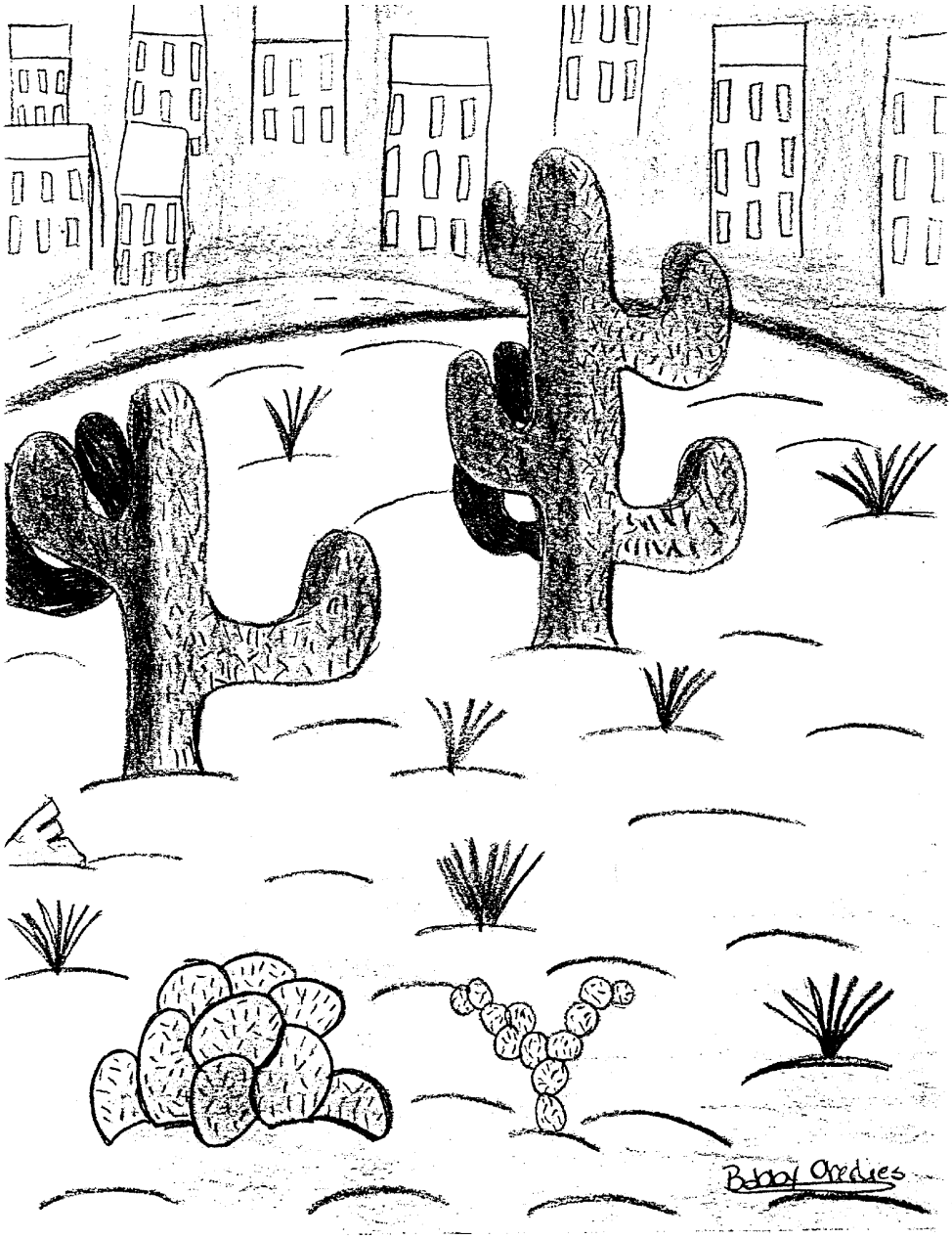
TEXAS REGISTER

Volume 27 Number 34 August 23, 2002 Pages 7665-8056



This month's front cover artwork:

Artist: *Bobby Oberlies*
8th Grade
Loflin Middle School

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

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

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

***Texas Register,* (ISSN 0362-4781),** is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $200. First Class mail subscriptions are available at a cost of $300 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

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

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

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Office of the Secretary of State
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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.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for July 23, 2002.

The following appointments were previously published in the August 9, 2002 issue of the *Texas Register* (27 TexReg 6915). The appointments were listed under an incorrect council name due to an error by the Governor's office. The previous name published was **Drug Demand Reduction Advisory Committee**, but should read **Texas State Incentive Grant Advisory Committee**. The following individuals were appointed on July 23, 2002 for terms at the pleasure of the Governor, James C. Oberwetter, Chairman of Dallas, Beverly Barron, Vice Chair of Odessa, Cathey Brown of Dallas, Clara Contreras of Edinburg, Tommy Cowan of Austin, Stephanie Haynes of Alpine, Tracy Levins of Austin, Randy Shell of Austin, Rev. Leslie Smith of Houston, Vickie Spriggs of Austin, Salvador Balcorta, CEO of El Paso, George Comiskey of Lubbock, Michelle Deaver of Dallas, Paula Gomez of Brownsville, Bob Gonzales of San Antonio, Dietrich Johnson of Longview, Nicole Masterjohn of Austin, Dawn Mathis of Houston, Jacob Patino of San Antonio, Barry Sharp of Austin.

Appointments for August 6, 2002.

Appointed as Judge of the 7th Judicial District Court for a term until the next General Election and until his successor shall be duly elected and qualified, Kerry L. Russell of Tyler. Mr. Russell will replace Judge Louis Gohmert, who was elevated to the 12th Court of Appeals.

Appointments for August 7, 2002.

Appointed to the Texas Council for Developmental Disabilities for terms to expire on February 1, 2003, Dana Smith Perry of Brownwood (replacing Joe Colunga of Brownsville who resigned), Melonie Smith Caster of Bedford (replacing Johnny Sauseda of Victoria who resigned).

Appointed to the Texas Council for Developmental Disabilities for terms to expire on February 1, 2007, Susan Baker of Alvin (replacing Linda Vancil Ponder of Ballinger whose term expired), Jan Reimann Newsom of Dallas (reappointed), Cynthia Lee Johnston of Dallas (replacing J. Robert Hester of Fort Worth whose term expired).

Appointed to the Houston-Galveston Regional Review Committee for terms to expire on January 1, 2004, Mayor Howard Kravetz of Panorama Village, Mayor Mary Sue Timmerman of Montgomery.

Appointed as Judge of the 160th Judicial District Court for a term until the next General Election and until his successor shall be duly elected and qualified, Joseph M. Cox of Dallas. Mr. Cox will replace David C. Godbey who resigned.

Appointed as Judge of the 338th Judicial District Court in Harris County for a term until the next General Election and until his successor shall be duly elected and qualified, Tommy Brock Thomas, Jr. of Katy. Mr. Thomas is replacing Justice Elsa Alcala who was elevated to the 1st Court of Appeals.

Appointed to the Lower Rio Grande Regional Review Committee for terms to expire on January 1, 2004, Commissioner Gloria Lynne Barrientos of Rio Hondo, Mayor Carlos Cantu of La Feria, Commissioner David A. Garza of Brownsville, Alderman Gary G. Minton of Los Fresnos, Mayor Lisandro Ramon of Lyford, Mayor Irene Romero of Los Fresnos, Judge Simon Salinas of Raymondville.

Appointed to the Trinity River Authority of Texas Board of Directors for a term to expire on March 15, 2005, Steve Cronin of Shepherd (replacing Billy Richardson of Point Blank who is deceased).

Appointed to the Trinity River Authority of Texas Board of Directors for terms to expire on March 15, 2007, Louis E. Sturns of Fort Worth (replacing Wanda Stovall of Fort Worth whose term expired), Linda D. Timmerman of Streetman (replacing H. Gene Reynolds of Fairfield whose term expired).

Appointments for August 13, 2002.

Appointed as Adjutant General of Texas for a term to expire February 1, 2003, General Wayne D. Marty of Austin (replacing General Daniel James who resigned).

Rick Perry, Governor

TRD-200205253

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Executive Order RP 16

Relating to the creation of the Statewide Texas Amber Alert Network.

WHEREAS, the State of Texas recognizes a need for a statewide approach to the rapid apprehension of criminals who would kidnap and otherwise harm the children of Texas; and

WHEREAS, a partnership between law enforcement, the media, and state and local authorities has been beneficial in thwarting the kidnapping and abduction of young children; and

WHEREAS, experts agree that the successful resolution of child abduction cases is aided by the rapid distribution of information concerning the details of the abduction and a description of the child and the abductor; and

WHEREAS, the "Amber Plan" has been effective in the swift apprehension of kidnappers and others who would harm the children of Texas; and

WHEREAS, the Amber Plan was created in 1996 in the Dallas-Fort Worth area after 9-year-old Amber Hagerman disappeared from her Arlington neighborhood while riding her bicycle; and

WHEREAS, a number of regional child abduction alert systems exist in a handful of urban Texas communities, yet no coordinated, statewide system exists; and

WHEREAS, Texas broadcast stations participate in the federal Emergency Alert System, which was created to disseminate emergency alert messages; and

WHEREAS, Marc Klaas has been instrumental in the creation of a nationwide, web-based program that further enhances law enforcement agencies' and broadcast stations' ability to rapidly disseminate information about abducted children and their suspected kidnappers through e-mails, faxes, and phone calls; and

WHEREAS, the Texas Department of Transportation has a network of electronic highway signs capable of flashing alerts about abducted children, thereby expanding the number of individuals helping search for them;

NOW, THEREFORE, I, Rick Perry, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

1. Creation. The Statewide Texas Amber Alert Network (the "Amber Network") is hereby created. The Amber Network is a cooperative effort of the Office of the Governor, the Department of Public Safety, the Department of Transportation, the Texas Association of Broadcasters, various business and private sector concerns, law enforcement agencies, state and local entities, and the public in the state of Texas.

2. Purpose. The Amber Network is a coordinated emergency alert program that will distribute information about abducted children. It will serve as an early warning system available for use by law enforcement to alert the public when a child has been kidnapped and the police believe the child is in danger. The Amber Network will rely on the cooperation of public and private agencies across the state to provide immediate communication from law enforcement agencies to the public when a report of child abduction has been confirmed. The Amber Network will rely on the eyes and ears of the public during an alert.

3. Activation. In order to activate the Amber Network, the following criteria must be met:

* The abducted child must be 17 years of age or younger;

* The local law enforcement agency must believe that the child has been abducted, that is, unwillingly taken from their environment without permission from the child's parent or legal guardian;

* The local law enforcement agency must believe that the missing child is in immediate danger of serious bodily harm or death;

* The local law enforcement agency must confirm that an investigation has taken place that verifies the abduction and has eliminated alternative explanations for the missing child; and

* Sufficient information is available to disseminate to the public that could assist in locating the child, the suspect, or the vehicle used by in the abduction.

4. Administration. The director of the Texas Department of Public Safety (the "director") shall act as the statewide coordinator of the Amber Network. The director will adopt necessary guidelines and issue proper directives to see that the Amber Network is properly implemented statewide. The director may modify the criteria for implementation and activation of the Amber Network if necessary. These guidelines and directives should include the design and printing of forms and documents for local law enforcement agencies to notify the Department of Public Safety of the need to activate the Amber Network. These guidelines should also include instructions on deactivation of the Amber Network once the abduction has been resolved or ended. The director is authorized to enter into agreements with state and local entities as well as with private entities to carryout the coordination and implementation of this plan.

5. Law enforcement agencies. To activate the Amber Network, a state, local, or federal law enforcement agency must verify that the proper criteria has been met to activate the plan. Once that verification has occurred, the law enforcement agency must immediately contact the Texas Department of Public Safety and supply the necessary information on forms proscribed by the director.

6. Broadcasters. Broadcast facilities across the state are encouraged to participate in the Statewide Texas Amber Alert Network through the existing Emergency Alert System (EAS). The Emergency Alert System should disseminate important information over radio and television stations concerning the abducted child. Primary and secondary broadcast stations in the appropriate area will receive notice directly from the Department of Public Safety concerning activation of the Amber Network.

7. State Agencies. All agencies of the State of Texas are hereby directed to cooperate with and assist in the development, implementation, and operation of the Statewide Texas Amber Alert Network. The Texas Department of Transportation shall develop an information activation program for the existing system of Dynamic Message Signs located across the state. Other state agencies with employees in the field shall consider the feasibility of developing a plan for providing their officers, investigators, or employees with information once the Amber Network has been activated.

8. Public. Attentive observation and watchful skills of the public are a key to making the Amber Network successful. After an alert has been issued, the public is encouraged to "be-on-the-lookout" for the child, the alleged abductor, or the alleged abductor's vehicle and to report any information to the issuing law enforcement agency immediately.

9. Termination. Any activation of the Amber Network may be cancelled by the reporting law enforcement agency or by the director of the Department of Public

Safety acting as the statewide coordinator of the plan. This order is effective immediately and shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding Governor.

Given under my hand this the 12th day of August, 2002.

Rick Perry, Governor

TRD-200205275

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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-0538

Mr. Felipe T. Alanis, Commissioner of Education, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas, 78701-1494

Re: Whether a parent has an unrestricted right of access to the school counseling records of his or her minor child (RQ-0506-JC)

S U M M A R Y

Generally, all student records are available to parents. Only under very narrow and unusual circumstances may a minor child's school counseling records be withheld from a parent. Under the Federal Family Educational and Privacy Rights Act, a public school may withhold a minor child's counseling records from a parent only if the records are kept in the sole possession of the counselor, are used only as the counselor's personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the counselor. Within this circumscribed category, state law permits the counselor to withhold a minor child's records only if the counselor is a "professional," as defined in section 611.001(2) of the Health and Safety Code, and further, if the counselor "determines that release" of such record "would be harmful to the patient's physical, mental, or emotional health." If the counselor does not fall within the category of licensed professional under section 611.001(2) of the Health and Safety Code, section 26.004 of the Education Code prevails, and the parent "is entitled to access to all written records" of the school district "concerning the parent's child, including . . . counseling records."

Opinion No. JC-0539

The Honorable Tony Goolsby, Chair, Committee on House Administration, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910

Re: Whether a slaughterhouse in Texas that slaughters, processes, possesses, sells, or transports horse-meat to foreign countries to be consumed by humans there violates section 149.002 or 149.003 of the Agriculture Code, and related questions (RQ-0512-JC)

S U M M A R Y

Chapter 149 of the Agriculture Code applies to slaughterhouses in Texas that process, possess, sell, or transport horse-meat to foreign countries as food for human consumption if the slaughterer has the requisite intent. The federal Meat Inspection Act, 21 U.S.C. ch. 12, does not appear to preempt prosecution for violations of chapter 149.

The Texas Department of Agriculture lacks authority to investigate and prosecute alleged violations of chapter 149. A county or criminal district attorney may investigate and prosecute alleged violations of chapter 149.

Opinion No. JC-0540

The Honorable Burt Solomons, Interim Chair, House Committee on Financial Institutions, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910

Re: Whether a bank may use information contained in the magnetic stripe of a driver's license (RQ-0514-JC)

S U M M A R Y

Section 521.126 of the Texas Transportation Code does not permit financial institutions to access magnetic stripe information on Texas driver's licenses. The restrictions on access to magnetic stripe information on Texas driver's licenses under section 521.126 of the Texas Transportation Code are not preempted by the USA Patriot Act of 2001, Pub. L. No. 107-56.

Opinion No. JC-0541

The Honorable Danny Buck Davidson, Criminal District Attorney, 123d Judicial District, 110 South Sycamore, Carthage, Texas, 75633

Re: Whether a sheriff in a county that does not have a bail bond board has the authority to post in the county jail a list of preapproved bondsmen (RQ-0517-JC)

S U M M A R Y A sheriff in a county that does not have a bail bond board is not authorized to post in the county jail a list of preapproved bondsmen.

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

TRD-200205294

Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 14, 2002

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Requests for Opinions

RQ-0581

The Honorable Robert F. Vititow

Rains County Attorney

P.O. Box 1075

Emory, Texas 75440

Re: Whether a county commissioner may simultaneously hold the office of city council member in a city located in that county, and related questions (Request No. 0581-JC)

Briefs requested by September 13, 2002

RQ-0582

Ms. Grace Shore

Chair, State Board of Education

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Expenditure of certain funds by the State Board of Education under particular riders to the General Appropriations Act (Request No. 0582-JC)

Briefs requested by September 13, 2002

RQ-0583

The Honorable Jose R. Rodriguez

El Paso County Attorney

500 East San Antonio, Room 203

El Paso, Texas 79901

Re: Whether the state may recover the cost of serving a summons in a juvenile justice proceeding (Request No. 0583-JC)

Briefs requested by September 13, 2002

For further information, please access the Attorney General's website at www.oag.state.tx.us. *or call the Opinion Committee at 512/ 463-2110.*

TRD-200205295
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 14, 2002

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EMERGENCY RULES

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

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

TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.436

The State Board for Educator Certification (Board or SBEC) adopts on an emergency basis amended §230.436(8), relating to the schedule of fees for certification services. Adoption of the amended rule allows SBEC to comply with state law prohibiting the agency from imposing an unauthorized tax on school districts.

School districts apply to SBEC for emergency permits to employ teachers who are not fully certified. Before September 1, 2002, SBEC will have replaced the current permit application process with a new, more efficient web-based system to be used to process emergency permits, nonrenewable permits and temporary exemption permits. It is anticipated that costs related to permit processing will decrease with the implementation of the system. Therefore, the current permit fee of $75 would be more than adequate to cover administration costs. A fee of $55 is a more reasonable fee to charge school districts for the issuance and maintenance of an emergency permit. Under the emergency rule, the decreased fee applies only to permits requested for the 2002 - 2003 school year by school districts using the new web-based system.

A levy by a state agency is a tax if its primary purpose is to raise revenues in excess of the amount needed for regulation of a profession or industry. A levy by a state agency is a regulatory fee if its primary purpose is to pay the costs of administering a regulatory program. *See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 460-63 (Tex. 1997); Conlen Grain and Mercantile, Inc. v. Tex. Grain Sorghum Producers Bd., 519 S.W.2d 620 (Tex. 1975); Robinson v. Hill, 507 S.W.2d 521 (Tex. 1974); County of Harris v. Sheppard, 291 S.W.2d 721 (Tex. 1956); Hurt v. Cooper, 110 S.W.2d 896, 899 (Tex. 1937); see also Tex. Att'y Gen. Op. Nos. JC-0501 (2002), JC-0001 (1999), JM-963 (1988).*

Accordingly, SBEC has determined that state law requires the adoption of a reduced fee on fewer than 30 days notice. Because SBEC is adopting the amended fee rule immediately without first proposing it, Section 21.042, Education Code, relating to approval of proposed rules by the State Board of Education, does not apply.

The rule is adopted on an emergency basis under Section 21.031(a), Education Code, which authorizes SBEC to regulate and to oversee all aspects of the certification of public school educators; Section 21.041(c), which authorizes SBEC to adopt a fee for the issuance and maintenance of an educator credential that is adequate to cover the cost of administration; and Section 2001.034, Government Code, which authorizes SBEC to adopt a rule on an emergency basis.

There are no other codes or rules affected.

§230.436. Schedule of Fees for Certification Services.

An applicant for a certificate or a school district requesting a permit shall pay the applicable fee from the following list.

(1) Standard Educational Aide certificate - $30.

(2) Standard certificate, additional specialization, teaching field, or endorsement/delivery system, based on recommendation by an approved teacher preparation entity or State Board for Educator Certification authorization; or extension or conversion of certificate - $75.

(3) Probationary certificate based on recommendation by an approved teacher preparation entity or Texas public school district - $50.

(4) Duplicate of certificate or change of name on certificate - $45.

(5) Addition of certification based on completion of appropriate examination - $75.

(6) Review of a credential issued by a jurisdiction other than Texas (nonrefundable) - $175.

(7) Temporary credential based on a credential issued by a jurisdiction other than Texas - $50.

(8) Initial permit, reassignment on permit with a change in assignment or school district, renewal is for nonconsecutive years, or renewal of permit on a hardship basis (nonrefundable) - $55 [~~75~~].

