $5,200; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(10) COMPANY: City of Garland; DOCKET NUMBER: 2000-1486-MSW-E; IDENTIFIER: Municipal Solid Waste Permit Number 1062A; LOCATION: Garland, Dallas County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §330.133(b) and (f), by failing to provide sufficient intermediate cover and prevent the erosion of intermediate cover; and 30 TAC §330.55(b), by failing to provide grid markers; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Tim Haase, (512) 239-6007; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(11) COMPANY: Goodyear Tire and Rubber Company; DOCKET NUMBER: 2001-0172-AIR- E; IDENTIFIER: Air Account Number JE-0039-N; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: rubber manufacturing; RULE VIOLATED: 30 TAC §116.115(c), §101.20(3), Air Permit Number 20040-PSD-TX-801, and the Code, §382.085(b), by failing to comply with the permitted oxides of nitrogen emission limits; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Laura Clark, (409) 899-8760; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Heartland Rig International, Inc.; DOCKET NUMBER: 2000-1389-IHW-E; IDENTIFIER: IHW Registration Number 35046; LOCATION: Brady, McCulloch County, Texas; TYPE OF FACILITY: truck trailer manufacturing; RULE VIOLATED: 30 TAC §335.6(c), by failing to update notice of registration information; 30 TAC §335.9(a)(1), by failing to keep waste generation records; 30 TAC §335.69(a)(1)(A) and (2), §335.112(a)(1), and 40 CFR §262.34(a)(1)(i) and (2), and §262.15(d), by failing to record inspection of containers, dispose of a drum of hazardous waste thinner, and immediately label and mark accumulation date on drums of hazardous waste thinner; 30 TAC §335.70(b), by failing to maintain annual waste summaries; and 30 TAC §335.431(c) and 40 CFR §268.50(a)(1), by failing to remove a restricted waste; PENALTY: $31,350; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(13) COMPANY: Laguna Madre Water District; DOCKET NUMBER: 2001-0200-MWD-E; IDENTIFIER: TPDES Permit Number 10350-001; LOCATION: Port Isabel, Cameron County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10350-001, and the Code, §26.121, by failing to comply with the effluent limits for total ammonia nitrogen and total suspended solids; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(14) COMPANY: Yec Sin Lee; DOCKET NUMBER: 2000-1381-PWS-E; IDENTIFIER: PWS Number 1012819; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(F) and (3), (f)(3), and (g), and §290.122, (formerly 30 TAC §§290.105(a)(2), 290.106(a), (b)(1) and (5), and (e), and 290.103(5)), and the Code, §341.033(d), by failing to collect and submit the required number of additional routine samples for bacteriological analysis, collect and submit routine monthly water samples for bacteriological analysis, collect and submit repeat samples for bacteriological analysis, exceeded the maximum contaminant level (MCL) for total coliform bacteria, and provide public notice related to the exceedance of the MCL for total coliform bacteria; PENALTY: $800; ENFORCEMENT COORDINATOR: Kimberly McGuire, (512) 239-4761; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: City of Littlefield; DOCKET NUMBER: 2001-0177-MWD-E; IDENTIFIER: Water Quality Permit Number 10207-001; LOCATION: Littlefield, Lamb County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), Water Quality Permit Number 10207-001, and the Code, §26.121, by failing to maintain and operate the treatment facility in order to achieve optimum efficiency of treatment capability, obtain representative soil samples of land irrigated with effluent, maintain effluent 30-day average for five-day biochemical oxygen demand, and submit written certification of compliance with its permit effluent limits; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(16) COMPANY: Logo Materials, Inc.; DOCKET NUMBER: 2000-1027-MSW-E; IDENTIFIER: Unauthorized Site Number 45514007; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: municipal solid waste; RULE VIOLATED: 30 TAC §330.4 and the Code, §26.121, by failing to obtain authorization or a permit prior to accepting municipal solid waste for disposal; PENALTY: $1,320; ENFORCEMENT COORDINATOR: Gary McDonald, (361) 825-3122; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(17) COMPANY: Marathon Ashland Petroleum LLC; DOCKET NUMBER: 2000-0780-AIR-E; IDENTIFIER: Air Account Number GB-0055-R; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.715(a), Permit Number 22433, and the Code, §382.085(b), by failing to control emissions which exceeded the maximum allowable emission rate for sulfur oxide and submit the reports for stack tests; PENALTY: $22,500; ENFORCEMENT COORDINATOR: Sushil Modak, (512) 239-2142; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Menasha Corporation; DOCKET NUMBER: 2000-1284-AIR-E; IDENTIFIER: Air Account Number RJ-0077-D; LOCATION: Rockwall, Rockwall County, Texas; TYPE OF FACILITY: protective packaging item production; RULE VIOLATED: 30 TAC §116.110(a) and the Code, §382.0518(a) and §382.085(b), by failing to obtain a permit or satisfy the conditions of a permit by rule for the cyclone/auger container system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Susan Johnson, (512) 239-2555; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(19) COMPANY: New Beginnings, Inc.; DOCKET NUMBER: 2000-1300-PWS-E; IDENTIFIER: PWS Number 1710022; LOCATION: Dumas, Moore County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c) and (g), (formerly 30 TAC §290.106(a) and (e)(2)), by failing to collect and submit routine monthly water samples for bacteriological analysis and provide public notification of its failure to comply with coliform monitoring requirements; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239- 5867; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(20) COMPANY: Oasis Car Wash, Inc. dba Oasis Car Wash; DOCKET NUMBER: 2000-1029- PST-E; IDENTIFIER: Petroleum