(9) Renewal in the school district of a permit at the same target certificate level and initial activation, or renewal in the same school district of a temporary classroom assignment permit - no fee.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205244

William Franz
Executive Director
State Board for Educator Certification
Effective Date: August 12, 2002
Expiration Date: December 10, 2002
For further information, please call: (512) 469-3011

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 2. MEDICAID VISION CARE PROGRAM

1 TAC §354.1025

The Health and Human Services Commission (HHSC) proposes new rule §354.1025, concerning Competitive Procurement of Vision Care Services. The proposed new rule is pursuant to cost containment strategies identified in the Appropriations Act passed in the 77th Texas Legislature. In accordance with Article II, Special Provisions relating to Medicaid Cost Containment, Rider 33 (i), the proposed new rule establishes a process for HHSC to competitively procure eyewear in a manner that encourages competition and results in savings to the state.

The proposed new rule, §354.1025, competitive procurement of vision care services, with simultaneously proposed amendments to §355.8001, Reimbursement for Optometric Services, and §355.8461, Reimbursement for EPSDT Eyeglass Program, will add fixed-unit pricing, determined by competitive procurement, to the Medicaid reimbursement methodology for nonprosthetic eyewear. Currently, Medicaid reimburses participating providers under a maximum fee schedule for nonprosthetic eyewear. Under the proposed new and amended rules, participating providers of nonprosthetic eyewear and repairs may be reimbursed a fixed-unit price, determined by competitive procurement. The contractor would be subject to Medicaid Vision Care Policy and contract requirements. Although eyeglasses and repairs are provided by a selected contractor, HHSC would be permitted to pay a dispensing fee to providers.

Don Green, Chief Financial Officer, has determined that during the first five years that the proposed new rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the section. The anticipated cost savings associated with competitive procurement are achieved through the implementation of the proposed amendments to §355.8001, Reimbursement for Optometric Services, and §355.8461, Reimbursement for EPSDT Eyeglass Program. The cost savings are identified in the preamble for the two reimbursement rules. This proposed new rule will not result in any fiscal implications for local health and human service agencies. Local governments will not incur additional costs.

Mr. Green has also determined that for each year of the first five years the proposed new rule is in effect, the public will benefit from adoption of the rule. The anticipated public benefit, as a result of enforcing the proposed provision, will be to ensure that additional choices of eyewear frames and lenses will be available to Medicaid beneficiaries at a reduction in costs to the state. The proposed new rule does not contain any substantive changes for recipients and is not expected to have any significant impact on access to eyewear.

The proposed new rule will not result in additional costs to persons required to comply with the proposed new rule, nor does the proposed new rule have any anticipated adverse affect on small or micro-businesses. Medicaid enrolled vision care providers will be required to alter their business practices in order to comply with the new rule as proposed. Medicaid-enrolled vision care providers will not be reimbursed for provision of nonprosthetic eyewear. HHSC will provide policy notification, information, and training to enrolled vision care providers in order to assure minimal business impact. The proposed new rule will not negatively affect local employment.

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

proposed new rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has evaluated the takings impact of the proposed new rule under §2007.043, Government Code. HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of governmental action and therefore does not constitute a taking. The proposed provision is reasonably taken to fulfill requirements of state law.

Comments on the proposal may be submitted to Dee Sportsman, Program Development, Medicaid/CHIP Division, Texas Health and Human Services Commission, 1100 W. 49th Street, MC Y-927, Austin, Texas 78756-3199 or at (512) 794-5164, within 30 days of publication of this proposal in the *Texas Register*.

A public hearing is scheduled for September 11, 2002, from 1 p.m. to 3 p.m. The hearing will be held in the Public Hearing Room, Health and Human Services Commission, 12555 Riata Vista Circle, Bldg. #3, Austin, Texas 78727.

The new rule is proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code, §32.021, and the Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed new rule affects the Government Code, Chapter 531, and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed new rule.

§354.1025. Competitive Procurement of Vision Care Services.

The Texas Health and Human Services Commission (HHSC) may establish a process for procuring eyewear that encourages competition and results in savings to the state.

(1) HHSC will determine what categories or individual types of eyewear may be procured through a competitive process using the following criteria:

(A) the cost effectiveness of competitively procuring a particular category or type of eyewear; and

(B) providing quality vision care services for beneficiaries.

(2) HHSC may limit the number of providers with whom it will contract to supply eyewear using the following criteria:

(A) responses to the competitive procurement request for proposal;

(B) beneficiary accessibility to vision services; and

(C) program cost effectiveness.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205232
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 424-6576

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CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Health and Human Services Commission (HHSC) proposes amendments to §355.8001, concerning Reimbursement for Optometric Services, and §355.8461, concerning Reimbursement for EPSDT Eyeglass Program. The proposed amendments are pursuant to cost containment strategies identified in the Appropriations Act passed in the 77th Texas Legislature. In accordance with Article II, Special Provisions relating to Medicaid Cost Containment, Rider 33 (i), the proposed amendments establish a process for HHSC to competitively procure eyewear in a manner that encourages competition and results in savings to the state.

Proposed amendments to §355.8001, Reimbursement for Optometric Services, and §355.8461, Reimbursement for EPSDT Eyeglass Program, will allow HHSC to pay providers a dispensing fee for competitively procured eyewear and add language referencing the proposed new rule, §354.1025, Competitive Procurement of Vision Care Services. Prescribing Medicaid vision providers would order eyewear from contracted vendors and a dispensing fee would be paid to the dispensing provider. Medicaid beneficiaries would not be adversely impacted by this change in reimbursement of eyewear.

Don Green, Chief Financial Officer, has determined that during the first year that the proposed amendments are in effect, cost savings in HHSC general revenue (GR) will be $1,161,593 in State Fiscal Year 2003. Five-year savings, from FY03-FY07, are estimated at $7,223,406 GR and $18,099,579 for all funds. These proposed amendments will not result in any fiscal implications for local health and human service agencies. Local governments will not incur additional costs.

Mr. Green has also determined that for each year of the first five years the proposed amendments are in effect, the public will benefit from adoption of the rules as amended. The anticipated public benefit, as a result of enforcing the proposed provisions, will be to ensure that additional choices of eyewear frames and lenses will be available to Medicaid beneficiaries at a reduction in costs to the state. The proposed amendments do not contain any substantive changes for recipients and are not expected to have any significant impact on access to eyewear.

The proposed amendments will not result in additional costs to persons required to comply with the rules, nor do the proposed amendments have any anticipated adverse affect on small or micro-businesses. Medicaid enrolled vision care providers will be required to alter their business practices in order to comply with the proposed rules as amended. Medicaid-enrolled vision care providers will not be reimbursed for provision of nonprosthetic eyewear. HHSC will provide policy notification, information, and training to enrolled vision care providers in order to assure minimal business impact. The proposed amendments will not negatively affect local employment.

HHSC has determined that none of the proposed amendments is a "major environmental rule" as defined by §2001.0225, Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector

of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has evaluated the takings impact of the proposed amendments under §2007.043, Government Code. HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of governmental action and therefore does not constitute a taking. The proposed provisions are reasonably taken to fulfill requirements of state law.

Comments on the proposal may be submitted to Dee Sportsman, Program Development, Medicaid/CHIP Division, Texas Health and Human Services Commission, 1100 W. 49th Street, MC Y-927, Austin, Texas 78756-3199 or at (512) 794-5164, within 30 days of publication of this proposal in the *Texas Register*.

A public hearing is scheduled for September 11, 2002, from 1 p.m. to 3 p.m. The hearing will be held in the Public Hearing Room, Health and Human Services Commission, 12555 Riata Vista Circle, Bldg. #3, Austin, Texas 78727.

DIVISION 1. MEDICAID VISION CARE PROGRAM

1 TAC §355.8001

The amendments are proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code, §32.021, and the Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect the Government Code, Chapter 531, and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed amendments.

§355.8001. Reimbursement for Optometric Services.

The Health and Human Services Commission (HHSC) [~~department periodically~~] determines and may adjust the [~~rate of~~] reimbursement rate or methodologies for optometric services [~~within appropriation limitations of the Texas Medical Assistance (Medicaid) Program. The department or its designee notifies each provider about the maximum fee schedule. The department or its designee determines reimbursement rates~~] according to the provisions described in §355.8085 [~~§29.1104~~] of this title (relating to Texas Medicaid Reimbursement Methodology).

(1) Examination. Reimbursement for [~~an~~] eye examinations [~~examination~~] by refraction is determined in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology) [~~the Texas Medicaid reimbursement methodology~~].

[~~(2) Eyewear. Reimbursement for prosthetic eyewear is determined in accordance with the Texas Medicaid reimbursement methodology and includes fitting services. Reimbursement for nonprosthetic eyewear is based on the unit cost for each pair of eyeglasses rather than costs for components. Reimbursement by the Medicaid Program is limited to the type of lenses and frames prescribed under §29.102 of this title (relating to Specifications for Eyewear). There is no charge to the recipient for this eyewear. The provider may dispense eyewear with optional features that include, but are not limited to, special tints, coatings, and types of lenses and styles of frames selected by the recipient beyond the specifications of the Medicaid Program. The department or its designee reimburses the provider up to the allowable amount for the basic eyewear and the recipient is responsible for the cost of the optional feature(s) he selects.~~]

[~~(A) The recipient selecting optional features must sign the claim at the indicated place acknowledging selection of eyewear or features beyond program benefits.~~]

[~~(B) The recipient is responsible for arranging to pay for the optional feature(s) with the provider.~~]

[~~(C) The provider may charge the recipient his usual price for the selected optional feature(s), but he may not charge for his professional services.~~]

(2) Eyewear. Reimbursement for prosthetic eyewear is determined in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology) and includes fitting services. Reimbursement for nonprosthetic eyewear is based on:

(A) the unit cost for each pair of eyeglasses rather than costs for components; or

(B) a fixed-unit price determined by competitive procurement, as authorized in §354.1025 of this title (relating to Competitive Procurement of Vision Care Services). If nonprosthetic eyewear is competitively procured, a dispensing fee may be paid to the dispensing provider in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology).

(3) Reimbursement is limited to the type of lenses and frames described in §354.1017 of this title (relating to Specifications for Eyewear). There is no charge to the recipient for this eyewear.

(4) Optional eyewear features. If eyewear is not competitively procured, the provider may dispense eyewear with optional features that include, but are not limited to, special tints, coatings, and types of lenses and styles of frames selected by the recipient beyond the specifications of the Medicaid program. The HHSC reimburses the provider up to the allowable amount for the basic eyewear and the recipient is responsible for the cost of the optional feature(s) he selects.

(A) The recipient must sign the claim, or a patient certification, for claims the provider submits electronically, to acknowledge selection of eyewear or features beyond program benefits.

(B) The recipient is responsible for arranging to pay for the optional feature(s) with the provider.

(C) The provider may charge the recipient his usual price for the selected optional feature(s), but he may not charge for his professional services.

(5) [~~(3)~~] Contact lenses. Reimbursement for covered contact lenses, including the handling and dispensing services provided by the supplier, is determined in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology) [~~the Texas Medicaid reimbursement methodology, including the handling and dispensing services provided by the supplier~~].

(6) [~~(4)~~] Repairs.

(A) Repairs, as described in §354.1015 [~~§29.101~~] (2)(D) of this title (relating to Benefits and Limitations), are reimbursed at:

(i) [~~by the department or its designee at~~] the provider's actual cost for supplies plus the allowable handling fee, published in the reimbursement rate schedule; or [~~which is established by the department or its designee.~~]

(ii) a fixed-unit price determined by competitive procurement, as authorized in §354.1025 of this title (relating to Competitive Procurement of Vision Care Services).

(B) [~~(A)~~] Reimbursement for repairs does not exceed the replacement cost if the damaged eyewear had been replaced rather than repaired.

(C) [~~(B)~~] No reimbursement is made for repairs to eyewear that does not meet the specifications in §354.1017 [~~§29.102~~] of this title (relating to Specifications for Eyewear).

(7) [~~(5)~~] Eyewear materials and supplies. HHSC does not [~~No~~] reimburse[~~reimbursement is made by the department or its designee~~] for eyewear materials or supplies, regardless of cost, that do not meet the specifications for eyewear in §354.1017 [~~§29.102~~] of this title (relating to Specifications for Eyewear).

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205233
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 424-6576

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DIVISION 24. EPSDT: EYEGLASS PROGRAM

1 TAC §355.8461

The amendments are proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code, §32.021, and the Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect the Government Code, Chapter 531, and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed amendments.

§355.8461. Reimbursement.

The Health and Human Services Commission (HHSC) [~~department periodically~~] determines and may adjust the reimbursement rate or methodologies for optometric services [~~within appropriation limits of the Medicaid Program. The provider is notified of the reimbursement rate schedule by the department or its designee. Reimbursement rates are determined~~] according to the provisions as described in §355.8085 [~~§29.1104~~] of this title (relating to Texas Medicaid Reimbursement Methodology) [~~in the Purchased Health Services chapter~~].

(1) Examination. Reimbursement for eye examinations is determined in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology)[~~the Texas Medicaid reimbursement methodology~~].

[~~(2) Eyeglasses. Reimbursement for eyeglasses is based on the unit cost for each pair of eyeglasses plus the allowable dispensing and handling fee established by the department or its designee, rather than costs for components. Reimbursement by the Medicaid Program is limited to the type of lenses and frames specified in §33.403 of this title (relating to Specifications for Eyewear). The recipient is not charged for this eyewear. A provider may dispense eyewear with optional features beyond the listed specifications such as special tints, coatings, and other lenses and frame styles selected by the recipient. The department or its designee reimburses the provider up to the allowable amount for the basic eyewear, and the recipient is responsible for the cost of the optional features selected.~~]

[~~(A) The recipient selecting optional features must sign the claim or a patient certification, for claims the provider submitted electronically, to acknowledge selection of eyewear or features beyond program benefits~~].

[~~(B) The recipients must arrange payment for the optional features with the provider.~~]

[~~(C) The provider may charge the recipient the usual price for the optional features, but may not charge for his professional services.~~]

(2) Eyeglasses. Reimbursement for eyeglasses is based on:

(A) the unit cost for each pair of eyeglasses rather than costs for components; or

(B) a fixed-unit price determined by competitive procurement, as authorized in §354.1025 of this title (relating to Competitive Procurement of Vision Care Services). If eyewear is provided under competitive procurement, a dispensing fee may be paid to the dispensing provider in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology).

(3) Reimbursement is limited to the type of lenses and frames specified in 25 TAC §33.403 (relating to Specifications for Eyewear). The recipient is not charged for this eyewear.

(4) Eyewear with optional features. If eyewear is not competitively procured, a provider may dispense eyewear with optional features beyond the listed specifications such as special tints, coatings, and other lenses and frame styles selected by the recipient. HHSC reimburses the provider up to the allowable amount for the basic eyewear, and the recipient is responsible for the cost of the optional features selected.

(A) The recipient must sign the claim, or a patient certification, for claims the provider submits electronically, to acknowledge selection of eyewear or features beyond program benefits.

(B) The recipient must arrange payment for the optional features with the provider.

(C) The provider may charge the recipient the usual price for the optional features, but may not charge for his professional services.

(5) [~~(3)~~] Contact lenses. Reimbursement for contact lenses, including the handling and dispensing services provided by the supplier, is determined in accordance with §355.8085 of this title (relating to Texas Medicaid Reimbursement Methodology) [~~the Texas Medicaid reimbursement methodology, including the handling and dispensing services provided by the supplier~~].

(6) [~~(4)~~] Repairs.

(A) Repairs, as described in 25 TAC §33.402(3)(C) [~~of this title~~] (relating to Benefits and Limitations), are reimbursed based on :

(i) the provider's actual cost for supplies plus an allowable handling fee, established by the HHSC [~~department or its designee~~] and published [~~indicated~~] in the reimbursement rate schedule; or

(ii) a fixed-unit price determined by competitive procurement, as authorized in §354.1025 of this title (relating to Competitive Procurement for Vision Care Services).

(B) [~~(A)~~] Reimbursement for repairs may not exceed the replacement cost if the damaged eyewear had been replaced rather than repaired.

(C) [~~(B)~~] No reimbursement is made for repairs to eyewear that does not meet the specifications in 25 TAC §33.403 [~~of this title~~] (relating to Specifications for Eyewear).

(7) [~~(5)~~] Eyewear materials and supplies. No reimbursement is made for eyewear materials or supplies, regardless of cost, that do not meet the specifications for eyewear in 25 TAC §33.403 [~~of this title~~] (relating to Specifications for Eyewear).

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205297
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 424-6576

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 187. CAPITAL ACCESS PROGRAM

10 TAC §§187.8, 187.10, 187.11, 187.13, 187.14, 187.16, 187.17

The Texas Department of Economic Development (department) proposes amendments to Chapter 187, Capital Access Program, §§187.8, 187.10, 187.11, 187.13, 187.14, 187.16, and 187.17 relating to providing access to capital for small and medium sized businesses and nonprofit organizations that might otherwise fall outside conventional lending guidelines. The Capital Access Program is authorized by Texas Government Code, Chapter 481, Subchapter BB.

The proposed amendments are necessary clarify program practices and add controls and improvements recommended by an internal audit of the program. Minor punctuation errors have been corrected.

Proposed amendments to §§187.8 and 187.11 clarify that a time period described as 15 days means 15 business days.

Proposed amendment to §187.13 clarify that charge-offs against a reserve account must be approved in advance by the department; that financial institutions must, in most cases, pursue recovery of funds claimed against the reserve account; that records substantiating non-recoverable losses must be retained for three years; that a claim form must be submitted prior to, rather than after, a charge-off; and that claim forms must state whether a financial institution intends to place a claim against the reserve fund on the form submitted or to request payment on the claim at a later date. Proposed amendments further specify circumstances under which the department may reject a claim against the reserve account.

Proposed amendments to §187.14 specify circumstances under which the state may withdraw funds in a reserve account. Proposed amendments further provide for quarterly statements of reserve account activity.

Proposed amendments to §187.16 clarify information required in annual reports and provide for suspension of enrollment of subsequent loans for failure to comply with annual reporting requirements.

Proposed amendments to §187.17 update department contact information.

Dan Martin, Director of Business Incentives, has determined for each year of the first five years that the amendments are in effect there will be no fiscal implications to the state or to local governments as a result of the amendments. No cost to either government or the public will result from the amendments. There will be no impact on small businesses or micro-businesses.

Mr. Martin has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of the amendments is a clearer understanding of the rules and processes for participation in the program. No economic costs are anticipated to persons who are required to comply with the proposed amendments.

Written comments on the proposed amendments may be hand delivered to Texas Economic Development, 1700 North Congress, Suite 130, Austin, Texas 78701, mailed to P.O. Box 12728, Austin, Texas 78711-2728, or faxed to (512)936-0415 and should be addressed to the attention of Mary Herrick, Legal Assistant. Comments must be received within 30 days of publication of the proposed amendments.

The amendments are proposed pursuant to Government Code §481.0044(a), which directs the Governing Board of the department to adopt rules for administration of department programs, Government Code §481.406, which directs the department to adopt rules for the Capital Access Program, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

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

§187.8. Enrollment of Loans into the Program.

(a) Reserve deposits will not be remitted by the department to the reserve account of participating financial institution until the receipt of an enrollment form by the institution.

(b) An enrollment form shall be sent to the department within 15 business days of loan origination. Origination is considered to be the earlier of the date the loan documents have been executed or the date the loan proceeds are first forwarded to the eligible borrower.

(c) The enrollment form submitted by participating institutions, developed by the department, shall include at least the following information as well as other information the department may require:

(1) name, address, phone and contact of the participating financial institution;

(2) name, address, phone and contact of the eligible borrower;

(3) certification that to the best of the participating institution's knowledge the borrower is eligible under program guidelines;

(4) the total loan amount being made by the financial institution to the borrower;

(5) the amount of the loan being enrolled in the program;

(6) business description;

(7) description of use of loan proceeds;

(8) employment information of the eligible borrower;

(9) gross sales of the eligible borrower for the past 12 months;

(10) ethnicity and gender of borrower;

(11) whether borrower is a certified State of Texas historically underutilized business;

(12) if applicable, verification of status as a project within an enterprise zone, or for day-care center or group day-care home;

(13) amount of participating financial institution's deposit to reserve;

(14) amount of eligible borrower's deposit to reserve;

(15) calculation of the department's contribution to reserve;

(16) execution of the certification on behalf of the participating financial institution by an authorized officer, which shall include the officer's name, title and the date of execution.

(d) Execution of the enrollment form shall imply that all information provided on this form is true and correct, and that the lender is relying on the representation of the borrower for the following numbered items of the enrollment form: (2), (3), (6), (7), (8), (9), (10), (11), and (12).