Storage Tank (PST) Facility Identification Numbers 0012030 and 0050069; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: car wash; RULE VIOLATED: 30 TAC §115.242(3)(A) and the Code, §382.085(b), by failing to provide a nozzle spring on dispenser number two; and 30 TAC §115.245(2) and the Code, §382.085(b), by failing to perform a pressure decay test; PENALTY: $2,875; ENFORCEMENT COORDINATOR: Wendy Penland, (817) 588-5867; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(21) COMPANY: Oxy Vinyls, LP; DOCKET NUMBER: 2000-0097-AIR-E; IDENTIFIER: Air Account Number HG-0192-D; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing; RULE VIOLATED: 30 TAC §116.115(a), Air Permit Number 35280, and the Code, §382.085(b), by failing to maintain a maximum filling rate of 3,500 gallons per hour for each of the methanol tanks and maintain a maximum filling rate of 1,000 gallons per hour for the filling of drums; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Trina Lewison, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: Racetrac Petroleum, Inc.; DOCKET NUMBER: 2000-1240-PST-E; IDENTIFIER: PST Facility Identification Number 0070448; LOCATION: Mesquite, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC § 115.245(2) and the Code, §382.085(b), by failing to conduct pressure decay testing annually; 30 TAC §290.51(a)(3), by failing to pay public health service fees; and 30 TAC §334.21, by failing to pay underground storage tank (UST) fees; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5890; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(23) COMPANY: Daniel Sertuche dba Sertuche & Son Plumbing; DOCKET NUMBER: 2000- 1453-OSI-E; IDENTIFIER: Installer Registration Number 2177 (expired); LOCATION: Victoria, Victoria County, Texas; TYPE OF FACILITY: on-site installer; RULE VIOLATED: 30 TAC §285.58(a)(3) and the Code, §366.051(c) and §366.054; by failing to obtain the necessary permitting authority prior to installing or constructing an on-site sewage facility; and 30 TAC §285.50(b), (c), and (e), and the Code, §366.071, by failing to have a valid registration; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(24) COMPANY: Strasburger Enterprises, Inc.; DOCKET NUMBER: 2001-0127-IWD-E; IDENTIFIER: National Pollutant Discharge Elimination System (NPDES) Permit Number TXG830049; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: gasoline wholesale; RULE VIOLATED: NPDES Permit Number TXG830049 and the Code, §26.121, by failing to comply with the permitted daily maximum concentration limit for benzene and pH; PENALTY: $2,250; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5145; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(25) COMPANY: Sun Valley Distribution, Inc.; DOCKET NUMBER: 2000-0842-AIR-E; IDENTIFIER: Air Account Number EE-1117-O; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline dispensing; RULE VIOLATED: 115.252(2) and the Code, §382.085(b), by allegedly allowing the transfer of gasoline with a Reid vapor pressure greater than seven pounds per square inch absolute; PENALTY: $720; ENFORCEMENT COORDINATOR: Rebecca Cervantes, (915) 834-4965; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901- 1206, (915) 834-4949.

(26) COMPANY: Mr. Diem Cao Truong dba T Market; DOCKET NUMBER: 2000-1031-PST- E; IDENTIFIER: PST Facility Identification Number 0025179; LOCATION: Hurst, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Code, §382.085(b), by failing to successfully perform the annual pressure decay test; 30 TAC §115.246(6) and the Code, §382.085(b), by failing to maintain a record of the daily inspection; 30 TAC §334.48(c) and the Code, §26.3475, by failing to conduct inventory volume measurements; 30 TAC §334.49(c)(4)(C) and the Code, §26.3475, by failing to test the cathodic protection system for operability; 30 TAC §334.50(b)(1)(A) and (2)(A)(ii)(I), and the Code, §26.3475, by failing to monitor tanks for releases monthly and perform tightness test for pressurized piping; 30 TAC §334.93(a) and (b), by failing to demonstrate financial responsibility; and 30 TAC §334.21, by failing to pay UST fees; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Melinda Houlihan, (817) 588-5868; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(27) COMPANY: Texas Curb Cut, Incorporated; DOCKET NUMBER: 2001-0107-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Plan Number 0000010; LOCATION: Round Rock, Williamson County, Texas; TYPE OF FACILITY: storage rental; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to submit an Edwards Aquifer Protection Plan prior to commencing construction over the Edwards Aquifer recharge zone; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(28) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2000-1304-MLM- E; IDENTIFIER: Industrial Solid Waste Registration Number 64138; LOCATION: San Angelo, Tom Green County, Texas; TYPE OF FACILITY: road construction and maintenance; RULE VIOLATED: 30 TAC §335.62, by failing to perform hazardous waste determination on spent parts-cleaning solvent waste; and 30 TAC §334.4(b), by failing to ship the solvent waste to an authorized processor; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(29) COMPANY: Texas Parks and Wildlife Department Inks Lake State Park; DOCKET NUMBER: 2001-0052-MWD-E; IDENTIFIER: Water Quality Permit Number 11566-001 (expired); LOCATION: Burnet, Burnet County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: the Code, §26.121, by allegedly having applied wastewater without a permit; PENALTY: $4,000; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(30) COMPANY: City of Venus; DOCKET NUMBER: 2001-0016-PWS-E; IDENTIFIER: PWS Number 1260006; LOCATION: Venus, Johnson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(i), (iii), and (iv), (c)(3)(B) and (J), by failing to meet minimum water system capacity requirements of two or more wells, service pumps, and elevated storage capacity, meet the requirement that the casing shall extend a minimum of 18 inches above the elevation, and meet the requirement that the concrete sealing block must extend at least three feet from the well casing in all directions; PENALTY: $740; ENFORCEMENT COORDINATOR: Judy Fox, (817) 588-5825; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010- 6499, (817) 588-5800.

(31) COMPANY: Western Transportation Inc.; DOCKET NUMBER: 2001-0162-PST-E; IDENTIFIER: Enforcement Identification Number 15901; LOCATION: Azle, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.221 and the Code, §382.085(b), by failing to ensure that during the transfer of gasoline from any delivery vessel into a stationary storage container that gasoline vapors displaced from the gasoline storage container are captured by the delivery vessel through a vapor recovery system; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Judy Fox, (817) 588-5825; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(32) COMPANY: Xklen Corporation; DOCKET NUMBER: 2000-1306-MLM-E; IDENTIFIER: Industrial Solid Waste Registration Number 83163; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: solvent waste transportation service; RULE VIOLATED: 30 TAC §330.4(b), by allegedly having transported parts-cleaning solvent waste to an unauthorized processing facility; PENALTY: $360; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239- 5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200102711
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: May 15, 2001

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Public Notice

The executive director of the Texas Natural Resource Conservation Commission (TNRCC) is issuing a public Notice of Intent to Delete (delist) the Thompson Hayward Chemical Company Proposed State Superfund Site (the Site) from the State Registry, the list of State Superfund sites which 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. TNRCC is proposing this delisting because the Site has been accepted into the Voluntary Cleanup Program.

The Site, including all land, structures, appurtenances, and other improvements, is approximately 4.74 acres, located at U.S. Route 277 South, in Munday, Knox County, Texas. The Site also includes any areas where hazardous substance(s) have come to be located as a result, either directly or indirectly, of releases of hazardous substance(s) from the Site.

From the mid-1950s through the 1960s, the Site was used as a small-scale pesticide formulation and distribution facility. Structures on the site include metal, brick and wood buildings, three pesticide mixing pits, concrete foundations and a railroad spur. Commercial operations began in 1957 with the formulation and distribution of pesticides. Dry pesticide formulations and blending of liquid pesticides were accomplished in separate pits inside the metal and brick buildings, respectively. Arsenic and organochlorine pesticides have been found at the site.

The Site has been accepted into the TNRCC Voluntary Cleanup Program and is, therefore, eligible for deletion from the State Registry as provided by 30 TAC §335.344(c).

T H Agriculture & Nutrition, L.L.C. (THAN) conducted a Remedial Investigation and prepared a Response Action Plan (RAP) under an Agreed Administrative Order with the TNRCC. Response Actions were developed for soil, debris, and shallow groundwater. THAN plans to remediate the Site under the Texas Risk Reduction Program (TRRP) Remedy Standard B based on a commercial/industrial land use designation.

The Response Action described in the RAP consists of excavation and disposal of all soils contaminated with arsenic and organochlorine pesticides at concentration exceeding the TRRP Protective Concentration Limits established for the site. Miscellaneous debris will also be excavated and disposed at an appropriate permitted offsite permitted facility. The RAP describes how a deed notice will be filed with the real property records of Knox County to the effect that the site be restricted to commercial/industrial uses. The RAP also includes groundwater monitoring and restrictions on the use of the shallow groundwater. The Response Action described in the RAP will be conducted under the TNRCC Voluntary Cleanup Program.

As per 30 TAC §335.344(b), the TNRCC will hold a public meeting to receive comment on this proposed deletion. This meeting will not be a contested case hearing within the meaning of Texas Government Code, Chapter 2001. The meeting will be held at 10:00 a.m. on Tuesday, June 26, 2001, at the TNRCC offices, 12100 Park 35 Circle, Building C, Room 131E, and will consist of two parts: an informal discussion period and a formal comment period.