(e) The department, may, but is not required, to notify participating financial institutions when proceeds available in the fund soon may not be sufficient to meet the demand for reserve contributions.

(f) If proceeds within the fund are insufficient to provide reserve contributions to participating financial institutions, those institutions may still enroll loans without the additional state contribution, subject to normal enrollment guidelines.

§187.10. Establishment of the Reserve Account and Purpose.

(a) On approval of the department and after entering into a participation agreement with the department, a participating financial institution making a capital access loan shall establish a reserve account in accordance with the provisions of Chapter 481, Subchapter BB, §481.408.

(b) Reserve accounts shall be established in a money market fund within the participating financial institution.[,] The [~~the~~] interest rate for the money market fund shall be the competitive rate offered to other customers of the financial institution invested in the money market fund.

(c) The reserve account shall be used by the financial institution only to cover any losses arising from a charge-off of a capital access loan, or a loan partially enrolled under the program, made by the financial institution.

§187.11. Contributions Made to the Reserve Account.

(a) For each capital access loan made by a participating financial institution, the financial institution shall certify to the department, within 15business days, that the institution has made a capital access loan, the amount the financial institution has deposited into the reserve account, including the contributions made by the eligible applicant, and, if applicable that the eligible applicant is located in or financing a project, activity, or enterprise in an area designated as an enterprise zone or is a child-care center or group day-care home.

(b) When a participating financial institution makes a loan enrolled under the program, it shall require a fee of the eligible applicant in an amount that is not less than two percent but not greater than three percent of the principal amount of the loan, which will then be deposited into the institution's reserve account. The amount of reserve contribution made by an eligible applicant may be financed within the loan being originated.

(c) The financial institution shall also place into the reserve account an amount equal to that placed into the reserve account by the eligible applicant. The institution may recover all or part of its contribution to reserve in any manner previously agreed upon between the participating financial institution and the eligible borrower.

(d) The department shall place into the reserve account an amount to be determined by the following:

(1) an amount equal to the total amount deposited by the financial institution and the eligible applicant for each loan if the institution:

(A) has assets of more than $1 billion; or

(B) has previously enrolled loans in the program that in the aggregate are more than $2 million.

(2) an amount equal to 150% of the total deposit made by the financial institution and the eligible applicant if the financial institution is not described within paragraph (1) of this subsection.

(3) notwithstanding paragraphs (1) and (2) of this subsection, an amount equal to 200% of the total amount deposited by both the institution and the eligible applicant if:

(A) the eligible applicant is located or financing a project, activity, or enterprise in an area designated as an enterprise zone; or

(B) the eligible applicant is a small or medium size business or a non-profit organization that operates or proposes to operate a day-care center or group day-care home, as those terms are defined by Human Resources Code, §42.002.

§187.13. Withdrawals from Reserves by Participating Institutions.

(a) In the event a loan enrolled under this program is charged-off, the participating financial institution may withdraw from its established reserve account an amount necessary to cover the anticipated loss.

(b) A participating financial institution, with the department's approval, may withdraw from its established reserve immediately subsequent to loan charge-off that has been approved by the department, or the institution may choose to attempt further collection proceedings before withdrawal. So long as the lender has notified the department of the charge-off of an enrolled loan within the allowed 30 day time frame and the reserves are adequate to cover the charge-off at the time of notification, the lender shall not be limited to how long they may delay a claim for reimbursement. However, accrual of interest on charged-off loans will only be allowed for a time period of 180 days subsequent to charge-off. Recoupment [~~Recovery~~] of all other expenses, as is reasonable and necessary, shall be allowed to be claimed [~~recovered~~] by the financial [~~lending~~] institution through its established reserve account.

(c) Only non-recoverable losses, plus reasonable and customary expenses, may be removed from the reserve account. Money taken in excess of this amount must be returned immediately to the reserve account. The financial institution must pursue recovery of claimed

amounts, unless otherwise noted on the claim form. The financial institution shall notify the department within thirty calendar days of any subsequent recovery made on any loan upon which a claim has been made.

(d) The reserve account shall be used by the financial institution only to cover any losses arising from a charge-off of a capital access loan, or that portion of a partially enrolled loan that is enrolled under the program, made by the financial institution.

(e) Partially enrolled loan amounts and enrolled loans sharing collateral or guarantees shall be subordinated to unenrolled portions and loans for purposes of claim subsequent to charge-off.

(f) The financial institution shall maintain records substantiating the non-recoverable losses, plus reasonable and necessary expenses, for three years [~~12 months~~] following withdrawal from the program.

(g) A claim form, signed and dated by an authorized officer of the financial institution, must be remitted to the department detailing the charged-off program loan [~~within~~] 30 days prior to [~~of~~] the charge-off. Claim forms will contain the following information:

(1) borrower's name;

(2) loan number used by the bank to identify the loan;

(3) date of charge-off;

(4) amount of claim, broken down to include:

(A) customer principal;

(B) accrued/unpaid interest;

(C) out-of-pocket expenses; and

(D) total claim amount.

(5) statement of intent by the financial institution concerning its continued efforts to recover the charged-off loan;

(6) statement of intent by the financial institution on whether to claim against the reserves as outlined on the form submitted or to request payment on the [~~continue collection efforts and pay~~] claim at a later date;

(7) authorized signature, title, date and phone number of officer of the submitting financial institution.

(h) The department may reject a claim :[~~when the representations and warranties provided by the participating financial institution at the time of enrollment have been determined to be misleading or false or if the records of the financial institution do not substantiate the claim.~~]

(1) if the claim form is not accurate and complete as prescribed by paragraph (g) of this section;

(2) if the representations and warranties provided by the participating financial institution at the time of enrollment have been determined to be misleading or false;

(3) if the records of the financial institution do not substantiate the claim;

(4) if funds in the financial institution's reserve account are insufficient to cover the claim;

(5) if the claim form is not submitted thirty (30) days prior to the charge-off; or

(6) for other good cause

§187.14. State's Rights with Respect to the Reserve.

(a) All of the money in a reserve account established under this program is property of the state.

(b) The state is entitled to earn interest on the amount of contributions made by the department, eligible applicant, and financial institution to a reserve account.

(c) The department shall withdraw monthly or quarterly from a reserve account the amount of interest earned by the state.

(d) The department shall deposit the amount withdrawn into the fund.

(e) If the amount in a reserve account exceeds 33% of the balance of the financial institution's outstanding capital access loans, the department may withdraw the excess amount and deposit the amount in the fund. A withdrawal of money authorized here under may not reduce an active reserve account to less than $200,000.

(f) Withdrawal of reserves in accordance with subsection (c) of this section shall be based on information provided by the participating financial institution in its annual report to the department.

(g) The department shall withdraw from the financial institution's reserve account all principal and interest and deposit it into the fund when all three of the subsequent conditions exist:

(1) a financial institution is no longer eligible to participate in the program or a participation agreement entered into under the program expires without renewal by the department or financial institution;

(2) the financial institution has no outstanding capital access loans; and

(3) the financial institution has not made a capital access loan within the preceding 24 months.

(h) The department may withdraw from the financial institution's reserve account all principal and interest and deposit it into the fund when either of the subsequent conditions exist:[~~The department may inspect the files of a participating financial institution with regard to loans enrolled under the program during normal business hours.~~]

(1) the financial institution has failed to comply with any directive or instruction issued by the department; or

(2) the financial institution has failed to comply with any express term or condition of the participation agreement.

(i) The department may inspect the files of a participating financial institution with regard to loans enrolled under the program during normal business hours.

(j) The financial institution shall remit a quarterly statement to the department providing details of the balance and the payments and receipts activity in the reserve account for the prior quarter.

§187.16. Annual Reporting and Auditing Requirements.

(a) A participating financial institution shall remit an annual report to the department containing the information required by Chapter 481, Subchapter BB, §481.411. The report must:

(1) provide information with regard to outstanding capital access loans, capital access loan losses, and any other information consistent with the objectives of the program the department considers appropriate;

(2) state the total amount of loans for which the department has made a contribution from the fund under the program; [~~and~~]

(3) include a copy of the institution's most recent financial statement;and[~~.~~]

(4) include information regarding the type and size of businesses and nonprofit organizations with capital access loans; [and]

[(5) provide a breakdown of the ethnicity and gender of eligible applicants enrolled in the program during the year being reported.]

(b) The department may suspend enrollment of subsequent loans of a financial institution that fails to comply with the annual reporting requirement prescribed by this section.

§187.17. Communications with the Department.

All communications about the program should be directed to Business Incentives [Services] Division, Capital Access Program, Texas Department of Economic Development, Post Office Box 12728-2728, Austin, Texas 78711; (512) 936-0260 [936-0269].

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205242
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 936-0177

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 29. MANAGEMENT AND CARE OF ARTIFACTS AND COLLECTIONS

13 TAC §§29.1 - 29.3, 29.5

The Texas Historical Commission (hereafter referred to as the Commission) proposes the creation of new Chapter 29 rules (Sections 29.1 - 29.3, 29.5), as part of Title 13, Part 2 of the Texas Administrative Code, relating to the management and care of artifacts collected under the jurisdiction of Texas Government Code Chapter 442 and the Antiquities Code of Texas (Title 9, Chapter 191, of the Texas Natural Resources Code)

The Commission has a legal responsibility to oversee the custody, care, and condition of historic collections owned by the State of Texas and under the authority of the Commission which includes permitted collections, Commission generated collections, donated collections, and court-action collections. This responsibility includes ensuring that collections are placed in appropriate curatorial facilities and that such facilities provide appropriate care for these items. For a curatorial facility to be designated to receive held-in-trust state-associated collections, such institutions must be certified by the Commission. These purposed rules provide a method to select appropriate facilities through an orderly, objective certification process.

This policy applies to curatorial facilities that want to receive state-associated collections after the effective date of the rules implementing this policy. It does not apply to objects purchased by the Commission as office furnishings but does apply to objects and documents purchased through the Texas Historical Artifacts Acquisition Program.

Certification is a concept applied to monitor practices and professional development and distinguish those curatorial facilities that follow the standards set by the profession and the Commission. The focus of this process is on accountability through documentation, inventory, and sound curatorial practices. It is an evaluation process that recognizes certain criteria must be met and followed as the normal course of action in order to verify and insure that the collections are receiving professional care to the best of the capabilities of the curatorial facility. Certification is a recognition that the curatorial facility is following curatorial standards and acting responsibly and appropriately towards its collections within its resources, and is a verification of accountability. The Certification process is a program of self-evaluation, constructive review, recognition of professional performance, and a tool for self-examination.

The Commission's certification program is based on a set of state and nationally-derived, professional criteria against which Texas curatorial facilities receiving state-associated collections under the authority of the Commission are measured. These standards include those of the American Association of Museums and the Accreditation and Review Council of the Council of Texas Archeologists, as interpreted, modified, and adopted by the Commission. All curatorial facilities will be evaluated following the same format and process. Accreditation of a curatorial facility by the American Association of Museums or the Accreditation and Review Council of the Council of Texas Archeologists does not substitute for Commission certification, but such accreditation recognition strengthens and may accelerate the institution's application and facilitates a timely review and determination.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the rules are in effect, there may be fiscal implications for state and local governments as a result of administering these rules.

It is voluntary for curatorial facilities to become certified, and therefore the costs associated with these rules will only apply if a facility elects to become certified. The lack of information concerning what improvements may need to be made makes it impossible to estimate actual costs for curatorial facilities that decide to become certified.

Curatorial facilities that are part of state or local governmental bodies may choose to undergo the certification process. There will be direct costs in undergoing certification review generally limited to staff time required to complete the self-evaluation and assist with the field review. There will be indirect cost to curatorial facilities that need to make improvements to facilities or programs to achieve the levels required for certification.

Mr. Oaks has also determined that for each year of the first five years period the rules are in effect the public benefit anticipated as a result of the implementation of these rules will be improved inventory and accountability for state-owned collections, better care for artifacts, and increased security for collections. There may be minimal effects on small businesses or micro-businesses. There may be minimal anticipated economic costs to members of the public who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P. O.

Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the Texas Register.

The adoption of these rules is proposed under both Section 442.005(q), Title 13, Part 2 of the Texas Government Code and Section 191.052, Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter. No other statutes, articles or codes are affected by these new rules.

§29.1. Object.

The Texas Historical Commission (here after referred to as the Commission) is specifically empowered to adopt reasonable rules and regulations concerning the care and curation of artifacts, objects, and collections owned by Commission and those recovered under the jurisdiction the Antiquities Code of Texas.

§29.2. Purpose.

The purpose of this policy is to provide a method to select appropriate facilities through an orderly, objective certification process.

§29.3. Definitions.

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

(1) Accession -- means the formal acceptance of a collection and it's recording into the holdings of a curatorial facility and generally includes a transfer of title. For held-in-trust collections, stewardship but not title is transferred to the curatorial facility.

(2) Antiquities -- means the tangible aspects of the past, which relate to human life and culture. Some examples include objects, written histories, architectural significance, cultural traditions and patterns, art forms, and technologies.

(3) Artifact -- means an object that has been removed from an archeological site.

(4) Baseline inventory -- means the most basic inventory done by summary count within general categories (also known as an entry or accessions inventory).

(5) Certification -- means a process through which a curatorial facility establishes that it has achieved certain standards and follows acceptable practices with respect to its collections.

(6) Certified curatorial facility -- means a museum or repository that has been certified by the Commission for the purposes of curating state-associated collections.

(7) Collection -- means an associated set of objects, samples, records, or documents.

(8) Commission -- means the Texas Historical Commission and its staff.

(9) Conservation -- means scientific laboratory process for cleaning, stabilizing, restoring, and preserving artifacts.

(10) Cultural resource -- means any building, site, district, structure, object, pre-twentieth century shipwreck, data, and locations of historical, archeological, educational, or scientific interest, including, but not limited to, prehistoric and historic Native American or aboriginal campsites, dwellings, and habitation sites, archeological sites of every character, treasure embedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of the contents thereof, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants' prehistory, history, natural history, government, or culture. Examples of cultural resources include Native American mounds and campgrounds, aboriginal lithic resource areas, early industrial and engineering sites, rock art, early cottage, and craft industry sites, bison kill sites, cemeteries, battlegrounds, all manner of historical structures, local historical records, etc.

(11) Curatorial Facility -- means a museum or repository.

(12) Deaccession -- means the permanent removal of an object or collection from the holdings of a curatorial facility.

(13) Destructive analysis -- means destroying all or a portion of an object or sample to gain specialized information. For purposes of these rules, it does not include analysis of objects or samples prior to their being accessioned by a curatorial facility.

(14) Disposal -- means the discard of an object or sample after being recovered and prior to accession.

(15) Held-in-trust collection. -- means those state-associated collections under the authority of the Texas Historical Commission that are placed in a curatorial facility for care and management; stewardship is transferred to that curatorial facility but not ownership.

(16) Inventory -- means a physically-checked, itemized list of the objects in a curatorial facility's holdings. Itemized refers to having some sort of categorization, whether it be object-by-object or some type of grouping. Inventory is usually performed by numerical count, but weight may be considered in addition to or instead of a count, where it may be appropriate.

(17) Museum -- means a legally organized not-for-profit institution, essentially educational in nature; having a formally stated mission; with a professionally trained staff that uses and interprets objects for the public through regularly scheduled programs and exhibits; with a program of documentation, care, and use of collection or tangible objects; and having a program of maintenance and presentation of exhibits.

(18) Political subdivision -- means a local government entity created and operating under the laws of this state, including a city, county, school district, or special district created under the Texas Constitution, Article III, Section 52(b)(1) or (2), or Article XVI, Section 59.

(19) Public lands -- means non-federal public lands that are owned or controlled by the State of Texas or any of its political subdivisions, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas.

(20) Repository -- means a permanent, not-for-profit educational or research-oriented agency or institution, having a professionally trained staff, that provides in-perpetuity legal housing and curation of collections.

(21) Significance -- means a trait attributable to sites, buildings, structures and objects of historical, architectural, and archeological (cultural) value which are eligible for designation to State Archeological Landmark status and protection under the Antiquities Code of Texas. Similarly, a trait attributable to properties included in or determined eligible for inclusion in the National Register of Historic Places.

(22) Site -- means any place or location containing physical evidence of human activity. Examples of sites include: the location of prehistoric or historic occupations or activities, a group or district of buildings or structures that share a common historical context or period of significance, and designed landscapes such as parks and gardens.

(23) State-associated collections -- means the collections owned by the State and under the authority of the Texas Historical Commission. This includes the following:

(A) Permitted collections -- means collections that are the result of work governed by the Texas Antiquities Code of Texas on land or under waters belonging to the State of Texas or any political subdivision of the State requiring the issuance of a permit by the Commission.

(B) Non-permitted collections -- means collections that are the result of work governed by the Antiquities Code on land or under waters belonging to the State of Texas or any political subdivision of the State conducted by Commission personnel without the issuance of a permit.

(C) Purchased collections -- means collections that are the result of the acquisition of significant historical items by the Commission through Texas Historical Artifacts Acquisition Program or use of other State funds.

(D) Donated collections -- means collections that are the result of a gift, donation, or bequest to the Commission.

(E) Court-action collections -- means collections that are awarded to the Commission by a court through confiscation of illegally-obtained archeological artifacts or any other material that may be awarded to the Commission by a court of law.

(24) State Archeological Landmark -- means any cultural resource or site located in, on, or under the surface of any lands belonging to the State of Texas or any county, city, or other political subdivision of the state, or a site officially designated as a landmark at an open public hearing before the Commission.

§29.5. Certification of Curatorial Facilities for State-Associated Held-in-Trust Collections.

(a) Establishment of certification program.

(1) The Commission shall determine through the program established by this subchapter appropriate facilities to house state-associated held-in-trust collections generated or purchased by the Commission, generated through antiquities permits issued under the authority of the Commission as provided by the Texas Natural Resources Code, Chapter 191, donated to the Commission, or placed with the Commission through the order of a court.

(2) The certification process shall consider the management and care of all state-associated collections at the curatorial facility.

(3) The requirements of this subchapter related to the placement of state-associated collections in certified curatorial facilities shall apply to the following:

(A) All collections placed in curatorial facilities by the Commission after December 31, 2005; and,

(B) All collections generated under antiquities permits issued after December 31, 2005.

(4) No collection or any component of a collection as described under the jurisdiction of this subchapter may be placed in a curatorial facility that is not certified through the process established by this section.

(5) This section does not apply to the placement of collections in curatorial facilities prior to the effective date of this requirement as specified in subsection (a)(3), above. It does apply to any subsequent transfer of collections or a component of a collection taking place after the effective date of this requirement as specified in subsection (a)(3)(A)-(B), above.

(6) This section does not apply to the temporary loan of a collection or a component of a collection.

(7) Certification shall be effective for a period of ten years, after which time, the curatorial facility must apply for renewal through the procedures provided in this subchapter. Renewal will be based upon the standards for certification in place at the time renewal is requested.

(8) The certification process shall be implemented upon the effective date of these rules, and the staff of the Commission shall develop procedures to begin the review of applicants at the earliest possible date. The requirement that all new collections shall be placed only in certified curatorial facilities shall be effective as specified in subsection (a)(3)(A)-(B), above.

(b) Procedures for Certification.

(1) Application. A curatorial facility seeking certification from the Commission shall apply to the Commission on a form provided by the Commission.

(A) The form shall require the applicant to provide essential information and documentation to allow the Commission to determine whether the facility is a curatorial facility within the definition of that term.

(B) Staff of the Commission shall evaluate the application and make a recommendation to the executive director on whether the facility should be allowed to proceed with the certification process.

(C) The executive director may determine that the certification review should be terminated at this point in the process.

(2) Submission of written materials for certification.

(A) A curatorial facility approved for full review will be sent a certification review packet including a self-evaluation to be performed by the curatorial facility and other information concerning requirements for the certification process.

(B) The self-evaluation and other materials must be submitted to the Commission within six months.

(C) The completed documentation shall be reviewed by the Commission. If clarification or additional information is requested by the Commission, the facility shall have 30 days to furnish the information required.

(D) Failure to provide the requested information or inadequacy of the materials provided may lead to the termination of the review process.

(E) Staff of the Commission shall review the self-evaluation and other written materials provided and make a recommendation to the executive director on whether the facility should be allowed to proceed with the certification process.

(F) The executive director may determine that the review should be terminated at this point in the process.

(3) Field review.