All persons desiring to make comments regarding the proposed deletion of the Site 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., June 26, 2001 and should be sent to Jeffrey E. Patterson, TNRCC, Superfund Cleanup Section, Remediation Division, MC-143, P. O. Box 13087, Austin, TX 78711-3087. For further information, please contact Mr. Patterson at (800) 633-9363 or (512) 239-2489.

A portion of the record for the Site, including documents pertinent to the executive director's proposed delisting, are available for review during regular business hours at the City-County Library, 121 East B Street, Munday, Texas 76371, (940) 422-4877. The complete public file may be obtained during regular business hours at TNRCC's Records Management Center, Building D, North Entrance, Room 190, 12100 Park 35 Circle, Austin, Texas 78753, telephone number (800) 633-9363 or (512) 239-2920. Fees are charged for photocopying file information.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-2463. Requests should be made as far in advance as possible.

TRD-200102700
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: May 14, 2001

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North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the March 16, 2001, issue of the *Texas Register* (26 TexReg 2241). The selected consultant will undertake the development of a rail planning and implementation study for the Dallas/Fort Worth International Airport.

The consultant selected for this project is DMJM Aviation, 1200 Summit Avenue, Fort Worth, Texas. The maximum amount of this contract

is $750,000. Work on this project began May 8, 2001, and all work will be completed by December 2001.

TRD-200102695
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: May 14, 2001

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Public Utility Commission of Texas

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 8, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Sprint Communications Company, L.P. doing business as Sprint for an Amendment to its Certificate of Operating Authority (COA) and for a Service Provider Certificate of Operating Authority (SPCOA), Docket Number 23552 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, and long distance services. Applicant seeks to discontinue to provide residential retail local exchange services by resale in Southwestern Bell Telephone and Verizon service areas. Applicant will continue to provide services through its ION product. Sprint also offers business retail local exchange services by resale. Sprint requests the commission approve relinquishments of its COA number 50006 and in lieu thereof, grant it an SPCOA.

Applicant's requested SPCOA geographic area includes Southwestern Bell Telephone Company and Verizon service areas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than June 1, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200102723
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2001

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 8, 2001, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Provis Broadband Texas, LLC, doing business as Provis Broadband for a Service Provider Certificate of Operating Authority, Docket Number 24085 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance services and Internet access.

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, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than May 30, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200102647
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 8, 2001, for waiver of the requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of U. S. Online, Inc. (USOL) for Temporary Waiver of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 24084.

The Application: USOL is requesting a temporary waiver of the implementation deadline, from February 15, 2001 to August 1, 2001. USOL asserts that it is currently unable to comply with all the requirements contained in the rule due to problems encountered by the company's billing vendor.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 24084.

TRD-200102691
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 14, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 3, 2001, for waiver of the requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of West Texas Rural Telephone Cooperative, Inc. (West Texas) for Temporary Waiver of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 24089.

The Application: West Texas is requesting a temporary waiver of the implementation deadline, from February 15, 2001 to August 5, 2001.

West Texas asserts that it is currently unable to comply with all the requirements contained in the rule due to problems encountered by the cooperative's billing vendor.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 24089.

TRD-200102692
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 14, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 3, 2001, for waiver of the requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of W. T. Services, Inc. (WTS) for Temporary Waiver of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 24090.

The Application: WTS is requesting a temporary waiver of the implementation deadline, from February 15, 2001 to August 5, 2001. WTS asserts that it is currently unable to comply with all of the requirements contained in the rule due to problems encountered by the company's billing vendor.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 24090.

TRD-200102693
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 14, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 3, 2001, for waiver of the requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of International Exchange Communications, Inc. (IECom) for Temporary Waiver of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 24091.

The Application: Matrix Telecom, Inc. (Matrix) on behalf of IECom is requesting a temporary waiver of the implementation deadline, for an extension of time to comply with the rule requirements. Matrix informs the commission that IECom is in bankruptcy and being managed through the bankruptcy by Matrix. Matrix was unaware of IECom's non-compliance and requests an extension of time to determine IECom's compliance with the requirements of P.U.C. Substantive Rule §26.25.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 24091.

TRD-200102694
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 14, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on May 14, 2001, for waiver of the requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of Progressive Concepts, Inc. (PC) for Short Term Waiver of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 24106.

The Application: PC is requesting a temporary waiver of the implementation deadline, from February 15, 2001 to September 30, 2001, with respect to P.U.C. Substantive Rule §26.25. PC asserts that it is currently unable to comply with all the requirements contained in the rule.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 24106.

TRD-200102729
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2001

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Notice of Joint Petition of Verizon Southwest, Inc. *et.al.* to Provide Extended Metropolitan Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a joint application on April 27, 2001, seeking approval of optional, two-way, Extended Metropolitan Service (EMS), from the Willis Exchange to the Houston Metropolitan Exchanges, pursuant to P.U.C. Substantive Rule §26.217.

Project Title and Number: Joint Petition of Verizon Southwest, Inc, Governmental Representatives of the Willis Exchange, Southwestern Bell Telephone Company, and Alltel Communications, Inc., to Provide Optional, Two-Way, Extended Metropolitan Service (EMS) from the

Willis Exchange to the Houston Metropolitan Exchanges, Pursuant to P.U.C. Substantive Rule §26.217(b)(8), Project Number 24029.

The Joint Petition and Agreement: The proposed plan is an optional, two-way, extended metropolitan area service offering to which Verizon Southwest, Inc.'s residence and business local exchange customers within the Willis Exchange will be able to call within the designated calling area for a monthly, flat rate.

The joint applicants have requested that the joint agreement filing be processed administratively pursuant to P.U.C. Substantive Rule §26.217(b)(8). Persons who wish to intervene in the proceeding or comment upon action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than August 7, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7003.

TRD-200102722
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2001

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on April 4, 2001, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Miami Exchange for Expanded Local Calling Service, Project Number 23918.

The petitioners in the Miami exchange request ELCS to the exchanges of Borger, Shamrock, and Wheeler.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than May 31, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200102721
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2001

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Public Notice of Interconnection Agreement

On May 8, 2001, Etex Telecom and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 24087. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 24087. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by June 8, 2001, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 24087.

TRD-200102703
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 14, 2001

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Request for Information for Outreach Services for Speech-to-Speech Relay Telecommunications Services

The Public Utility Commission of Texas (commission) is issuing a Request for Information (RFI) for Outreach Services for Speech-to-Speech Relay Telecommunications Services. The request is being undertaken pursuant to the commission's statutory responsibility to provide relay telecommunications services. Further information regarding relay services may be found in the Texas Utilities Code, Public Utility Regulatory Act, Chapter 56, Subchapter D.

To be considered, the responses must arrive at the commission on or before 3:00 p.m., C.S.T., Friday, July 13, 2001.

The Public Utility Commission is requesting responses from entities with any relevant experience in conducting public awareness campaigns, particularly experience with campaigns targeted at persons with disabilities. Entities that meet the definition of a historically underutilized business (HUB), as defined in Texas Government Code, Chapter 2161, §2161.001, are encouraged to submit a response.

Project Description. The Public Utility Commission of Texas requests information on conducting an outreach effort to notify persons with speech disabilities of the availability of relay services for the speech disabled and how to access the service.

Use of Information Gathered Selection. The commission will use the information gathered to determine whether to issue a request for proposals to provide the outreach services. If a request for proposals is issued, the commission will select one or more contractors to provide outreach services based on the ability of the proposer to provide the best value in carrying out requirements identified in the RFP. Evaluation criteria will include, but is not limited to, evidence of ability to manage the project; experience of the organization; qualifications of assigned personnel; evidence of successful projects of a similar nature; the clarity of the description of details for carrying out the project; the total estimated fee; and whether the proposed project time lines are logical and appropriate.

Requesting the RFI. A complete copy of the RFI may be obtained by writing Ed Bosson, Relay Texas Administrator, Public Utility Commission, P.O. Box 13326, Austin, Texas 78711- 3326, or emailing ed.bosson@puc.state.tx.us, or faxing (512) 936-7003. The RFI will be available Friday, May 25, 2001 and will be mailed on that date to all parties who have requested a copy and to a list of prospective respondents prepared by commission staff.

Deadline for Receipt of Responses. Responses must be received no later than 3:00 p.m. on Friday, July 13, 2001, in the Central Records Division of the Public Utility Commission of Texas, Room G-113, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Responses received in Central Records after 3:00 p.m. on Friday, July 13, 2001 will not be considered. Responses may be filed in Central Records between 9:00 a.m. and 5:00 p.m., Monday through Friday. Regardless of the method of submission of the Response, the commission will rely solely on Central Records' time/date stamp in establishing the time and date of receipt. Responses should be filed under Project Number 23033.

TRD-200102724
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2001

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Railroad Commission of Texas

Synopsis of Dissent of Commissioner Charles W. Matthews from Railroad Commission of Texas Order Adopting New Rule 16 T.A.C. §1.10

On May 8, 2001, the majority of the Railroad Commission of Texas adopted a new substantive rule regarding recusal of commissioners in contested cases. I believe this rule violates Article II, §1 of the Texas Constitution, which separates the powers of government into the legislative, executive, and judicial branches. The Commission lacks the authority to adopt such a rule, and the rule conflicts with the current law regarding the qualification of commissioners to hear contested cases. Accordingly, I dissent. According to the preamble of the rule, the provisions of the new rule are not binding on a commissioner. Instead, they are "offered as a rule so that members of the public will know the standards of ethical conduct to which the commissioners, individually and voluntarily, hold themselves." For the record, I want to make clear that I do not bind myself to this rule.