(A) A curatorial facility that has submitted its self-evaluation and other written materials and approved to proceed with the certification process shall be contacted to arrange for a field review.

(B) At a time to be agreed upon by the Commission staff and the facility, an on-site evaluation of the facility shall be conducted by the Commission.

(C) Field review of the curatorial facility will be conducted by qualified staff of the Commission.

(D) An applicant for certification must make their facilities and records freely available to the field reviewers of the Commission in order to be considered for certification.

(E) Upon completion of the on-site evaluation, the persons performing the evaluation shall complete a written report of the on-site evaluation.

(F) The written report and recommendation shall be submitted to the executive director for his review. The executive director may approve, disapprove, or amend the recommendation.

(G) The applicant shall be provided notice of the Commission meeting when its application will be considered and provided a copy of the executive director's recommendation.

(4) Consideration by the Commission.

(A) The Commission may direct that this matter be considered in a committee of the Commission prior to consideration by the full Commission.

(B) The Commission shall consider the recommendations of the staff and/or executive director and all other matters submitted or prepared in connection with the application and shall make a decision on the certification of the curatorial facility. The decision of the Commission shall be provided in writing to the curatorial facility. If certification is denied, the Commission shall provide reasons for the denial to the curatorial facility.

(C) The decision of the Commission shall be based on the matters properly submitted in the certification process, and the decision shall measure the qualifications, stated objectives, and resources of the curatorial facility against the standards for certification established by the Commission.

(i) The Commission shall consider the evaluation of the curatorial facility and determine which, if any, disabling and deficiency factors may be present in the curatorial facility.

(ii) The Commission shall grant certification of the curatorial facility based on the disabling and deficiency factors by the following standards:

(I) Four or more disabling factors, certification denied;

(II) Three or fewer disabling factors and no more than four deficiency factors, certification granted;

(III) Three or fewer disabling factors and five or six disabling factors, provisional status granted; or

(IV) Three or fewer disabling factors and seven or more deficiency factors, certification denied.

(D) If a curatorial facility is certified with existing disabling factors or deficiencies, a monitoring process will assure that these problems are rectified before subsequent certification can take place. If these factors have not been addressed by the end of its certification period, then the curatorial facility will not receive a subsequent certification.

(E) Provisional status.

(i) If the Commission determines that the curatorial facility does not meet all of the qualifications for certification, but should be granted provisional status, the curatorial facility must submit a plan and schedule for correcting the problems to the Commission within 90 days of the approval of provisional status. The Commission shall consider the plan and schedule and either approve it or return it to the curatorial facility with suggested revisions. The curatorial facility shall resubmit the plan and schedule until approved by the Commission. If such problems are corrected and appropriate evidence of such correction is presented to the Commission, the Commission may grant certification to the curatorial facility at the next succeeding quarterly meeting of the Commission.

(ii) A curatorial facility that is granted provisional status shall be considered as a certified curatorial facility unless it subsequently fails to correct the disabling and deficiency factors within the time allotted, at which time the Commission may vote to deny certification.

(iii) Provisional status shall initially be granted for a period of three years. The period may be extended for up to three one-year increments by the Commission if the curatorial facility is determined to be making progress in remedying the disabling and deficiency factors. Provisional status may not be extended beyond the six-year limit. Each extension will require justification and a vote of the Commission.

(F) Except as provided by this subchapter, a curatorial facility that is denied certification by the Commission may not reapply for certification within one year of the denial of its application.

(c) Appeal.

(1) If the executive director has determined that the review of an application for certification of a curatorial facility should be terminated prior to field review, the curatorial facility may appeal that decision to the Commission by requesting in writing a review of the decision at the next succeeding quarterly Commission meeting, provided that such request must be received not less than 30 days prior to the meeting. The curatorial facility and the executive director may submit arguments in writing to the Commission concerning the appeal.

(2) If the executive director and/or staff recommend against certification of a curatorial facility, the facility may respond in writing to such recommendation. If the curatorial facility determines that it needs additional time to respond to the staff and/or executive director's recommendation, it may request that the consideration of the certification be delayed until the next succeeding quarterly meeting, and shall submit its response not less than 30 days prior to the next succeeding quarterly meeting. Only one such delay in the consideration of certification shall be granted, except on vote of the Commission.

(3) The staff or the executive director may comment on any response of the curatorial facility.

(4) Except as may otherwise be provided by law, the decision of the Commission on certification of a curatorial facility is final.

(d) Criteria for Certification.

(1) The Commission shall develop and adopt objective criteria for the evaluation of curatorial facilities.

(2) The criteria shall be in writing and shall be made available to any person requesting them.

(3) The evaluation shall focus on the care and management of all state-associated held-in-trust collections present at the facility.

(4) The following certification criteria will be used to evaluate curatorial facilities:

(A) Governance.

(i) specific mission statement;

(ii) institutional organization document; and

(iii) evidence of not-for-profit status.

(B) Finance.

(i) clear fiscal plan;

(ii) financial reporting system, with an external audit; and

(iii) continued efforts to raise level of support.

(C) Policies. Written collections management policies addressing:

(i) acquisitions;

(ii) scope of collections;

(iii) legal title;

(iv) held-in-trust agreements;

(v) contract of gift;

(vi) accessioning;

(vii) deaccessioning and disposal of collections or collection items;

(viii) cataloging;

(ix) loans;

(x) destructive loans of held-in-trust collections;

(xi) inventory;

(xii) adequate and appropriate insurance;

(xiii) appraisals;

(xiv) access to collections;

(xv) record keeping;

(xvi) collections care;

(xvii) conservation;

(xviii) disaster management;

(xix) pest management; and

(xx) security.

(D) Procedures. Written collections management procedures addressing:

(i) acquisitions;

(ii) accessioning;

(iii) deaccessioning and disposal of collections or collection items;

(iv) documentation;

(v) cataloging;

(vi) loans;

(vii) destructive loans of held-in-trust collections;

(viii) inventory;

(ix) environmental control (lighting, temperature, relative humidity, air particulates);

(x) conservation assessment;

(xi) housekeeping;

(xii) cleaning, packaging, and housing of collections;

(xiii) packing and shipping of collections;

(xiv) access to collections;

(xv) written disaster management plan addressing:

(I) accidents;

(II) fire;

(III) flood; and

(IV) other natural disasters;

(xvi) written pest management plan; and

(xvii) written security plan.

(E) Physical Facilities.

(i) sound, appropriate structure;

(ii) adequate and appropriate insurance;

(iii) security system;

(iv) fire prevention, detection, and suppression programs; and

(v) environmental controls (temperature, relative humidity, air particulates).

(F) Staff.

(i) written code of ethics;

(ii) written personnel policy;

(iii) written job descriptions;

(iv) minimum one full-time staff member trained in collections care; and

(v) support for staff training programs in collections care and memberships to museum-related organizations.

(G) Visiting scholars and researchers.

(i) written policy concerning access to collections; and

(ii) written procedures concerning security, access, and handling of collections.

(H) Records management.

(i) functional accession, catalog, inventory, and photo documentation system;

(ii) updated and current list of held-in-trust state-associated collections; and

(iii) baseline inventory of held-in-trust state-associated collections.

(I) Collections care.

(i) housing;

(I) current floor plan;

(II) appropriate housing units with adequate and appropriate space; and

(III) accessible and organized collections;

(ii) packaging;

(I) appropriate materials;

(II) appropriate object spacing; and

(III) appropriate organization of collections.

(e) Application of criteria. In making the determination of certification status, all of the above criteria are considered. In particular,

at the Application stage, the curatorial facility must fit the definition; have a mission statement, a statement of purpose, and a scope-of-collections statement; and have a written collections management policy. If the curatorial facility does not meet these three basic criteria, then certification is denied and the process goes no further. At the Commission level, disabling factors could prevent certification. Deficiency factors could result in provisional status or denial.

(1) Disabling factors are the absence of any of the following:

(A) written procedures and plans;

(B) written held-in-trust agreements for state-associated collections;

(C) list of held-in-trust state-associated collections;

(D) baseline inventory for each held-in-trust state-associated collection;

(E) record keeping system;

(F) accession system;

(G) catalog system;

(H) inventory system;

(I) environmental controls (temperature, relative humidity, air particulates);

(J) fire prevention, detection, or suppression programs;

(K) full-time employee trained in collections care;

(L) appropriate physical facilities; and

(M) appropriate housing or housing conditions.

(2) Deficiency factors are the following:

(A) substandard policies;

(B) substandard procedures and plans;

(C) incomplete held-in-trust agreements for state-associated collections;

(D) incomplete list of held-in-trust state-associated collections;

(E) incomplete baseline inventory for each held-in-trust state-associated collection;

(F) inadequate record keeping system;

(G) inadequate accession system;

(H) inadequate catalog system;

(I) inadequate inventory system;

(J) substandard environmental controls (temperature, relative humidity, air particulates);

(K) substandard fire prevention, detection, or suppression programs;

(L) substandard physical facilities;

(M) substandard housing or housing conditions; and

(N) substandard packaging.

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

Filed with the Office of the Secretary of State on August 5, 2002.

TRD-200205051
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 463-5711

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.94

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

The Railroad Commission of Texas withdraws the proposed amendments to §3.94, relating to Disposal of Oil and Gas NORM Waste, published in the February 8, 2002, issue of the *Texas Register* (27 TexReg 844) and proposes the repeal of §3.94. The Commission proposes the repeal in order to move the provisions of §3.94, which is a lengthy rule, into 16 TAC Chapter 4, new subchapter F, to be entitled Oil and Gas NORM. The new rules in Chapter 4 are proposed concurrently with this repeal.

Also in the February 8, 2002, issue of the *Texas Register*, at 27 TexReg 989, the Commission proposed the review of §3.94, in accordance with Texas Government Code, §2001.039; the Commission has withdrawn that review and proposes the review of §3.94, as it is proposed to be repealed. The notice of proposed review will be filed with the *Texas Register* concurrently with this document. As stated in the concurrent rule review notice, the agency's reasons for adopting rules relating to oil and gas NORM waste continue to exist.

Dr. Steven Seni, Assistant Director, Environmental Services, Oil and Gas Division, has determined that for each year of the first five years the proposed repeal will be in effect, there will be no fiscal implications for state or local governments because the rule requirements will continue to exist, with some modifications, in a different chapter.

David Cooney, Assistant Director, Office of General Counsel, has determined that for each year of the first five years the proposed repeal of §3.94 is in effect, the anticipated public benefit from adoption of the proposed repeal of §3.94 will be a clearer understanding of the Commission's rules because they will be better organized and the requirements more clearly stated.

Mr. Cooney has determined that there will be no cost of compliance for individuals, small businesses, or micro- businesses.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas*

Register. For further information, call Dr. Steven Seni at (512) 475-4439. The status of rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the repeal under Texas Health and Safety Code, §401.415, which grants the Railroad Commission sole authority to regulate and issue licenses, permits, and orders for the disposal of oil and gas NORM, and authority to require the owner or operator of oil and gas equipment used in exploration, production, or disposal to determine whether the equipment contains or is contaminated with oil and gas NORM waste and to identify any equipment determined to contain or be contaminated with oil and gas NORM in order to protect public health and safety and the environment.

Texas Health and Safety Code, §401.415, is affected by the proposed repeal.

Issued in Austin, Texas on August 6, 2002.

§3.94. Disposal of Oil and Gas NORM Waste.

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

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205166
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-1295

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CHAPTER 4. ENVIRONMENTAL PROTECTION
SUBCHAPTER F. OIL AND GAS NORM

16 TAC §§4.601 - 4.603, 4.605, 4.608, 4.611, 4.614, 4.617, 4.620, 4.623, 4.626, 4.629, 4.632

The Railroad Commission of Texas proposes new §§4.601, 4.602, 4.603, 4.605, 4.608, 4.611, 4.614, 4.617, 4.620, 4.623, 4.626, 4.629, and 4.632, relating to Purpose; Exclusions and Exemptions; Definitions; Identification of Equipment Contaminated With NORM; Worker Protection Standards; Prohibited Disposal; Authorized Disposal Methods; Permit for Injection; Permit for Surface Disposal; Alternatives; Recordkeeping; Inspection; and Penalties and Certificate of Compliance, in 16 Texas Administrative Code (TAC) Chapter 4, new Subchapter F to be entitled Oil and Gas NORM. The Commission proposes these new rules on the same date it withdraws proposed amendments to §3.94, relating to Disposal of Oil and Gas NORM Waste, published in the February 8, 2002, issue of the *Texas Register* (27 TexReg 844), and on the same date the Commission proposes to repeal §3.94; the withdrawal and proposed repeal will be filed with the *Texas Register* concurrently with these proposed new rules. Many provisions of current §3.94 and new provisions in subchapter F are consistent with (but not entirely the same as) the amendments to §3.94 proposed in the February 8, 2002, issue of the *Texas Register.* Also in that issue, at (27 TexReg 989), the Commission proposed the review of §3.94; the Commission has withdrawn that review, but concurrently proposed the review of §3.94 in order that the review has the same comment period as the proposed repeal and this new proposal.

New Subchapter F recodifies in a more organized fashion Commission regulations concerning oil and gas NORM and oil and gas NORM waste and moves the rules into 16 TAC Chapter 4, entitled Environmental Protection. The Commission proposes the new rules in subchapter F to: (1) protect public health and safety and the environment by requiring operators to label oilfield equipment contaminated with NORM at or above the level that makes the possessor of the equipment a general licensee pursuant to applicable regulations of the Texas Department of Health (TDH), which is the state's radiation control agency; (2) define exemption levels for radiation exposure and concentration consistent with health and safety regulations of the TDH; (3) update the Commission's NORM regulations to conform with requirements adopted by the TDH in 25 TAC Chapter 289, related to Radiation Control; and (4) reiterate that operators must comply with applicable health and safety regulations of the TDH when they are engaged in activities involving NORM disposal.

Background

In November 2000, in response to a legislative directive, the Commission delivered to the Governor a report entitled *A Study of Regulation of Oil and Gas Naturally Occurring Radioactive Material (NORM) Waste In Texas* (NORM Study), reporting the Commission's findings from its investigation of NORM in Texas oil fields. The NORM Study is on file in the Commission's library in the William B. Travis Building, 12th floor, 1701 North Congress, Austin, Texas 78711. On page 12 of the study, the Commission noted that, of 612 sites inspected, 59 sites had equipment with readings at or greater than the level of 50 microroentgens per hour (µR/hr), the limit above which the TDH rule 25 TAC §289.259(d)(3) states the equipment is subject to the TDH regulations which apply to general licensees. Out of over 5,900 readings statewide, 203 were at or greater than 50 µR/hr.

Senate Bill 1338 (SB 1338), 77th Legislature (2001), amended Texas Health and Safety Code §401.415 by adding new subsections (a)(2)(A) and (a)(2)(B) specifically authorizing the Commission, in order to protect public health and safety and the environment, to require the owner or operator of oil and gas equipment used in exploration, production, or disposal to determine whether the equipment contains or is contaminated with oil and gas NORM waste, and to identify any equipment determined to contain or be contaminated with oil and gas NORM. In response to this legislation, the Commission proposed the amendments to §3.94 published in the February 8, 2002, issue of the *Texas Register* (27 Tex Reg 844).

On March 5, 2002, the Commission held a public hearing at the William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas, to give Commission staff the opportunity to discuss aspects of the February 8 proposal with interested parties and to solicit comments. In addition, the Commission received written comments on the proposed amendments through May 9, 2002. After considering the comments, the Commission has decided to withdraw the February 8 amendments and instead proposes these new rules in new Subchapter F.

The Proposed February 8 Amendments (Now Withdrawn)

The February 8 amendments to §3.94 were intended to respond to SB 1338 and would have specifically required owners or operators of oil and gas equipment to: (1) perform periodic radiation surveys depending on the presence of NORM in a given oil or gas field, the type of maintenance or operational activity, and time; and (2) report to the Commission contamination readings

on individual pieces of equipment. The Commission has now determined that those proposed survey and reporting requirements were unworkable because the survey requirements would be highly prescriptive without proportionate increased likelihood of attaining the statutory goal of clearly notifying workers and the public when there is a potential risk of NORM exposure from oil field equipment.

The Commission has therefore changed the requirements in this new proposal to the more direct approach of simply requiring identification and tagging of NORM-contaminated equipment. In addition, the Commission has changed the proposed reporting requirements to require operators to retain appropriate records instead of filing the records with the Commission.

Response to Comments on Proposed Amendments Published in the February 8, 2002, Issue of the Texas Register

The Commission will address many of the comments received on the February 8 amendments to §3.94 because the discussion helps explain why the Commission chose to withdraw the original proposal and propose different requirements in new rules.

One commenter stated that changes to §3.94 are unnecessary because the current rule is working. This commenter also stated that SB 1338 contains language indicating that the Commission "may require" testing, not "shall require testing." Another commenter stated that changes to §3.94 are unnecessary based on the Commission's 2000 NORM study.

One commenter asserted that the Commission exceeded its jurisdiction under SB 1338 and that the Commission does not have statutory authority to require sampling for NORM that is not NORM waste or to treat all equipment in an entire field as contaminated with NORM waste. The same commenter concluded that the Commission proposed to delete language from §3.94(b)(3) in the February 8 amendments because it intends to assert jurisdiction over NORM recycling activities, equipment decontamination, and the possession, use, transfer, transport, and/or storage of oil and gas NORM waste.

One commenter expressed strong support for NORM surveys because they are in the best interest of affected parties and the state.

In addressing these comments, the Commission concludes that despite use of the permissive "may" in SB 1338, the statute nevertheless broadened the Commission's authority to include not only oil and gas NORM waste, but also NORM-contaminated equipment in order to protect public health and safety and the environment. Given the compelling state interest in public health and the clear expansion of Commission authority in this area by the legislature, the Commission is obliged to initiate the equipment identification provisions.

The Commission also proposes other revisions to be consistent with the TDH NORM regulations. TDH regulates, among other things, the possession, storage, use and transportation of NORM. Persons who owns or operate NORM-contaminated equipment must comply with TDH requirements. In order to comply with the TDH requirements for a general licensee, including worker protection standards, the person must know whether or not the person possesses equipment contaminated with NORM above the exemption level of 50 µR/hr. The Commission's proposal does not change these requirements.

Regarding the Commission's own requirements, after review of the legislative history of SB 1338 and testimony on the bill by the author and others, the Commission determined that the intent of the bill was to direct the Commission to review its 2000 NORM study and any other relevant information concerning risks to public health and safety and the environment from NORM-contaminated equipment, and to determine whether or not additional requirements might be necessary. After this evaluation, the Commission has determined the legislature specifically wanted operators to identify oil-field equipment contaminated with NORM in order to reduce radiation risk to workers and other persons. Therefore, the Commission proposes to require owners or operators of oil and gas equipment to identify and tag equipment that contains or is contaminated with NORM above the exemption level established by the TDH. The Commission has determined that these changes will further protect oil and gas field workers from exposure to airborne radiation that may be ingested or inhaled.

Six commenters stated that the proposed changes would increase the testing and recordkeeping requirements. One commenter stated that the history of the enabling legislation did not contemplate reporting to the Commission. Three commenters stated that recordkeeping should be simple, effective, non-punitive, and should be reduced. Another commenter was concerned about the burden on the Commission to track individual pieces of equipment.

The Commission agrees that SB 1338 does not require reporting to the Commission and has reconsidered the cost/benefit related to collecting and maintaining such data. The proposed new rules do not mandate ongoing reporting of contaminated equipment to the Commission, but will require operators to retain such records for five years (rather than the three years originally proposed in the February 8 amendments) instead of filing them with the Commission, thus reducing some recordkeeping and reporting requirements. The five year retention period assures records are available for a reasonable time after operators are required to have equipment labeled two years from the date of adoption.

One commenter offered major recommendations to: (1) restructure the proposed amendments; (2) delete the requirement for biennial surveys and full labeling of all equipment; (3) delete the listing of fields with NORM contamination; and (4) substitute a methodology for NORM assessments with a deadline for initial assessments, minimum standards for conducting NORM surveys, flexible labeling, and a requirement for reassessments when conditions have changed since the previous assessment.

The Commission appreciates the commenter's effort to develop an alternative to the Commission's original proposed amendments. The Commission agrees, in part, with the commenter and has proposed a simpler provision in §4.605, relating to Identification of Equipment Contaminated with NORM, which accomplishes the equipment identification in a more direct manner as the commenter suggested. The Commission has not proposed a methodology for surveys, but will allow individual operators to determine the most efficient method for their particular situations.