I filed comments on the proposed rule on March 26, 2001. I want to take this opportunity to address the Commission's two substantive responses to my comments. The Commission's argument that Article 6447 specifically permits this rule as "necessary for [the Commission's] government" is inconsistent with both the structure and language of Article 6447. The second paragraph of Article 6447, entitled "Qualifications," is the only part of Article 6447 that specifically deals with commissioner conflict of interest. The provision concerning commissioners having authority to make rules for their governance appears under the heading "Organization," which is directed to the organization and day-to-day operations of the Commission and has nothing to do with the qualifications of a commissioner to hold office or the reasons a commissioner would be disqualified or should recuse. The conflict of interest provisions that specifically set forth the bases for recusal of a commissioner are in Chapter 572 of the Government Code.

Although not stated in the text of the rule, the preamble recites that the rule is not binding. Hence, the Commission appears to have accepted my argument that it has no authority to promulgate a binding rule regarding recusal of commissioners. Designating the proposed rule as voluntary rather than mandatory does not cure the problem that this rule exceeds the Commission's authority. This voluntary aspect of the rule raises several questions. Why would the Commission adopt a rule that is not binding? Does a non-binding rule even constitute an appropriate rule under the Administrative Procedure and Practice Act? If the purpose of the rule is to inform the public about the standards of ethical conduct to which the commissioners bind themselves, how is the public supposed to be informed that the rule is voluntary and not binding if the text of the rule itself does not say so?

I also believe that the provisions of this rule do not constitute good public policy. It is especially cynical and self-serving for an elected body to create its own ethical rules. In so doing, officeholders could create rules specifically designed to preclude an actual or potential opponent from either qualifying for office or taking action on matters before the Commission.

The Commission's adoption of the rule in question violates the fundamental tenet of administrative law that an agency can adopt only such rules as are authorized by and consistent with its statutory authority. The new rule exceeds the Commission's rulemaking authority and conflicts with established law. The conditions in the new rule under which a Railroad Commissioner must recuse himself or herself from a contested case go well beyond those adopted by the Legislature and set forth in Government Code §572.058 and Article 6447. The Legislature has not delegated to the Commission the authority to adopt a rule that purports to bind individual commissioners to a standard of ethical conduct higher than the standard enacted by the Legislature.

The majority's reliance on the Texas Rules of Civil Procedure is inappropriate. The standard imposed by statute and constitution upon judges expressly requires recusal when a party is related to the judge by the third degree of affinity or consanguinity. There are no such statutory or constitutional provisions extending conflict of interest provisions to the third degree of kinship to the Railroad Commission of Texas. Adopting a rule that imposes requirements in addition to those set by law, departs from and conflicts with the statute. Accordingly, the rule is an invalid exercise of the Commission's authority.

If this Commission wants higher ethical standards to apply to its members, it should ask the Legislature to mandate the higher standards. So far, the Legislature has not chosen to do so. In fact, earlier this session,

the Sunset Advisory Committee rejected recommending any changes to the ethical standards applicable to the Texas Railroad Commissioners.

This is an issue of significant enough importance that Senator Frank Madla, Chairman of the Intergovernmental Relations Committee, at my behest, requested an Attorney General Opinion regarding the legality of the proposed rule. The Attorney General received the request on April 6, 2001, and the Chair of the Opinion Committee set a due date of October 3, 2001, for the opinion. My colleagues declined to extend the courtesy to Senator Madla and General Cornyn of deferring action on the rule until the Attorney General Opinion had been issued.

For the reasons set forth above, I respectfully dissent. For copies of my comments filed on March 26, 2001, or the complete version of my dissent, please contact the Commission's General Counsel at (512) 463-7003. Both the comments and the complete version of the dissent will be available on my website at www.rrc.state.tx.us/commissioners/matthews/index.html.

TRD-200102730
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas
Filed: May 15, 2001

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Southwest Texas State University

Consultant Proposal Request

The Gilbert M. Grosvenor Center for Geographic Education

Southwest Texas State University in San Marcos, Texas solicits proposals for a consultant to conduct a feasibility study to determine the expected success of a capital campaign that will focus on Gil M. Grosvenor and his accomplishments.

Your proposal should include the following elements:

• your philosophy on conducting a capital campaign without conducting a feasibility study

• an outline of your approach to and method of conducting a capital campaign

• identification of strategies for reaching prospects for a capital campaign, including the active participation of Gilbert Grosvenor and the National Geographic Society

• names/qualification of the principal individuals who will be assigned this project

• a list of clients your firm has served in this capacity

• a proposed fee and payment schedule for a feasibility study and a separate fee schedule for a campaign only

• a suggested time frame

Contact: Carroll D. Wiley, Associate Vice President for University Advancement, Southwest Texas State University, San Marcos, TX 78666, 1-800-687-6124

Closing date: 30 days from posting date

TRD-200102655
William A. Nance
Vice President for Finance and Support Services
Southwest Texas State University
Filed: May 11, 2001

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Stephen F. Austin State University

Notice of Availability of Consulting Services Contract

This request for consulting services is filed under the provisions of the Government Code, Chapter 2254.

Stephen F. Austin State University (SFA), Nacogdoches, Texas, requests proposals from consulting firms to identify sources of extramural funding in Washington, DC, to support specific areas of research and development for the University and cooperators; represent the University in meetings with governmental agencies, conservation organizations, industry associations, and private research firms; arrange briefings for University faculty and staff; and schedule and/or host meetings in Washington, DC, between University personnel and potential funding sources.

Expertise among nationally recognized faculty at Stephen F. Austin State University affords excellent potential for developing major research and outreach programs in the very narrow and specific areas of:

1) **Carbon Sequestration Through the Growth of Trees.** Carbon dioxide, a pollutant generated by fossil fuel combustion and considered a major greenhouse gas, is also a primary ingredient in the formation of wood in trees. By planting trees in previously unforested areas, or by increasing the growth and productivity of existing forests, we may be able to extract significant quantities of carbon dioxide from the air and convert it into a valuable resource. Research is needed to quantify the sequestration of carbon with a wide variety of trees on a wide range of physiographic regions.

2) **Animal Waste Disposal on Forest Land.** Poultry, swine, and cattle production is an increasingly important aspect of the sustainable economic development in rural America. However, disposal of wastes from production facilities has become a major problem. Since animal wastes contain high levels of nutrients especially nitrogen significant potential exists for disposing of animal wastes on forest land. Information is needed both on beneficial and negative impacts of such land applications.

3) **Biotechnology of Medicinal Plants.** Chemical compounds that occur naturally in trees and other plants offer great promise in the treatment of certain cancers. Excellent potential exists at SFA for maximizing the production of such beneficial chemical compounds and their analogs by developing cultivars and cultural techniques. Opportunities for rural economic development can be realized through efforts to encourage the planting of trees, the harvesting of tissues, and the extraction of chemicals locally.

The University intends to make the selection of a consulting firm by July 1, 2001. Previous experience, client references, and billing packages will be important considerations in the award of the proposed contract.

Interested parties are invited to contact Dr. R. Scott Beasley, Dean, Arthur Temple College of Forestry by June 15, 2001 to express their interest and describe their capabilities. Further information may be obtained from Dr. Beasley at (936) 468-3304, or by mail at Arthur Temple College of Forestry, Stephen F. Austin State University, P. O. Box 6109, Nacogdoches, Texas 75962-6109.

TRD-200102747
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: May 16, 2001

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Texas Turnpike Authority, Division of the Texas Department of Transportation

Notice of Availability of Final Environmental Impact Statement (US 183A)

The Texas Turnpike Authority (TTA), a division of the Texas Department of Transportation, hereby issues this notice to advise the public that a Final Environmental Impact Statement (FEIS) has been prepared and approved for proposed U.S. Highway 183 Alternate (US 183A). As proposed, the project would be located in southwestern Williamson County, east of existing US 183 and the cities of Cedar Park and Leander. The study limits, addressed in the FEIS, extend from existing US 183 at RM 620, north to existing US 183 approximately three miles north of the City of Leander. The length of the proposed facility is approximately 12 miles. The purpose of the proposed facility is to alleviate traffic congestion on existing US 183, and improve mobility and safety on area roadways.

Alternatives evaluated in the FEIS, and presented at the public hearing, include taking no action (the "no build" alternative) and two primary route alternatives (Alternative 1 and Alternative 2). Alternative 1 begins at RM 620 and follows existing US 183 to Lakeline Blvd. At Lakeline Blvd, it veers northeast then north, approximately three-fourths of a mile east of existing US 183. After crossing FM 1431, Alternative 1 again veers northeast then north until it crosses RM 2243. After crossing RM 2243, Alternative 1 follows a northwest path until it rejoins existing US 183 approximately 3 miles north of the City of Leander. Like Alternative 1, Alternative 2 begins at RM 620 and follows existing US 183 to Lakeline Blvd. At Lakeline Blvd, it veers northeast then north approximately 2 miles east of existing US 183. North of FM 1431, Alternative 2 roughly follows County Road 272 until it crosses Brushy Creek. After crossing Brushy Creek, Alternative 2 follows a northwest path until it rejoins existing US 183 north of Leander. Alternative 1 is identified in the FEIS as the preferred alternative.

As currently proposed, the ultimate facility design is anticipated to be a controlled access six mainlane roadway within a usual right-of-way of 400 feet. Frontage roads, auxiliary lanes, grade separations and direct connection ramps will be constructed at varying locations, depending on the final alignment and design.

The proposed US 183A project is being developed as a toll road candidate. Accordingly, in conjunction with other project development related activities, TTA is conducting a study to evaluate the feasibility of developing the proposed project as a toll road and financing it, in whole or in part, through the issuance of revenue bonds.