Nine commenters stated that biennial surveys are too frequent, unnecessary, and an unreasonable burden in fields where a NORM exposure level of greater than 50 µR/hr has not been found. Two of the commenters suggested a frequency of five years. Two commenters stated that biennial surveys would be acceptable if surveys could cease after several surveys detected NORM levels below the exemption level. Another commenter suggested that no surveys are necessary if a lease has been in operation for 10 years and NORM exposure is less than 50 µR/hr except for new reservoir production equipment, which could be surveyed every two years and then surveying would be

discontinued after three or four surveys if no NORM above 50 µR/hr was found. Another commenter suggested that the rule allow an assessment option that would not require a survey of all equipment, only representative equipment or a percentage of equipment in a production area. Another commenter stated that resurveys should not be necessary unless production characteristics change or other relevant information warranted reassessment.

Five commenters stated that surveys of idle equipment or repeated or blanket equipment resurveys after the equipment has already been found to contain NORM are wasteful and unnecessary.

Regarding the survey comments, the Commission based the initial proposed amendments in §3.94(b)(2) regarding periodic surveys of equipment in fields where NORM has not been measured above 50 µR/hr on the premise that NORM may accumulate in equipment over time as greater volumes of fluid, particularly produced water, move through the equipment, and also on the fact that produced water volumes generally increase as fields mature. The Commission has since concluded that the field-oriented survey and resurvey approach initially proposed in §3.94(b)(2), now withdrawn, would be unworkable and inefficient. The Commission has proposed simpler and more workable wording in new §4.605 that would require NORM-contaminated equipment to be identified and tagged. TDH regulations currently require an operator that is a general licensee, *i.e.,* is in possession of equipment with radiation exposure greater than 50 µR/hr, to comply with 25 TAC §289.259(d)(3). Proposed new §4.605 would require the operator to clearly mark the equipment as NORM-contaminated.

Six commenters expressed concerns about the rationale of categorizing a field as NORM-contaminated based on one survey reading. Two commenters stated that an entire field, especially a county regular field, should not be included in the requirements because one survey found NORM in equipment, especially when different reservoirs are involved. Another commenter stated that it is unrealistic to categorize a field based on one piece of equipment. Another commenter stated that no fields should be listed as problem areas. One commenter stated that the Commission does not have the authority to treat all equipment in a field as contaminated when there is evidence to the contrary.

The Commission agrees that listing a field, especially a county regular field, as a field contaminated by NORM based on one survey is problematic. The proposed new rules do not include requirements that are tied to fields or maintenance and operations procedures, but simply require owners and operators to identify and tag NORM-contaminated equipment.

Four commenters stated that the 50 µR/hr threshold is too low to be a health risk. One of these commenters asked for the statistical link between employee health and the proposed February 8 amendments and another asked for medical evidence. One of the commenters suggested that the exemption level be raised to 250 µR/hr. One commenter stated that the Commission should research the health risks associated with 50 µR/hr. Three commenters stated that the radiation levels ignore background radiation levels and that background radiation should be removed (subtracted) from absolute radiation levels.

The Commission reviewed SB 1338 and the Health and Safety Code, Chapter 401, to discern state law and policy concerning consistency among state agencies charged with enforcing radioactivity regulations. The Commission concluded that the provisions of Chapter 401, when viewed as a whole, indicate it is the policy of the state for such standards to be consistent both among state agencies and between state and federal authorities. SB 1338, which amended Health and Safety Code, §401.415(d), requires the Commission to consult with the TDH and the Texas Natural Resource Conservation Commission (TNRCC) regarding administration of the Commission's authority to regulate and issue licenses, permits, and orders for the disposal of oil and gas NORM waste, and to require owners and operators of oil and gas equipment to determine whether the equipment contains oil and gas NORM and identify such equipment. The policy of interagency consultation runs throughout Chapter 401. *See* §401.001(1)(B) and (C), concerning the policy of the state to maintain single, effective regulatory system compatible with other states' systems; §401.002, concerning the program to promote orderly regulatory pattern in the state, among the states, and between the federal government and the state; §401.015, concerning creating one radiation advisory board made up of representatives of all the relevant industries; §401.052, concerning the requirement that the radiation advisory board's rules for transportation of radioactive material and waste, to the extent practical, be compatible with the United States Department of Transportation (USDOT) and the United States Nuclear Regulatory Commission (USNRC) regulations; and §401.0525, concerning the requirement that the board's groundwater protection standards be compatible with federal standards. Consistent with this policy of compatibility, Health and Safety Code §401.415(e) provides that the Commission shall adopt rules for the management of oil and gas NORM waste and in so doing shall consult with the TNRCC and the TDH regarding protection of the public health and the environment. Further, the Commission's rules shall provide protection for public health, safety, and the environment equivalent to the protection provided by rules applicable to disposal of other NORM wastes having similar properties, quantities, and distribution, although the approved methods and sites for disposing of oil and gas NORM wastes may be different from those approved for other NORM wastes. The Commission concludes that the oil and gas NORM radiation standards (*i.e.,* the minimum NORM exposure rate or concentration that triggers a requirement) should not be different from the TDH NORM standards.

In addition, the exemption level for equipment of 50 µR/hr, including background, was established by the TDH during the adoption of its NORM regulations in 1993. At that time, TDH received comments from oil and gas operators who desired a quick and easy method for establishing exemption criteria for equipment that did not also require a determination of background radiation. Furthermore, review of the background readings for the 612 sites surveyed in the Commission's NORM Study determined that the average background reading was 9.6 µR/hr and that only three sites were included as NORM contaminated when readings, including background, were slightly greater than 50 µR/hr. Finally, inclusion of background levels eliminates the uncertainties as to the accuracy of a background reading at a particular site. For all the foregoing reasons, the Commission has retained the 50 µR/hr requirement in this proposal.

Two commenters stated that the definition of routine maintenance is vague and requested clarification regarding routine versus non-routine and routine versus unscheduled maintenance.

These terms are not used in proposed new subchapter F.

One commenter stated that NORM presents a potential health risk when inhaled and it is necessary that operators and workers be aware of when NORM exists and when workers may come in contact with contaminated equipment. Another commenter stated that any employee should be protected when exposed to airborne particulate matter that may contain alpha-emitting NORM. Another commenter stated that the primary reason for worker notification is the risk of inhalation from airborne NORM. The same commenter offered that conducting wet operations and opening tank hatches to measure oil levels are activities that present a low risk of exposure to NORM.

The Commission agrees with the commenters. The current proposal includes requirements in §4.605 for the identification and tagging of NORM-contaminated equipment because the Commission has determined that such requirements would protect the health of workers. The Commission anticipates that the provisions in proposed new §4.605 will enhance awareness of NORM risk to workers, and that employers will use tools and methods to minimize the risk.

Four commenters stated that the costs estimates for complying with the February 8 proposal were too low. One of the commenters provided a cost estimate for compliance of approximately three times the Commission's estimate. One of the commenters stated that off-site disposal is expensive and suggested that the state furnish disposal sites around the state.

The Commission notes that the February 8 amendments requiring mandatory surveys may have been perceived as requiring additional cost. However, in proposed new subchapter F, the only additional requirement that would impact cost is in §4.605, which requires NORM-contaminated equipment to be tagged. This cost, however, should be minimal.

The Commission reiterates that pursuant to 25 TAC §289.259, and since adoption of TDH's NORM regulations, operators already have been required to know whether they possess equipment that has an exposure rate of 50 µR/hr or greater of NORM.

Section 289.259 establishes radiation protection standards for the possession, use, transfer, and/or storage of NORM. The section applies to any person who engages in, among other activities, the use, transfer, or storage of NORM. Exceptions include certain categories of NORM waste and, pursuant to 25 TAC §289.259(d)(3), pipe (tubulars) and other downhole or surface equipment used in oil production contaminated with NORM scale or residue not otherwise exempted if the maximum radiation exposure level does not exceed 50 µR/hr including background radiation level at any accessible point. Thus, any person who possesses such equipment used in oil production and contaminated with NORM scale or residue in excess of 50 µR/hr is subject to the general licensee requirements of 25 TAC §289.259. Such persons therefore are charged with knowing if the equipment is contaminated with NORM scale or residue in excess of 50 µR/hr.

Two commenters agreed with raising the radiation level (30 pCi/g) for onsite disposal. Another commenter believes that technical supporting evidence is needed to show that the 30 pCi/g level is protective of public health.

The Commission's requirement for onsite disposal is the same as that of the TDH, which adopted the 30 pCi/g exemption level for oil and gas NORM waste in §289.259, effective April 11, 1999, on the basis of scientific evidence.

Two commenters stated that the labeling requirement for individual pieces of equipment to include the NORM reading would not present any additional value and could cause liability problems. One of commenters stated that the requirement would cause operators to re-label equipment.

The Commission concludes that labeling should reduce liability problems. Proposed new §4.605 requires only that the label bear the letters "NORM."

Two commenters stated that the rule will result in frivolous lawsuits, but did not elaborate on their concern.

The Commission concludes that the specific statutory instruction in SB 1338 to protect public health, safety, and the environment act outweigh any potential frivolous lawsuits.

One commenter suggested that open hole and cased hole wireline equipment be exempted in the definition of "equipment."

The Commission notes that radioactive wireline equipment is a "radioactive source" as defined by TDH regulations. Such sources are not NORM and, therefore, are not within the scope of this rulemaking. In proposed new subchapter F, the Commission modified the definition of "equipment" exclude exploration equipment, making a specific exemption for wireline equipment is unnecessary.

Another commenter suggested excluding equipment associated with drilling operations because NORM has not been associated with drilling operations.

The Commission agrees that NORM has not been found associated with well drilling equipment and did not intend for a drilling contractor's equipment to be surveyed and identified because such equipment is not owned or operated by the oil or gas operator. In proposed new §4.603, the Commission defines "equipment" to refer to equipment used for production or disposal. This language is also consistent with 25 TAC §289.259(d)(3).

One commenter asked if radon emanation rates were addressed in the February 8 amendments.

Neither the Commission's February 8 amendments nor the proposed new rules in subchapter F include radon emanation rates. The TDH removed radon emanation rate criteria from the exemption level for oil and gas NORM waste in its amendments to 25 TAC §289.259 in 1999.

One commenter expressed concern about the definition of "disposal" with regard to decontamination activities. Another commenter proposed clarification of the definition of "disposal" to provide that accidental spills, discharges, and releases are not acts of disposal.

The Commission did not propose any amendments to the definition of disposal in the February 8 amendments and has not done so in the proposed new rules in subchapter F. The Commission determined no amendments were necessary because it has received very few questions concerning the current definition in the eight years §3.94 has been in effect. This definition of disposal is consistent with current rule definitions. Further, releases may be acts of disposal whether or not they are intentional.

One commenter asked why NORM contamination was much higher in the Commission's District 7C than in other Commission districts based on the Commission's survey.

The Commission surveyed a higher percentage of commercial disposal operations in District 7C than in other districts. The

Commission determined that a high throughput of waste at commercial facilities allowed higher concentrations of NORM to accumulate in equipment over time.

Another commenter stated that testing at commercial disposal facilities should be accelerated.

The Commission agrees and proposes in new §4.605(a) a requirement that commercial disposal facilities label NORM-contaminated equipment within two years of the effective date of the new rule.

One commenter stated that the requirements for surface disposal of NORM are too difficult to understand and that laboratory analysis should not be required. The commenter offered that 50 µR/hr be the standard for onsite soil/waste mixture.

The Commission's proposed new rules in subchapter F change the standard for onsite application from 5 pCi/g of Radium-226 and Radium-228 to 30 pCi/g of Radium-226 or Radium-228 above background. The proposed new rule also allows the onsite application of other radionuclides of 150 pCi/g or less in order to be consistent with TDH exemption levels. The Commission finds these changes to be straightforward. In practice, screening to determine exposure rate in µR/hr is a common procedure to evaluate where the highest reading occurs followed by confirmation sampling and analysis of the concentration of mixed soil and NORM waste. The Commission will work with the TDH in the future on the possibility of survey-based standards for soil and mixed media, and intends to work with the TDH to develop workshops to help operators comply with the new requirements.

One commenter stated that the list of contaminated fields should be updated. One commenter was concerned about how fields would be added to the list.

The Commission intends to maintain a list of fields where NORM contamination has been identified. The list will be updated as Commission inspectors report on equipment that is or should be tagged. Proposed subchapter F does not use a field-based approach; it simply requires operators to identify NORM-contaminated equipment.

One commenter stated that Commission inspectors should be provided testing equipment, such as survey meters.

The Commission has some testing equipment, has recently purchased more survey equipment, and intends to purchase more when funding becomes available.

Two commenters stated that NORM surveyors should be adequately trained, knowledgeable, and able to interpret the data.

The Commission generally agrees; however, no state requirements currently exist regarding training for persons who perform NORM surveys. Taking a reading to determine whether or not equipment is contaminated with NORM is a relatively simple procedure.

One commenter suggested that the location of equipment that has been surveyed for NORM be recorded on a plat drawn to scale.

The Commission disagrees and finds that specific identification of NORM-contaminated equipment by tagging is preferable because it provides persons with direct notice of the presence of NORM.

One commenter suggested that all NORM-contaminated equipment be decontaminated before it is transferred to another person or sent to another lease. Another commenter proposed clarification of the requirement in the February 8 amendments to §3.94(b)(2) to survey equipment prior to transfer so that the requirement only apply to transfer of the equipment to another lease, unit, or facility.

The Commission disagrees. The TDH's adopted §289.259(f)(4)(A) allows the transfer of NORM-contaminated equipment provided the equipment will be used for the same purpose or at the same site. The concerns of both commenters should be addressed in the new proposal because the Commission proposes in new §4.605 to simply require labeling of NORM-contaminated equipment, whether it stays in one place or is moved.

One commenter had questions regarding the activities that would be under the jurisdiction of the TDH, specifically with regard to possession, storage, transfer, and transport.

The Commission has not proposed any changes that would conflict with the TDH regulation regarding general licensees and these activities.

One commenter suggested that a time limit be placed on NORM-contaminated equipment that is taken out of service in order to track when it is decontaminated, put to use, or salvaged.

The Commission finds that time limits on the management of NORM in equipment is essentially a NORM storage issue and therefore is outside the Commission's jurisdiction.

Two commenters recommended that the Commission develop landfarming and burial standards for onsite NORM disposal.

The Commission has determined that landfarming oil and gas NORM waste that requires a permit under §3.8, relating to Water Protection, must comply with the requirements for NORM disposal as identified in proposed new §4.620.

One commenter asked if the February 8 amendments to §3.94(b)(3) beginning with "Activities involving" and ending with "activities other than disposal of oil and gas NORM waste" should be stricken.

The Commission disagrees with the commenter. The language is intended to specify those activities that are excluded because they are under the jurisdiction of the TDH.

One commenter stated that measures that are appropriate for pipe-refurbishing yards are not appropriate for oil field operations.

The Commission does not have jurisdiction over activities or equipment at pipe-refurbishing yards, except for disposal of NORM waste generated there. This rulemaking therefore considers activities related to oil and gas production and NORM disposal operations.

One commenter asked how the Commission ensures that employers are meeting the requirements for worker protection.

The TDH, as the state radiation control agency, has jurisdiction over worker protection standards, except for activities involving disposal of oil and gas NORM waste. In order to ensure that employers are protecting their workers, the Commission, in the February 8 amendments to §3.94(c), proposed the adoption of TDH worker protection standards for disposal activities. Proposed Subchapter F does not include adoption of TDH worker protection standards by reference because Commission staff is

not trained to enforce the TDH worker protection regulations; however, proposed Subchapter F does restate worker protection requirements with more specificity as to the categories of protective measures the TDH requires, and to add citations to specific applicable TDH regulations.

One commenter raised several questions regarding prohibited and authorized disposal methods in the February 8 amendments to §3.94(d) and (e).

The Commission did not propose amendments regarding prohibited and authorized disposal methods in the February 8 amendments and has not proposed any changes to these requirements as now proposed in §4.611 and §4.614, relating to Prohibited Disposal and Authorized Disposal Methods, respectively.

One commenter asked whether land spreading of NORM waste is decontamination or dilution, and whether landspreading concentrates or dilutes NORM.

The Commission finds that landspreading of NORM waste is decontamination in the context of provisions in proposed new §4.614(d). The Commission also finds that such treatment is dilution, but that dilution is acceptable for NORM. The Commission also finds that the land treatment authorized by proposed new §4.614(d) is a dilution method.

One commenter disagreed with the requirements for consent of the landowner for disposal of NORM waste in a well that is being plugged when the waste was generated on another lease or unit.

The Commission finds that the risk posed by NORM warrants such notification and notes that all notification provisions in both the February 8 amendments and in proposed new subchapter F are the same as those required by the Commission since it first adopted NORM regulations on December 12, 1994.

Proposed New Rules in New Subchapter F

The Commission proposes new §4.601, relating to Purpose, with somewhat different wording than what is currently in §3.94(b)(1) to add a reference to the new equipment identification requirements. The new rule is also slightly different from what the Commission proposed in the February 8 amendments to §3.94(b)(1) because proposed new §4.601 includes a specific reference to the current requirement that operators that possess oil and gas NORM comply with the Commission's regulations *and* applicable TDH regulations.

Proposed new §4.601 is generally the same as current Rule 94(b)(1), except that proposed §4.601(c) contains some new wording that specifically identifies TDH regulations that persons who handle oil and gas NORM or oil and gas NORM waste are expected to follow.

Proposed new §4.602, regarding Exclusions and Exemptions, is substantively similar to the February 8 amendments to §3.94(b)(3) and(4), and generally the same as current §3.94(b)(3) and(4), except that the proposed new rule does not include language that it is limited to disposal of oil and gas NORM waste, because SB 1338 authorizes the Commission to require an operator to determine if oil and gas equipment is contaminated with NORM and subsequently to identify such equipment.

The Commission proposes new §4.603, relating to Definitions, including definitions for "Commission," "equipment," "NORM-contaminated equipment," and "radiation survey instrument," which are different from current §3.94 *and* different from the February 8 amendments. "Equipment" is defined as oil and gas equipment used in production and disposal. The February 8 definition of equipment included exploration equipment, but the current proposal does not because the Commission determined that exploration equipment does not pose such a risk of becoming contaminated with NORM to warrant coverage and because the relevant TDH regulation, 25 TAC §289.259(d)(3), does not reference exploration equipment. "NORM-contaminated equipment" is defined as equipment that contains or is contaminated with NORM when appropriate radiation survey instruments detect radiation exposure levels greater than 50 µR/hr, consistent with the exemption level established by the TDH in 25 TAC §289.259(d)(3). The proposed new definition for "Commission" includes the Commission or its delegate; the February 8 amendments did not reference "delegate." "Radiation survey instrument" is defined as an instrument used to measure radiation and capable of measuring radiation exposure levels from 1 µR/hr to 500 µR/hr, consistent with TDH standards. Unlike the February 8 amendments, proposed new §4.603 does not include definitions for "radiation survey" and "routine maintenance" because the proposed new rules do not require operators to conduct a survey at a specific time; instead, operators are required to know if their equipment is contaminated with NORM at or greater than 50 µR/hr, and if it is, to clearly mark the equipment.

Consistent with the February 8 amendments, new rules in subchapter F do not include references to the Texas Radiation Control Regulations (TRCR) in order to conform to the TDH's recodification of its radiation regulations. Instead of referring to "TRCR," proposed new rules in subchapter F cite specific TDH regulations in the Texas Administrative Code.

Proposed new §4.605, relating to Identification of Equipment Contaminated with NORM, represents the primary change from current §3.94 and is markedly different from the February 8 amendments to §3.94(b)(2). Proposed new §4.605(a) states that within two years of the effective date of this rule, each person who owns or operates equipment used for production or disposal and each person who owns or operates equipment associated with a commercial facility, as defined in §3.78 (relating to Fees, Performance Bonds, and Alternative Forms of Financial Security Required to be Filed), shall identify NORM-contaminated equipment with the letters "NORM" by attaching a clearly visible waterproof tag or marking with a legible waterproof paint or ink. Proposed new §4.605(b) states that within six months of the effective date of this rule, each a person whom the Commission has notified that equipment the person owns or operates is contaminated with NORM at a level of greater than 50 microroentgens per hour (µR/hr) shall, on each lease that is the subject of the Commission notice, identify NORM-contaminated equipment with the letters "NORM" by attaching a clearly visible waterproof tag or marking with a legible waterproof paint or ink. Proposed new §4.605(c) requires that the radiation survey instruments used to assess radiation exposure levels in equipment be able to measure radiation exposure from 1 µR/hr to 500 µR/hr and to conform with regulations adopted by the TDH in 25 TAC §289.259(e), relating to Licensing of Naturally Occurring Radioactive Material (NORM). This new wording is different because the February 8 amendments required operators to survey equipment. Proposed new rules in subchapter F do not require the survey, but require operators to identify NORM-contaminated equipment.

Proposed new §4.608, relating to Worker Protection Standards, is different from the February 8 amendments to §3.94(c) because

the proposed new rule more specifically identifies the relevant TDH regulations but does not adopt them by reference.

The Commission proposes new §4.611, relating to Prohibited Disposal, which includes the current provisions of §3.94(d).

The Commission proposes new §4.614, relating to Authorized Disposal Methods. The provisions in this section differ slightly from the February 8 amendments to §3.94(e), regarding the requirement for determining the concentration of Radium-226 or 228 to be consistent with TDH regulations. The original §3.94(e) required a determination of Radium-226 and 228, but TDH uses the conjunction "or" rather than "and" when referencing Radium-226 and 228 in this context. Thus, proposed §4.614(b)(7) requires an operator to include on Form W-3A, Intent to Plug and Abandon, the radioactivity level of any NORM radionuclides to be disposed of in a well to be plugged, not just Radium-226 and Radium-228 as §3.94 currently requires. The Commission proposes this provision to conform to 25 TAC §289.259(d)(1)(A)(ii), relating to Licensing of Naturally Occurring Radioactive Material (NORM).

Similarly, proposed new §4.614(c) is the same as the February 8 amendment to §3.94(e)(2)(A) and raises the radioactivity limit of oil and gas NORM waste that has been treated or processed for authorized onsite disposal by burial from less than five picocuries per gram (pCi/g) to less than 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other radionuclide. The Commission proposes new §4.614(d) with similar wording to the February 8 amendments to §3.94(e)(2)(B) to allow disposal of NORM waste on the same site where it was generated by mixing it with material on the land surface if the radioactivity concentration of the NORM and soil waste mixture does not exceed 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other radionuclide. The new limits on radioactivity levels for burial and mixing material on the land surface are proposed to conform to 25 TAC §289.259(d), which the TDH adopted effective April 11, 1999, to change the exemption levels for oil and gas NORM waste after the Commission adopted §3.94 effective December 12, 1994.

The Commission proposes new §4.617, relating to Permit for Injection, which is similar to the February 8 amendments to §3.94(f), including §3.94(f)(2)(C), now proposed as §4.617(c)(3). Proposed new §4.617(c)(3) requires that an application for a permit to dispose oil and gas NORM waste under §3.9 of this title, relating to Disposal Wells, include information on the maximum measured radioactivity level of oil and gas NORM waste to be injected in units of pCi/g of NORM radionuclides other than Radium-226 or Radium-228. This change is necessary to conform with 25 TAC §289.259(d)(1)(A)(ii), relating to Licensing of Naturally Occurring Radioactive Material (NORM). The other provisions in proposed new §4.617, including the notice requirements in §4.617(d), are substantively the same requirements which have been in effect since the Commission adopted §3.94 effective December 12, 1994.

The Commission proposes new §4.620, relating to Permit for Surface Disposal, which is similar to the February 8 amendments to §3.94(g), including §3.94(g)(1), now §4.620(b), concerning standards for issuance of a permit for surface disposal under §3.8, related to Water Protection. New 4.620(b) increases the allowed radioactivity of an oil and gas NORM waste that is to be buried or mixed with the land surface from less than five pCi/g above the background level to less than 30 pCi/g of Radium-226 or Radium-228 and less than 150 pCi/g for any other radionuclide. The Commission proposes new §4.620(c)(3) to require that the applicant for a permit to dispose of oil and gas NORM waste by burial or by mixing with the land surface provide the maximum measured radioactivity level of any other NORM radionuclide. In addition, the Commission proposes new §4.620(c)(4) to require that the applicant include the background radiation concentration measured in µR/hr as well as concentration measured in pCi/g of Radium-226 or Radium-228. These changes were proposed in the February 8 amendments to §3.94(g) and are necessary to conform with 25 TAC §289.259(d)(1)(A)(i) and (ii), relating to Licensing of Naturally Occurring Radioactive Material (NORM). The remaining provisions in proposed new §4.620, including the notification requirement in §4.620(d), have been in effect since the Commission first adopted §3.94 effective December 12, 1994.

The Commission proposes new §4.623, relating to Alternatives, to allow the Commission to approve alternatives to the provisions of proposed §4.617 and §4.620 upon demonstration in writing that the alternatives will protect the public health, safety, and the environment. This proposed rule does not differ substantially from the current §3.94(k), which has been in effect since December 12, 1994.

The Commission proposes new §4.626, related to Recordkeeping, to require operators to retain records relating to the identification of NORM-contaminated equipment and disposal for at least five years. In proposed §4.626(b), the owner or operator of the lease, unit, or facility is responsible for maintaining records of the radiation exposure levels of equipment and the date the exposure levels were determined. Proposed new §4.626 is different from the February 8 amendments in that the record retention period is increased from three to five years, but there is no requirement for operators to file these records with the Commission. The Commission determined five years is appropriate because the proposed new rules in subchapter F make each operator, rather than the Commission, responsible for retaining records. Furthermore, proposed new §4.605, relating to Identification of Equipment Contaminated With NORM, would require identification and tagging of all equipment contaminated with NORM within two years of the effective date of the rule, so the five year record retention provision provides the Commission ample time to monitor compliance. Proposed new §4.626(c)(5) would require the owner to maintain records on the radioactivity level of oil and gas NORM waste for any other NORM radionuclide, not just Radium-226 and Radium-228, consistent with the TDH regulations.

The Commission proposes new §4.629, relating to Inspection, and §4.632 relating to Penalties and Certificate of Compliance, to convey the Commission's inspection and enforcement authority under proposed new subchapter F. These proposed rules do not differ substantively from provisions in current §3.94(j) which have been in effect since the Commission first adopted §3.94 effective December 12, 1994.

Fiscal Implications

Dr. Steven Seni, Assistant Director, Environmental Services, Oil and Gas Division, has determined that for each year of the first five years the proposed new rules in subchapter F will be in effect, there will be fiscal implications for state government as a result of enforcing or administering the new rules. The Commission may need to purchase additional radiation-monitoring equipment in order to verify operator compliance with the requirement in §4.605 to identify NORM-contaminated equipment, and Commission inspectors will need to integrate the task of compliance monitoring into the inspection process. The Commission cannot

quantify the time demands of these additional tasks, but does not anticipate adding personnel for this purpose. If the Commission purchases radiation-monitoring equipment, the expenditure would be made in the first year; the purchase of a radiation survey instrument, such as a scintillation counter, would cost approximately $500 to $1,000. There would be no substantial fiscal impact in the second through the fifth years. There will be no fiscal impact on local governments.

David Cooney, Assistant Director, Office of General Counsel, has determined that for each year of the first five years the proposed new rules in subchapter F will be in effect, the anticipated public benefit from adoption of the new rules will be enhanced prevention of pollution and protection of public health, particularly that of oil field and service company workers and all potential equipment handlers, from NORM-contaminated oil and gas equipment. The standards set forth in proposed new subchapter F would provide operators with requirements for identifying potential NORM-contaminated equipment. Compliance with the rules will reduce potential health risk to workers and the public throughout Texas.

Mr. Cooney has determined that there will be incremental costs of compliance for operators that are individuals, small businesses, or micro-businesses. The Commission does not have the data to compare the cost of compliance for small businesses with the cost of compliance for the largest businesses affected by the proposed new rules in subchapter F, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales; however, the Commission has determined that most new expenses are related to additional requirements for identifying and tagging oil and gas equipment that is contaminated with NORM. In order to comply with current TDH regulations, operators already are required to determine radiation exposure levels in order to discern whether or not they are a general licensee under the TDH regulations. If the operator is a general licensee, the operator must comply with the worker protection standards and the requirements for use of NORM-contaminated equipment as specified by the TDH regulations. Therefore, the Commission expects the overall incremental cost of complying with new requirements to identify and tag NORM-contaminated equipment to be relatively low.

The Commission has determined that a local employment impact analysis pursuant to Texas Government Code, §2001.022, as amended by House Bill 1872, 77th Legislature (2001), is not necessary because the cost of initial compliance is not anticipated to be significant. The Commission cannot identify any specific geographic area of the state where continued identification of NORM-contaminated equipment and/or decontamination would be required at a level that would affect the local economy.

The Commission has not conducted a regulatory analysis of a major environmental rule under Texas Government Code, §2001.0225(b), for two reasons. First, the Commission finds that the proposed new rules in subchapter F are not "major environmental rules" as defined in Texas Government Code, §2001.0225(g)(3); the Commission finds that the proposed new rules do 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. Second, the Commission proposes the new rules in subchapter F under the specific provisions enacted by Section 1, Senate Bill 1338, 77th Legislature (2001), rather than the general powers of the Commission. Therefore, according to Texas Government Code, §2001.0225(a)(4), the proposed new rules are not subject to the requirements of the section.

The Commission has proposed the review of §3.94, as it is proposed for repeal, in accordance with Texas Government Code §2001.039. The proposed notice of review will be filed with the *Texas Register* concurrently with the proposed repeal of §3.94 and the proposed new rules in chapter 4, subchapter F. The proposed review published in the February 8, 2002, issue of the *Texas Register* at (27 TexReg 989) has been withdrawn.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 60 days after publication in the *Texas Register.* For further information, call Dr. Steven Seni at (512) 475-4439. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the new rules in subchapter F under Texas Health and Safety Code, §401.415, which grants the Railroad Commission sole authority to regulate and issue licenses, permits, and orders for the disposal of oil and gas NORM waste, and authority to require the owner or operator of oil and gas equipment used in exploration, production, or disposal to determine whether the equipment contains or is contaminated with oil and gas NORM waste and to identify any equipment determined to contain or be contaminated with oil and gas NORM in order to protect public health and safety and the environment. Texas Health and Safety Code, §401.415, is affected by the proposed new rules.

Issued in Austin, Texas, on August 6, 2002.

§4.601. Purpose.

(a) This subchapter establishes requirements for the identification of equipment contaminated with oil and gas Naturally Occurring Radioactive Material (NORM), and the disposal of oil and gas NORM waste for the purpose of protecting public health, safety, and the environment.

(b) The provisions of this subchapter do not supersede other Commission regulations relating to oil and gas waste management, including disposal.

(c) The provisions of this subchapter do not supercede the applicable rules of the Texas Department of Health (TDH), including but not limited to 25 TAC §289.202 (relating to Standards for Protection Against Radiation from Radioactive Material) and 25 TAC §289.259 (relating to Licensing of Naturally Occurring Radioactive Material (NORM)).

§4.602. Exclusions and Exemptions.

(a) Exclusions. Activities involving the recycling of oil and gas NORM waste; the decontamination of equipment and facilities that are contaminated with oil and gas NORM waste as a result of activities other than disposal of oil and gas NORM waste; the possession, use, transfer, transport, and/or storage of oil and gas NORM waste; and worker protection standards associated with such activities are under the jurisdiction of the TDH.

(b) Exemptions. The following activities are exempt from the requirements of this subchapter:

(1) disposal of produced water by injection into a well permitted under §3.9 of this title (relating to Disposal Wells) or §3.46 of this title (relating to Fluid Injection into Productive Reservoirs);

(2) disposal of produced water by discharge to surface waters and in accordance with a discharge permit issued under §3.8 of this title (relating to Water Protection); and

(3) disposal of equipment that has been decontaminated in accordance with a license issued by the TDH and that meets the exemption criteria of 25 TAC §289.259(d) (relating to Licensing of Naturally Occurring Radioactive Material (NORM)).

§4.603. Definitions.

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

(1) Background radiation--Radiation at the ground surface from:

(A) cosmic sources;

(B) non-technologically enhanced naturally occurring radioactive material, including radon, except as a decay product of source or special nuclear material; or

(C) global fallout as it exists in the environment from the testing of nuclear explosive devices. "Background radiation" does not include sources of radiation from radioactive materials regulated by the TDH.

(2) Commission--The Railroad Commission of Texas or its designee.

(3) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any oil and gas NORM waste into or on any land or water so that such waste, or any constituent thereof, may enter the environment or be emitted into the air or discharged into any waters, including subsurface waters. For purposes of this subchapter, disposal of oil and gas NORM waste includes its management at the site (*e.g.*, lease, unit, or facility) where disposal will occur when undertaken for the explicit purpose of facilitating disposal at that site. The term does not include decontamination activities, except for in-place mixing of oil and gas NORM waste to remedy historical contamination of the land surface and decontamination of equipment and facilities that become contaminated solely through disposal operations. In addition, the term does not include activities, including processing or treatment, that occur at a location other than the disposal site.

(4) Equipment--Oil and gas equipment used for production or disposal, including but not limited to pipes (tubulars), tanks, vessels, pumps, valves, flow lines, and connectors such as tees and elbows, provided that such equipment is or has been in contact with waste or produced fluids or substances.

(5) Microroentgens per hour (µR/hr)--A measurement of exposure from x-ray and gamma ray radiation in air.

(6) NORM--Naturally occurring radioactive material.

(7) NORM-contaminated equipment--Equipment that exhibits a minimum radiation exposure level greater than 50 µR/hr including background radiation level at any accessible point.

(8) Oil and gas waste--Oil and gas waste as defined in §3.8 of this title (relating to Water Protection).

(9) Oil and gas NORM waste--Any solid, liquid, or gaseous material or combination of materials (excluding source material, special nuclear material, and by-product material) that:

(A) in its natural physical state spontaneously emits radiation;

(B) is discarded or unwanted;

(C) constitutes, is contained in, or has contaminated oil and gas waste; and

(D) prior to treatment or processing that reduces the radioactivity concentration, exceeds exemption criteria specified in 25 TAC §289.259(d)(1)(2) and (3) (relating to Licensing of Naturally Occurring Radioactive Material (NORM)).

(10) Person--A natural person, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(11) Picocuries per gram (pCi/g)--A measure of the radioactivity in one gram of a material. One picocurie is that quantity of radionuclide(s) that decays at the rate of 3.7 x 10 10^{-2} disintegrations per second.

(12) Radiation survey instrument--An instrument used to detect and measure radiation exposure levels from 1 µR/hr through at least 500 µR/hr.

§4.605. Identification of Equipment Contaminated with NORM.

(a) Except as provided in subsection (b) of this section, within two years of the effective date of this rule, each person who owns or operates equipment used for production or disposal and each person who owns or operates equipment associated with a commercial facility, as defined in §3.78 (relating to Fees, Performance Bonds, and Alternative Forms of Financial Security Required to be Filed), shall identify NORM-contaminated equipment with the letters "NORM" by attaching a clearly visible waterproof tag or marking with a legible waterproof paint or ink.

(b) Within six months of the effective date of this rule, each person whom the Commission has notified that equipment the person owns or operates is contaminated with NORM at a level of greater than 50 microroentgens per hour (µR/hr) shall, on each lease that is the subject of the Commission notice, identify NORM-contaminated equipment with the letters "NORM" by attaching a clearly visible waterproof tag or marking with a legible waterproof paint or ink.

(c) Radiation survey instruments used to determine whether equipment is NORM-contaminated shall comply with regulations adopted by the TDH in 25 TAC §289.259(e) (relating to Licensing of Naturally Occurring Radioactive Material (NORM)).

§4.608. Worker Protection Standards.

Any employer of persons engaged in activities involving the disposal of oil and gas NORM waste shall comply with 25 TAC §289.202 (relating to Standards for Protection Against Radiation from Radioactive Material) adopted effective October 1, 2000, including but not limited to:

(1) implementing a radiation protection program as provided in 25 TAC §289.202(e);

(2) controlling the occupational dose to all employees as provided in 25 TAC §289.202(f)-(m);

(3) conducting surveys and monitoring as provided in 25 TAC §289.202(p) and (q);

(4) assuring respiratory protection and implement controls to restrict internal exposure in restricted areas as provided in 25 TAC §289.202(v)-(x);

(5) posting signs and labels as provided in 25 TAC §289.202(z)-(dd);

(6) keeping records of radiation protection programs and of special exposures as provided in 25 TAC §289.202(ll)-(NN), (pp)-(RR), and (vv); and

(7) keeping reports as provided in 25 TAC §289.202(WW)-(z.) and (aaa).

§4.611. Prohibited Disposal.

No person may dispose of oil and gas NORM waste except as provided in this subchapter. Disposal of oil and gas NORM waste other than produced water by discharge to surface or subsurface waters, as defined in §3.8 of this title (relating to Water Protection), shall be prohibited. Disposal of oil and gas NORM waste by spreading on public or private roads also shall be prohibited.

§4.614. Authorized Disposal Methods.

(a) Purpose. This section authorizes the methods for disposing of oil and gas NORM waste without a permit.

(b) Disposal in plugged and abandoned well. A person may dispose of oil and gas NORM waste by placing it between plugs in a well that is being plugged and abandoned, provided that:

(1) No person may dispose of oil and gas NORM waste at a lease or unit other than the lease or unit where the oil and gas NORM waste was generated unless prior to commencement of disposal operations, the surface owner of the lease or unit where the disposal occurs provides written consent for the disposal.

(2) The oil and gas NORM waste shall be placed in the well at a depth at least 250 feet below the base of usable quality water in compliance with §3.14 of this title (relating to Plugging).

(3) If the oil and gas NORM waste is encased in a tubing string, the tubing shall be:

(A) placed, not dropped, in the well; and

(B) left with an assembly that allows ready retrieval, if the string is not secured in cement.

(4) A cement plug shall be set immediately above the oil and gas NORM waste and the plug shall be either:

(A) above a cement retainer;

(B) above a cast iron bridge plug; or

(C) tagged to locate its position.

(5) The cement of the surface plug shall be color dyed with red iron oxide.

(6) A permanent marker that shows the three-bladed radiation symbol specified in 25 TAC §289.202(z) (relating to Standards for Protection Against Radiation from Radioactive Material), adopted effective October 1, 2000, without regard to color, shall be welded to the steel plate at the top of the well casing.

(7) The operator shall state on Form W-3A, Intent to Plug and Abandon:

(A) the physical nature (such as pipe scale, contaminated soil, basic sediment, equipment, pipe, pumps, or valves) of the oil and gas NORM waste;

(B) the volume of oil and gas NORM waste;

(C) the radioactivity level of the oil and gas NORM waste (in pCi/g of Radium-226 and Radium-228 and any other NORM radionuclides for soil or other media (such as pipe scale, contaminated soil, basic sediment, etc.), or in µR/hr for equipment (such as pipes, pumps and valves);

(D) the operator(s) of the lease, unit, or facility at which oil and gas NORM waste was generated; and

(E) the source(s), if known, of the oil and gas NORM waste by Commission district; field; lease, unit, or facility; and producing formation.

(8) If the oil and gas NORM waste is encased in tubing, the operator shall state on Form W-3A, Intent to Plug and Abandon:

(A) the size, grade, weight per foot, and outside diameter of the tubing;

(B) the subsurface depth of both the top and bottom of the tubing;

(C) the diameter of the retrieval assembly; and

(D) whether the tubing is free in the hole or is secured by cement, a bridge plug, or a cement retainer.

(9) The operator shall submit Form W-3A to the Commission's district office for the location of the oil and gas NORM waste disposal site.

(c) Burial. Except as otherwise provided in this subsection, a person may dispose of oil and gas NORM waste by burial at the same site where the oil and gas NORM waste was generated, provided that, prior to burial, the oil and gas NORM waste has been treated or processed such that the radioactivity concentration does not exceed 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other NORM radionuclide within the treated or processed waste. Such treatment or processing, if it occurs at the disposal site, is considered to fall within the definition of disposal because it is necessary to facilitate disposal. This subsection does not authorize any person to bury NORM-contaminated equipment.

(d) Landfarming. A person may dispose of oil and gas NORM waste at the same site where the oil and gas NORM waste was generated by applying it to and mixing it with the land surface, provided that after such application and mixing the radioactivity concentration in the area where the oil and gas NORM waste was applied and mixed does not exceed 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other radionuclide.