The US 183A FEIS is available for review at the offices of the TTA, 125 E. 11th Street, Austin, Texas 78701 and at the TTA Project Office, 1421 Wells Branch Parkway, Building 1, Suite 107, Pflugerville, Texas 78660. Copies of the FEIS may be purchased from TTA for the actual cost of reproduction.

Copies of the FEIS have also been filed with and are available for public review at the Austin Public Library/Austin History Center (Reading Room), the Cedar Park Public Library, and the Leander Public Library.

Comments on the FEIS may be submitted to Ms. Stacey Benningfield, Environmental Manager, Texas Turnpike Authority Division, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483. For additional information contact Ms. Benningfield at the TTA Project Office or by telephone at (512) 225-1351.

TRD-200102736

Phillip Russell
Director
Texas Turnpike Authority, Division of the Texas Department of Transportation
Filed: May 16, 2001

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The University of Texas System

Consultant Proposal Request

The University of Texas at Austin requests, pursuant to the provisions of the Government Code, Chapter 2254.029, the submission of proposals leading to the award of a contract for Consulting Services. The University's objective is to develop the following:

(a) Facility Naming Rights packages, with projected values;

(b) Projected values for new arena suites;

(c) Prospective list of companies with an interest in acquiring naming rights;

(d) Strategies and procedures for marketing and sale of naming rights;

(e) Terms and conditions for a long-term Naming Rights Contract with one or more sponsoring entities selected by University; and

(f) Procedures for fulfillment of the Naming Rights Contract between University and the selected sponsoring entity or entities.

An award for the services specified herein will be made following a procedure using competitive sealed proposals.

Proposals will be opened publicly to identify the names of the RESPONDENTS, but will be afforded security sufficient to preclude disclosure of the contents of the proposal, including prices or other information, prior to award. After opening, an award may be made on the basis of the proposals initially submitted, without discussion, clarification, or modification, or on the basis of negotiation with any of the RESPONDENTS or, at UNIVERSITY'S sole option and discretion, UNIVERSITY may discuss or negotiate all elements of the proposal with selected RESPONDENTS which represent a competitive range of proposals. For purposes of negotiation, a competitive range of acceptable or potentially acceptable proposals may be established comprising the highest rated proposal(s). After the submission of a proposal but before making an award, UNIVERSITY may permit the offeror to revise the proposal in order to obtain the best final offer. UNIVERSITY may not disclose any information derived from the proposals submitted from competing offers in conducting such discussions. UNIVERSITY will provide each offeror with an equal opportunity for discussion and revision of proposals. Further action on proposals not included in the competitive range will be deferred pending an award, but UNIVERSITY reserves the right to include additional proposals in the competitive range if deemed in the best interest of UNIVERSITY. UNIVERSITY reserves the right to award a Contract for all or any portion of the requirements proposed by reason of this request, award multiple Contracts, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to re-solicit for proposals, or to reject any and all proposals if deemed to be in the best interests of UNIVERSITY and to temporarily or permanently abandon the procurement. If UNIVERSITY awards a contract, it will award the contract to the offeror whose proposal is the most advantageous to UNIVERSITY, considering price and the evaluation factors set forth in this RFP. The contract file must state in writing the basis upon which the award is made.

Interested parties may contact David Huertas at The University of Texas at Austin Purchasing Office for a copy of the RFP document by calling (512) 471-2858 or e-mailing him at djhuertas@mail.utexas.edu and

referencing RFP for Naming Rights. Alternate contact is Dana Springs at (512) 471-2856 or springs@mail.utexas.edu.

An original and five (5) copies of the proposal must be submitted by the Proposal submission deadline of 2 P.M., June 14, 2001.

TRD-200102727
Francie A. Frederick
Counsel and Secretary to the Board
The University of Texas System
Filed: May 15, 2001

♦ ♦ ♦

Texas Water Development Board

Request for Qualifications for Bond Counsel

The Texas Water Development Board (Board) and Texas Water Resources Finance Authority (Authority) are requesting proposals for bond counsel services. The deadline for proposal submission is 12:00 p.m., June 15, 2001.

The Board's/Authority's Boards of Directors will make their selection based upon demonstrated competence, experience, knowledge and qualifications. The Board's/Authority's Boards of Directors will then negotiate with the firm(s) selected a contract at a fair and reasonable price. By the Request for Qualification the Board/Authority has not committed themselves to employ bond counsel nor does the suggested scope of service or term of agreement therein require that the bond counsel be employed for any or all of those purposes. The Board/Authority reserves the right to make those decisions after receipt of proposals and the Board's/Authority's decision on these matters is final. The Board/Authority reserves the right to negotiate individual elements of the Firm's proposal and to reject any and all proposals.

Copies of the Request for Qualifications may be obtained by calling or writing Sissie Stacy at (512) 936-2246, fax (512) 463-5580.

TRD-200102741
Suzanne Schwartz
General Counsel
Texas Water Development Board
Filed: May 16, 2001

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 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 "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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