(e) Disposal at a licensed facility. A person may dispose of oil and gas NORM waste at a facility that has been licensed by the United States Nuclear Regulatory Commission, the State of Texas, or another state if such facility is authorized under its license to receive and dispose of such waste.

(f) Injection. Injection of oil and gas NORM waste that meets exemption criteria of 25 TAC §289.259 (relating to Licensing of Naturally Occurring Radioactive Materials (NORM)), as a result of treatment or processing at a facility licensed by the TDH (hereinafter referred to as a "specifically licensed facility") into a well permitted under §3.9 of this title (relating to Disposal Wells) is authorized under this section, provided that the requirements of this subsection are met.

(1) Prior to injecting treated or processed oil and gas NORM waste, the operator of the injection well shall notify the Commission in writing that the operator plans to inject oil and gas NORM waste that meets the exemption criteria of 25 TAC §289.259 as a result of treatment or processing at a specifically licensed facility. The operator shall include a copy of the TDH license for each facility where oil and gas NORM waste that will be injected is treated or processed in order to meet the exemption criteria of 25 TAC §289.259.

(2) Prior to injecting oil and gas NORM waste that has been treated or processed to meet the exemption criteria of 25 TAC §289.259, the injection well operator shall verify that the waste meets the exemption criteria by obtaining from the specifically licensed facility documentation regarding NORM surveys or other analyses conducted to

ensure that the treated or processed oil and gas NORM waste meets the exemption criteria of 25 TAC §289.259.

§4.617. Permit for Injection.

(a) Applicability. With the exceptions of produced water and oil and gas NORM waste that meets the exemption criteria of 25 TAC §289.259 (relating to Licensing of Naturally Occurring Radioactive Material (NORM)) as a result of treatment or processing at a facility specifically licensed by the TDH, no person may dispose of oil and gas NORM waste by injection into a well without a permit issued under §3.9 of this title (relating to Disposal Wells) that specifically allows disposal of oil and gas NORM waste. The provisions of this section apply in the case of oil and gas NORM waste disposal permits issued under §3.9.

(b) Standards for permit issuance. The Commission shall issue a permit to dispose of oil and gas NORM waste under §3.9 of this title (relating to Disposal Wells) only if the Commission determines that the subject oil and gas NORM waste will be disposed of in a manner that protects public health, safety, and the environment. Any permit to dispose of oil and gas NORM waste issued pursuant to §3.9 shall contain construction and operating requirements that are reasonably necessary to protect public health, safety, and the environment.

(c) NORM information. In addition to the application requirements of §3.9 of this title (relating to Disposal Wells), an applicant for a permit to inject oil and gas NORM waste shall include the information specified in this subsection. The Commission may require the applicant to provide any such additional information as may be necessary to show that the proposed disposal protects public health, safety, and the environment.

(1) The applicant shall describe the physical nature (such as pipe scale, contaminated soil, or basic sediment) of the oil and gas NORM waste to be disposed of;

(2) The applicant shall state the total volume of oil and gas NORM waste to be disposed of or the proposed rate of oil and gas NORM waste disposal; and

(3) The applicant shall state the maximum measured radioactivity level of the oil and gas NORM waste (in pCi/g of Radium-226 and Radium-228, and any other NORM radionuclide) that will be disposed of.

(d) Notice requirements. An applicant for a permit to inject oil and gas NORM waste under §3.9 of this title (relating to Disposal Wells) shall provide notice as required in that section and shall include in such notice the information required in subsection (c) of this section.

§4.620. Permit for Surface Disposal.

(a) Applicability. Except in the case of onsite disposal that meets the requirements of §4.614(c) and (d) of this title (relating to Authorized Disposal Methods), no person may dispose of oil and gas NORM waste by burying it or by applying it to and mixing it with the land surface without first obtaining a permit under §3.8 of this title (relating to Water Protection). The provisions of this section apply in the case of permits for such surface or near-surface disposal methods.

(b) Standards for permit issuance. The Commission shall issue a permit to dispose of oil and gas NORM waste under §3.8 of this title (relating to Water Protection) only if the Commission determines that the subject oil and gas NORM waste will be disposed of in a manner that protects public health, safety, and the environment. Any permit to dispose of oil and gas NORM waste issued pursuant to §3.8 shall contain construction and operating requirements that are reasonably necessary to protect public health, safety, and the environment. In addition, the Commission shall issue a permit for burial of oil and gas NORM waste only if, prior to burial, the oil and gas NORM waste has been treated or processed so that the radioactivity concentration does not exceed 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other NORM radionuclide. The Commission shall issue a permit to dispose of oil and gas NORM waste by applying it to and mixing it with the land surface only if, after such application and mixing, the radioactivity concentration in the area where the oil and gas NORM waste was applied and mixed will not exceed 30 pCi/g Radium-226 or Radium-228 or 150 pCi/g of any other NORM radionuclide.

(c) NORM information. In addition to the application requirements of §3.8 of this title (relating to Water Protection), an applicant for surface or near-surface disposal of oil and gas NORM waste shall include the information specified in this paragraph. The Commission may require the applicant to provide any such additional information as may be necessary to show that the proposed disposal will protect public health, safety, and the environment.

(1) The applicant shall describe the physical nature (such as pipe scale, contaminated soil, basic sediment) of the oil and gas NORM waste to be disposed of.

(2) The applicant shall state the total volume of oil and gas NORM waste to be disposed of or the proposed rate of oil and gas NORM waste disposal.

(3) If the oil and gas NORM waste has been treated or processed to reduce the radioactivity concentration under a specific license issued by the TDH, the applicant shall state the maximum measured radioactivity level (in pCi/g of Radium-226 and Radium-228 for soil or other media such as pipe scale, contaminated soil, basic sediment, etc.) If the oil and gas NORM waste will be treated or processed at the disposal site to reduce the radioactivity concentration, the applicant shall state the maximum measured radioactivity level (in pCi/g of Radium-226 and Radium-228, and any other NORM radionuclide, for soil or other media such as pipe scale, contaminated soil, basic sediment, etc.

(4) The applicant shall include the background radioactivity concentration (in pCi/g of Radium-226 and Radium-228) of the disposal area.

(5) The applicant shall describe all methods to be used to control dust from the oil and gas NORM waste during disposal.

(6) The applicant shall include written authorization from the surface owner, if different from the applicant, for disposal of oil and gas NORM waste on the surface owner's property.

(d) Notice requirements. The applicant shall give notice of an application for a permit to dispose of oil and gas NORM waste under this section as required in §3.8 of this title (relating to Water Protection) and such notice shall include the information required in subsection (c)(1)-(5) of this section.

§4.623. Alternatives.

The Commission may approve alternatives to the provisions of §§4.617 and 4.620 of this title (relating to Permit for Injection, and Permit for Surface Disposal) for good cause if the applicant demonstrates to the Commission's satisfaction that the alternatives will protect public health, safety, and the environment. An operator requesting to use an alternative method shall submit the request in writing. The Commission shall review the request within 30 days and shall approve or deny the request in writing.

§4.626. Recordkeeping.

(a) Retention period. A person shall retain current records relating to the radiation exposure levels of equipment and the disposal of oil and gas NORM waste for at least five years. Such records shall include the information specified in this section and in §4.605 of this

title (relating to Identification of Oil and Gas Equipment Contaminated with NORM).

(b) Equipment. The owner or operator of the lease, unit, or facility shall maintain records of the radiation exposure levels of equipment and the date the exposure levels were determined.

(c) Waste generation. The operator of the lease, unit, or facility at which oil and gas NORM waste was generated shall maintain records that include:

(1) the identity of the property where the oil and gas NORM waste was generated, including the Commission district; field; lease, unit, or facility; and producing formation, if known;

(2) the identity of the facility, site, or well where the oil and gas NORM waste was disposed of;

(3) the physical nature (such as pipe scale, contaminated soil, basic sediment, or equipment) of the oil and gas NORM waste;

(4) the volume of oil and gas NORM waste the person disposed of at that facility, site, or well; and

(5) the radioactivity level(s) of the oil and gas NORM waste (in pCi/g of Radium-226 and Radium-228 and any other NORM radionuclide for soil and other media such as pipe scale, contaminated soil, basic sediment, etc., or in μR/hr for equipment).

(d) Disposal. Each person who disposes of oil and gas NORM waste shall maintain records that include the identity of the operator of the lease, unit, or facility at which the oil and gas NORM was generated and the information required under subsection (b)or (c) of this subsection.

(e) Extension during investigation. Each operator shall retain any documents or records that contain information pertinent to the resolution of any pending Commission enforcement proceeding beyond any time period specified in this subchapter until the resolution of the proceeding.

(f) Examination and reporting. Any person who keeps records required by this subchapter shall make the records available for examination and copying by the Commission during reasonable working hours. Upon request of the Commission, the person who keeps the records shall file such records with the Commission.

§4.629. Inspection.

The Commission shall have access to properties subject to the requirements of this subchapter as provided in Texas Natural Resources Code, Title 3, Subtitle B, Chapter 88, §§88.091 and 88.092.

§4.632. Penalties and Certificate of Compliance.

A person who violates any requirement in this subchapter may be subject to the penalties and remedies specified in the Texas Natural Resources Code, Title 3, and subject to revocation of the certificate of compliance for any well as provided in §3.68 of this title (relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance).

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205224

Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-1295

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CHAPTER 9. LP-GAS SAFETY RULES

SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §9.32, §9.33

The Railroad Commission of Texas proposes amendments to §9.32 and §9.33, relating to LP-Gas Advisory Committee and LP-Gas Welding Advisory Committee. Specifically, the Commission proposes to amend subsection (b) in both rules to change the date on which each advisory committee is abolished in order to continue both committees in existence until August 31, 2006.

Byron Caffey, assistant director, Gas Services Division, LP-Gas Section, has determined that for each of the first five years the proposed amendments are in effect there will be no fiscal implications for state government as a result of enforcing or administering the sections because the amendments will continue two existing committees. There will be no fiscal implications for local government.

Mr. Caffey also has determined that the public benefit anticipated as a result of the amendments will be a continuation of the current process by which industry and consumer members of the committees voluntarily provide the Commission with expert advice regarding LP-gas and related activities. There is no anticipated economic cost to small businesses, micro-businesses, or to individuals except for those persons who are members of the advisory committees. The cost to the members arises from subsection (g) in both rules which states that the Commission will not reimburse advisory committee members for travel or other expenses related to service on the advisory committees. The amount of that cost cannot be determined because it will be different for each member.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket No. 1709. For further information, call Mr. Caffey at (512) 463-5762. The status of rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The amendments are proposed 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.

Texas Natural Resources Code, §113.051, is affected by the proposed amendments.

Issued in Austin, Texas on August 6, 2002.

§9.32. LP-Gas Advisory Committee.

(a) (No change.)

(b) Establishment; Duration. The LP-Gas Advisory Committee of the Railroad Commission of Texas is hereby established effective January 1, 1995. The committee is abolished on August 31, 2006 [~~2002~~], unless the Commission amends this subsection to establish a different date.

(c) - (m) (No change.)

§9.33. LP-Gas Welding Advisory Committee.

(a) (No change.)

(b) Establishment; Duration. The LP-Gas Welding Advisory Committee of the Railroad Commission of Texas is hereby established effective October 1, 1996. The committee is abolished on August 31, 2006 [~~2002~~], unless the Commission amends this subsection to establish a different date.

(c) - (m) (No change.)

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205095
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-1295

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CHAPTER 13. REGULATIONS FOR COMPRESSED NATURAL GAS (CNG) AND LIQUEFIED NATURAL GAS (LNG)

SUBCHAPTER A. SCOPE AND DEFINITIONS

16 TAC §13.10

The Railroad Commission of Texas proposes amendments to §13.10 relating to the CNG Advisory Committee. Specifically, the Commission proposes to amend subsection (b) to extend the date on which the advisory committee is abolished in order to continue the committee in existence until August 31, 2006, and subsection (d) to standardize the wording for the Commission's advisory committee member.

Byron Caffey, assistant director, LP-Gas Section, Gas Services Division, has determined that for each year of the first five years the proposed amendments are in effect there will be no fiscal implications for state government as a result of enforcing or administering the section because the amendments will continue an existing committee. There will be no fiscal implications for local government.

Mr. Caffey also has determined that the public benefit anticipated as a result of the amendments will be a continuation of the current process by which industry and consumer members of the committee voluntarily provide the Commission with expert advice regarding CNG and related activities. There is no anticipated economic cost to small businesses or to individuals except for those persons who are members of the advisory committee. The cost to the members arises from subsection (g) which states that the Commission will not reimburse advisory committee members for travel or other expenses related to service on the advisory committee. The amount of that cost cannot be determined because it will be different for each member.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket No. 1709. For additional information, call Mr. Caffey at (512) 463-5762. The status of rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The amendments are proposed under Texas Natural Resources Code, §116.012, which authorizes the commission to adopt rules and standards relating to liquefied natural gas activities to protect the health, welfare, and safety of the general public.

The Texas Natural Resources Code, §116.012, is affected by the proposed amendments.

Issued in Austin, Texas on August 6, 2002.

§13.10. CNG Advisory Committee.

(a) (No change.)

(b) Establishment; Duration. The CNG Advisory Committee of the Railroad Commission of Texas is hereby established effective February 1, 1999. The committee is abolished on August 31, 2006 [~~2002~~], unless the commission amends this subsection to establish a different date.

(c) (No change.)

(d) Composition of Committee; Membership Terms. The committee shall be composed of six members, five of whom are voting members. The five voting members shall include two CNG consumers, two members of the CNG industry, and one representative from local government. All members serve at the pleasure of the commission, for a period of two years. The Gas Services Division director's delegate [~~assistant director of the LP-Gas Section, Gas Services Division~~] shall serve as an ex officio, non-voting member of the committee.

(e) - (m) (No change.)

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205093
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-1295

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SUBCHAPTER G. GENERAL APPLICABILITY AND REQUIREMENTS

16 TAC §13.2001

The Railroad Commission of Texas proposes amendments to §13.2001 relating to the LNG Advisory Committee. Specifically, the Commission proposes to amend subsection (b) to extend the date on which the advisory committee is abolished in order to

continue the committee in existence until August 31, 2006, and subsection (d) to standardize the wording for the Commission's advisory committee member.

Byron Caffey, assistant director, LP-Gas Section, Gas Services Division, has determined that for each year of the first five years the proposed amendments are in effect there will be no fiscal implications for state government as a result of enforcing or administering the section because the amendments will continue an existing committee. There will be no fiscal implications for local government.

Mr. Caffey also has determined that the public benefit anticipated as a result of the amendments will be a continuation of the current process by which industry and consumer members of the committee voluntarily provide the Commission with expert advice regarding LNG and related activities. There is no anticipated economic cost to small businesses, micro-businesses, or to individuals except for those persons who are members of the advisory committee. The cost to the members arises from subsection (g) which states that the Commission will not reimburse advisory committee members for travel or other expenses related to service on the advisory committee. The amount of that cost cannot be determined because it will be different for each member.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket No. 1709. For additional information, call Mr. Caffey at (512) 463-5762. The status of rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The amendments are proposed under Texas Natural Resources Code, §116.012, which authorizes the commission to adopt rules and standards relating to liquefied natural gas activities to protect the health, welfare, and safety of the general public.

The Texas Natural Resources Code, §116.012, is affected by the proposed amendments.

Issued in Austin, Texas on August 6, 2002.

§13.2001. LNG Advisory Committee.

(a) (No change.)

(b) Establishment; Duration. The LNG Advisory Committee of the Railroad Commission of Texas is hereby established effective January 1, 1995. The committee is abolished on August 31, 2006 [~~2002~~], unless the commission amends this subsection to establish a different date.

(c) (No change.)

(d) Composition of Committee; Membership Terms. The committee shall be composed of eight members, seven of whom are voting members. The seven voting members shall include three LNG consumers, three members of the LNG industry, and one representative from local government; one industry representative shall be a registered professional engineer licensed to practice in the State of Texas. All members serve at the pleasure of the commission, for a period of two years. The Gas Services Division director's delegate [~~director of the Liquefied Petroleum Gas Division~~] shall serve as an ex officio, non-voting member of the committee.

(e) - (m) (No change.)

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205094
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §26.5, relating to Definitions; §26.31, relating to Disclosures to Applicants and Customers, §26.217, relating to Administration of Extended Area Service (EAS) Requests; §26.219, relating to Administration of Expanded Local Calling Service (ELCS) Requests; §26.221, relating to Application to Establish or Increase Expanded Local Calling Service (ELCS) Surcharges; §26.224, relating to Requirements Applicable to Basic Network Services for Chapter 58 Electing Companies; §26.401, relating to Texas Universal Service Fund (TUSF); §26.403, relating to Texas High Cost Universal Service Plan (THCUSP); and §26.420, relating to Administration of Texas Universal Service Fund (TUSF). The proposed amendments will eliminate references to the Tel-Assistance program which was repealed in September 2001 pursuant to House Bill 2156 (H.B. 2156), 77th Legislature (2001 Texas General Laws 5160), Relating to Eligibility Process for Certain Utility Customer Discounts, Public Utilities Regulatory Act (PURA) §55.015. In repealing the Tel-Assistance program (formerly, Public Utility Regulatory Act, Texas Utilities Code Annotated §§56.071 - .079), the Legislature stated in H.B. 2156, §4 and §5, respectively, that on September 1, 2001, "all funds, employees, and resources of the Public Utility Commission of Texas and the Texas Department of Human Services dedicated to the tel-assistance service program become funds, employees, and resources dedicated to the lifeline service program under §55.015, Utilities Code" and that "all persons receiving benefits under the tel-assistance service program shall be automatically enrolled in the lifeline service program." Project Number 26135 is assigned to this proceeding.

Janis Ervin, Senior Telecommunications Analyst, Telecommunications Division, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Ervin has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be language that is current and consistent with the legislative mandate found in H.B.

2156. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with these sections as proposed.

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

Comments on the proposed amendments (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Comments should be organized in a manner consistent with the organization of the proposed amendments. The commission requests that comments be limited to no more than 15 pages. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. All comments should refer to Project Number 26135.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §26.5

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically House Bill 2156, 77th Legislature (2001 Texas General Laws 5160), which requires that all persons receiving benefits under the Tel-Assistance service program shall be automatically enrolled in the Lifeline service program.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015.

§26.5. Definitions.

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

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

(11) Basic local telecommunications service - flat rate residential and business local exchange telephone service, including primary directory listings; tone dialing service; access to operator services; access to directory assistance services; access to 911 service where provided by a local authority or dual party relay service; the ability to report service problems seven days a week; lifeline [~~and tel-assistance~~] services; and any other service the commission, after a hearing, determines should be included in basic local telecommunications service.

(12) - (214) (No change.)

[~~(215) Tel-assistance service - A program providing eligible consumers with a 65% reduction in the applicable tariff rate for qualifying services.~~]

(215) [~~(216)~~] Telecommunications relay service (TRS) - A service using oral and print translations by either live or automated means between individuals who are hearing-impaired or speech-impaired who use specialized telecommunications devices and others who do not have such devices. Unless specified in the text, this term shall refer to intrastate telecommunications relay service only.

(216) [~~(217)~~] Telecommunications relay service (TRS) carrier - The telecommunications carrier selected by the commission to provide statewide telecommunications relay service.

(217) [~~(218)~~] Telecommunications utility -

(A) a public utility;

(B) an interexchange telecommunications carrier, including a reseller of interexchange telecommunications services;

(C) a specialized communications common carrier;

(D) a reseller of communications;

(E) a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system;

(F) a provider of operator services as defined by §55.081, unless the provider is a subscriber to customer-owned pay telephone service; and

(G) a separated affiliate or an electronic publishing joint venture as defined in the Public Utility Regulatory Act, Chapter 63.

(218) [~~(219)~~] Telephones intended to be utilized by the public - Telephones that are accessible to the public, including, but not limited to, pay telephones, telephones in guest rooms and common areas of hotels, motels, or other lodging locations, and telephones in hospital patient rooms.

(219) [~~(220)~~] Telephone solicitation - An unsolicited telephone call.

(220) [~~(221)~~] Telephone solicitor - A person who makes or causes to be made a consumer telephone call, including a call made by an automatic dialing/announcing device.

(221) [~~(222)~~] Test year - The most recent 12 months, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a public utility are available.

(222) [~~(223)~~] Texas Universal Service Fund (TUSF) - The fund authorized by the Public Utility Regulatory Act, §56.021 and 1997 Texas General Laws Chapter 149.

(223) [~~(224)~~] Tier 1 local exchange company - A local exchange company with annual regulated operating revenues exceeding $100 million.

(224) [~~(225)~~] Title IV-D Agency - The office of the attorney general for the state of Texas.

(225) [~~(226)~~] Toll blocking - A service provided by telecommunications carriers that lets consumers elect not to allow the completion of outgoing toll calls from their telecommunications channel.

(226) [~~(227)~~] Toll control - A service provided by telecommunications carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.

(227) [~~(228)~~] Toll limitation - Denotes both toll blocking and toll control.

(228) [~~(229)~~] Total element long-run incremental cost (TELRIC) - The forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the certificated telecommunications utility's (CTU's) provision of other elements.

(229) [~~(230)~~] Transport - The transmission and/or any necessary tandem and/or switching of local telecommunications traffic from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than a dominant certificated telecommunications utility.

(230) [~~(231)~~] Trunk - A circuit facility connecting two switching systems.

(231) [~~(232)~~] Two-primary interexchange carrier (Two-PIC) equal access - A method that allows a telephone subscriber to select one carrier for all 1+ and 0+ interLATA calls and the same or a different carrier for all 1+ and 0+ intraLATA calls.

(232) [~~(233)~~] Unauthorized charge - Any charge on a customer's telephone bill that was not consented to or verified in compliance with §26.32 of this title (relating to Protection Against Unauthorized Billing Charges ("Cramming")).

(233) [~~(234)~~] Unbundling - The disaggregation of the ILEC's network/service to make available the individual network functions or features or rate elements used in providing an existing service.

(234) [~~(235)~~] Unit cost - A cost per unit of output calculated by dividing the total long run incremental cost of production by the total number of units.

(235) [~~(236)~~] Usage sensitive blocking - Blocking of a customer's access to services which are charged on a usage sensitive basis for completed calls. Such calls shall include, but not be limited to, call return, call trace, and auto redial.

(236) [~~(237)~~] Virtual private line - Circuits or bandwidths, between fixed locations, that are available on demand and that can be dynamically allocated.

(237) [~~(238)~~] Voice carryover - A technology that allows an individual who is hearing-impaired to speak directly to the other party in a telephone conversation and to use specialized telecommunications devices to receive communications through the telecommunications relay service operator.

(238) [~~(239)~~] Volume insensitive costs - The costs of providing a basic network function (BNF) that do not vary with the volume of output of the services that use the BNF.

(239) [~~(240)~~] Volume sensitive costs - The costs of providing a basic network function (BNF) that vary with the volume of output of the services that use the BNF.

(240) [~~(241)~~] Wholesale service - A telecommunications service is considered a wholesale service when it is provided to a telecommunications utility and the use of the service is to provide a retail service to residence or business end-user customers.

(241) [~~(242)~~] Working capital requirements - The additional capital required to fund the increased level of accounts receivable necessary to provide telecommunications service.

(242) [~~(243)~~] "0-" call - A call made by the caller dialing the digit "0" and no other digits within five seconds. A "0-" call may be made after a digit (or digits) to access the local network is (are) dialed.

(243) [~~(244)~~] "0+" call - A call made by the caller dialing the digit "0" followed by the terminating telephone number. On some automated call equipment, a digit or digits may be dialed between the "0" and the terminating telephone number.

(244) [~~(245)~~] 311 answering point - A communications facility that:

(A) is operated, at a minimum, during normal business hours;

(B) is assigned the responsibility to receive 311 calls and, as appropriate, to dispatch the non-emergency police or other governmental services, or to transfer or relay 311 calls to the governmental entity;

(C) is the first point of reception by a governmental entity of a 311 call; and

(D) serves the jurisdictions in which it is located or other participating jurisdictions.

(245) [~~(246)~~] 311 service - A telecommunications service provided by a certificated telecommunications provider through which the end user of a public telephone system has the ability to reach non-emergency police and other governmental services by dialing the digits 3-1-1. 311 service must contain the selective routing feature or other equivalent state-of-the-art feature.

(246) [~~(247)~~] 311 service request - A written request from a governmental entity to a certificated telecommunications utility requesting the provision of 311 service. A 311 service request must:

(A) be in writing;

(B) contain an outline of the program the governmental entity will pursue to adequately educate the public on the 311 service;

(C) contain an outline from the governmental entity for implementation of 311 service;

(D) contain a description of the likely source of funding for the 311 service (i.e., from general revenues, special appropriations, etc.); and

(E) contain a listing of the specific departments or agencies of the governmental entity that will actually provide the non-emergency police and other governmental services.

(247) [~~(248)~~] 311 system - A system of processing 311 calls.

(248) [~~(249)~~] 911 system - A system of processing emergency 911 calls, as defined in Texas Health & Safety Code §772.001, as may be subsequently amended.

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

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205182
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 936-7308

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SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §26.31

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably

required in the exercise of its powers and jurisdiction; and specifically House Bill 2156, 77th Legislature (2001 Texas General Laws 5160), which requires that all persons receiving benefits under the Tel-Assistance service program shall be automatically enrolled in the Lifeline service program.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015.

§26.31. Disclosures to Applicants and Customers.

(a) Certificated telecommunications utilities (CTU). These disclosure requirements shall apply only to residential customers and business customers with five or fewer customer access lines.

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

(4) Customer rights. A CTU shall provide information regarding customer rights to customers in writing and free of charge at the initiation of service.

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

(C) The following information shall be included:

(i) - (xviii) (No change.)

(xix) if a CTU is offering Lifeline [~~or Tel-Assistance~~], how information about customers who qualify for Lifeline [~~or Tel-Assistance~~] may be shared between state agencies and their local phone service provider.

(5) - (6) (No change.)

(b) Dominant certificated telecommunications utility (DCTU). In addition to the requirements of subsection (a) of this section, the following requirements shall apply to residential customers and business customers with five or fewer customer access lines.

(1) Prior to acceptance of service. Before signing applicants or accepting any money for new residential service or transferring existing residential service to a new location, each DCTU shall provide to applicants information:

(A) (No change.)

(B) that clearly informs applicants about the availability of Lifeline service [~~and Tel-Assistance~~].

(2) (No Change.)

(c) (No change.)

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

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205183
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 936-7308

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SUBCHAPTER J. COSTS, RATES AND TARIFFS

16 TAC §§26.217, 26.219, 26.221, 26.224

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically House Bill 2156, 77th Legislature (2001 Texas General Laws 5160), which requires that all persons receiving benefits under the Tel-Assistance service program shall be automatically enrolled in the Lifeline service program.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015.

§26.217. Administration of Extended Area Service (EAS) Requests.

(a) (No change.)

(b) Extended Area Service. The term "utility(ies)" in this section refers to dominant certificated telecommunications utility(ies).

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

(5) EAS rate additives.

(A) Coincident with the filing of cost study results, or coincident with the toll revenue effect results, if filed, the utility(ies) shall file recommendations for proposed incremental rate additives, by class of service, necessary to support the cost of the added service, as well as to support the toll revenue effect, if such effect is filed.

(i) - (ii) (No change.)

~~*[(iii)* Tel-Assistance subscribers in the metropolitan exchange will not be assessed this rate additive.]~~

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

(D) The EAS rate additive to be used in the affected exchange(s) must meet the following standards.

(i) No increase in rates shall be incurred by the subscribers of non-benefiting [~~nonbenefitting~~] exchanges, that is, by subscribers whose calling scopes are not affected by the requested EAS service.

(ii) - (iv) (No change.)

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

§26.219. Administration of Expanded Local Calling Service Requests.

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

(g) Calculation of ELCS Fees. ELCS fees shall be calculated using the formula described in this subsection unless the presiding officer, for good cause, modifies the formula. Key formula terms are defined in §26.221(b) of this title.

(1) (No change.)

(2) ELCS fee formula. First, sum lost revenues and costs incurred to determine the ILEC's annual ELCS requirement. Divide the annual ELCS requirement by 12 to obtain the monthly requirement, which is the numerator. Second, obtain the most current count of access lines in the petitioning exchange. Multiply the number of business lines by two [~~and multiply the number of Tel-Assistance lines by 35%~~]. Add the doubled business lines [~~and the 35% of Tel-Assistance lines~~] to the number of residential lines. This total is the denominator. Third, divide the numerator by the denominator to obtain the monthly ELCS fee per residential line. Multiply the monthly ELCS fee per residential line by two to obtain the monthly ELCS fee per business line. [~~Multiply the monthly fee per residential line by 35% to obtain the monthly ELCS fee per Tel-Assistance line.~~] Round ELCS fees up or down to the nearest penny.

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

(h) - (i) (No change.)

§26.221. Applications to Establish or Increase Expanded Local Calling Service Surcharges.

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

(c) General Principles. The commission shall consider these general principles when establishing or increasing ELCS surcharges.

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

(8) ELCS surcharges shall be designed so that business subscribers are billed twice the monthly per line charge billed to residential subscribers [~~and Tel-Assistance subscribers are billed 35% of the monthly per line charge billed to residential subscribers~~].

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

(g) Calculation of initial ELCS surcharges. An initial ELCS surcharge shall be calculated using the formula described in this subsection unless the presiding officer, for good cause, modifies the formula.

(1) (No change.)

(2) Denominator. First, obtain the most current count of residential,and business [~~and Tel-Assistance~~] lines served by the ILEC in Texas. Second, multiply the number of business lines by two [~~and multiply the number of Tel-Assistance lines by 35%~~]. Third, add the doubled business lines [~~and the 35% of Tel-Assistance lines~~] to the number of residential lines. This total is the denominator.

(3) ELCS surcharge formula. Divide the numerator in paragraph (1) of this subsection by the denominator in paragraph (2) of this subsection to obtain the monthly ELCS surcharge per residential line. Multiply the monthly ELCS surcharge per residential line by two to obtain the monthly ELCS surcharge per business line. [~~Multiply the monthly ELCS surcharge per residential line by 35% to obtain the monthly ELCS surcharge per Tel-Assistance line.~~] Round ELCS surcharges up or down to the nearest penny.

(h) - (i) (No change.)

§26.224. Requirements Applicable to Basic Network Services for Chapter 58 Electing Companies.

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

(c) Basic network services.

(1) Services included in basic network services. Unless reclassified pursuant to PURA §58.024, the following are classified as basic network services pursuant to PURA §58.051(a):

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

(C) Lifeline [~~and tel-assistance~~] service;

(D) - (K) (No change.)

(2) - (5) (No change.)

(d) - (l) (No change.)

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

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205184

Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 936-7308

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SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §§26.401, 26.403, 26.420

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically House Bill 2156, 77th Legislature (2001 Texas General Laws 5160), which requires that all persons receiving benefits under the Tel-Assistance service program shall be automatically enrolled in the Lifeline service program.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015.

§26.401. Texas Universal Service Fund (TUSF).

(a) (No change.)

(b) Programs included in the TUSF.

(1) - (9) (No change.)

(10) Section 26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds); [~~and~~]

(11) Section 26.420 of this title (relating to Administration of Texas Universal Service Fund (TUSF));[~~.~~]

(12) Section 26.421 of this title (relating to Designation of Eligible Telecommunications Providers to Provide Service to Uncertificated Areas);

(13) Section 26.422 of this title (relating to Subsequent Petitions for Service to Uncertificated Areas); and

(14) Section 26.423 of this title (relating to High Cost Universal Service Plan for Uncertificated Areas where an Eligible Telecommunications Provider (ETP) Volunteers to Provide Basic Local Telecommunications Service).

§26.403. Texas High Cost Universal Service Plan (THCUSP).

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

(d) Service to be supported by the THCUSP. The THCUSP shall support basic local telecommunications services provided by an ETP in high cost rural areas of the state and is limited to those services carried on all flat rate residential lines and the first five flat rate single-line business lines at a business customer's location. Local measured residential service, if chosen by the customer and offered by the ETP, shall also be supported.

(1) Initial determination of the definition of basic local telecommunications service. Basic local telecommunications service shall consist of the following:

(A) - (I) (No change.)

(J) lifeline service[~~and tel-assistance services~~].

(2) (No change.)

(e) - (g) (No change.)

§26.420. Administration of Texas Universal Service Fund (TUSF).

(a) (No change.)

(b) Programs included in the TUSF.

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

~~[(7) Section 26.413 of this title (relating to Tel-Assistance Service);]~~

(7) [~~(8)~~] Section 26.414 of this title (relating to Telecommunications Relay Service (TRS));

(8) [~~(9)~~] Section 26.415 of this title (relating to Specialized Telecommunications Assistance Program (STAP));

(9) [~~(10)~~] Section 26.417 of this title (relating to Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF));

(10) [~~(11)~~] Section 26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds); [~~and~~]

(11) [~~(12)~~] Section 26.420 of this title (relating to Administration of Texas Universal Service Fund (TUSF));[~~.~~]

(12) Section 26.421 of this title (relating to Designation of Eligible Telecommunications Providers to Provide Service to Uncertificated Areas);

(13) Section 26.422 of this title (relating to Subsequent petitions for Service to Uncertificated Areas); and

(14) Section 26.423 of this title (relating to High Cost Universal Service Plan for Uncertificated Areas Where an Eligible Telecommunications Provider Volunteers to Provide Basic Local Telecommunications Service).

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

(e) Determination of the amount needed to fund the TUSF.

(1) Amount needed to fund the TUSF. The amount needed to fund the TUSF shall be composed of the following elements.

(A) Costs of TUSF programs. The TUSF administrator shall compute and include the costs of the following TUSF programs:

(i) - (vi) (No change.)

~~*[(vii)* Tel-Assistance Service, §26.413 of this title;]~~

(vii) [~~(viii)~~] Telecommunications Relay Service, §26.414 of this title; and

(viii) [~~(ix)~~] Specialized Telecommunications Assistance Program (STAP), §26.415 of this title.

(B) Costs of implementation and administration of the TUSF. The TUSF implementation and administration costs shall include appropriate costs associated with the implementation and administration of the TUSF incurred by the commission (including the costs incurred by the TUSF administrator on behalf of the commission), [~~any costs incurred by the Texas Department of Human Services caused by its administration of the Tel-Assistance program,~~] and any costs incurred by the Texas Commission for the Deaf and Hard of Hearing caused by its administration of the Specialized Telecommunications Assistance Program (STAP) and the Telecommunications Relay Service programs.

(C) (No change.)

(2) (No change.)

(f) Assessments for the TUSF.

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

(5) Recovery of assessments. A telecommunications provider may recover the amount of its TUSF assessment only from its retail customers who are subject to tax under Chapter 151 of the Tax Code, except for Lifeline, and Link Up [~~, and Tel- Assistance~~] services. For purposes of the recovery of the TUSF assessment, pay telephone providers are considered retail customers subject to Chapter 151 of the Tax Code. The commission may order modifications in a telecommunications provider's method of recovery.

(A) Retail customers' bills. In the event a telecommunications provider chooses to recover its TUSF assessment through a surcharge added to its retail customers' bills;

(i) (No change.)

(ii) the surcharge must be assessed as a percentage of every retail customers' bill, except Lifeline and[~~,~~] Link Up [~~, and Tel-Assistance~~] services.

(B) - (D) (No change.)

(6) (No change.)

(g) Disbursements from the TUSF to ETPs, ILECs, other entities and agencies.

(1) ETPs, ILECs, other entities, and agencies.

(A) ETPs. The commission shall determine whether an ETP qualifies to receive funds from the TUSF. An ETP qualifying for the following programs is eligible to receive funds from the TUSF:

(i) (No change.)

(ii) Small and Rural ILEC Universal Service Plan; and/or

(iii) Lifeline Service and Link Up Service.[~~; and/or~~]

~~*[(iv)* Tel-Assistance Service.]~~

(B) - (D) (No change.)

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

(h) - (j) (No change.)

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

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205185
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 936-7308

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TITLE 22. EXAMINING BOARDS

PART 37. TEXAS BOARD OF ORTHOTICS AND PROSTHETICS

CHAPTER 821. ORTHOTICS AND PROSTHETICS

The Texas Board of Orthotics and Prosthetics (board) proposes amendments to §§821.1 - 821.7, 821.9, 821.15, 821.17, 821.19, 821.21, 821.23, 821.25, 821.27, 821.29, 821.31, 821.33, 821.35, 821.37, 821.39, 821.41, 821.43, 821.45, 821.47, 821.49, 821.51, 821.53, 821.55, and 821.57, the repeal of §821.11 and §821.13, and new §821.28 concerning the licensure and regulation or orthotists, prosthetists, assistants, technicians, students and orthotic and prosthetic facilities.

The amendments cover introduction, definitions, the board's operation, public information, fees, general application procedures, general licensing procedures, examinations for licensure, acquiring licensure as a uniquely qualified person, licensing by examination, licensed prosthetist assistant, licensed orthotist assistant, or licensed prosthetist/orthotist assistance, technician registration, temporary license, provisional license, student registration, accreditation of prosthetic and orthotic facilities, standards. guidelines and procedures for a professional clinical residency, license renewal, continuing education, change of name and address, complaints, professional standards and disciplinary provisions, licensing persons with criminal backgrounds, default orders, surrender of license, suspension of license for failure to pay child support, civil penalty, program accessibility, consumer notification, and petition for the adoption of a rule. The repeals cover licensing by exemption from the license requirements and licensing by examination under special conditions requiring application by the 181st day after rules are adopted. The new section covers upgrading a student registration, temporary license or provisional license.

The board held workshops on November 2, 2001, February 15, 2002, and July 12, 2002, to review its rules for the purpose of compliance with the Government Code, §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rules continues to exist. As a result of the workshops, the board is amending its existing rules located at 22 Texas Administrative Code (TAC), Chapter 821 to satisfy the requirements of the Government Code, to eliminate language and sections no longer needed, to update existing rules to reflect changes in the statute, to add new fees and increase fees as needed, to amend the rules according to changes pursuant to the codification of the Orthotics and Prosthetics Act, Texas Occupations Code, Chapter 605 (House Bill 3155, 76th Texas Legislature, Regular Session, 1999), to delete duplicative language, to clarify, reorganize and simplify the rules, to update and strengthen the code of ethics, and to correct errors and omissions. The board finds that the reasons for adopting the rules continue to exist and proposes to readopt these rules with changes, except §§821.11 and 821.13, which are proposed for repeal.

The board submitted a Notice of Intent to Review in regards to Government Code, §2001.039, agency review of rules. The notice was published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6985). No comments were received due to the publication of this notice.

Specific amendments to §§821.1, Introduction, 821.2, Definitions, 821.6, General Application Procedures, 821.15, Acquiring Licensure as a Uniquely Qualified Person, 821.21, Technician Registration, 821.23, Temporary License, 821.25, Provisional License, 821.27, Student Registration, 821.29, Accreditation of Prosthetic and Orthotic Facilities, 821.39, Complaints, 821.41, Professional Standards and Disciplinary Provisions and 821.51, Civil Penalty, are proposed pursuant to House Bill 3155, 76th Texas Legislature, 1999, which codified the Orthotics and Prosthetics Act (Act) into the Texas Occupations Code, Chapter 605.

The amendments to §821.5(b)(18), Fees, and §821.49, Suspension of License Under the Family Code, are proposed pursuant to Senate Bill 700, 77th Texas Legislature, 2001, which amended the Family Code to improve the enforcement of child custody orders through action against professional licensees who are subjects of such orders.

An amendment in §821.1 adds the topic of the proposed new §821.28 concerning upgrading a student registration, temporary license or provisional license to this section, which harmonizes the rules.

An amendment to §821.2(17) regarding the definition of "licensed orthotist" adds the singular term "orthosis" to the list of terms authorized for use by the licensee. An amendment to §821.2(19) adds a definition for the term "licensed physician" which is used in the existing language in §821.6. An amendment in §821.2(20) regarding the definition of "licensed prosthetist" adds the singular term "prosthesis" to the list of terms authorized for use by the licensee. Amendments to §821.2(22) concerning "licensed prosthetist/orthotist" add several items to the list of terms that a licensee may use. An amendment in §821.2(24) clarifies the term "licensee" which is used throughout the existing rules.

Amendments to keep numbering sequences or lettering sequences correct after adding or deleting language can be found at §821.2(20)-(41).

The amendment to §821.3(f) is proposed pursuant to Senate Bill 12, 77th Texas Legislature, 2001, which prohibits licensing authorities and others from discriminating on the basis of certain genetic information or based on the refusal of the license applicant or license holder to submit the results of a genetic test, or refusal to submit to a genetic test or a family health history, or refusal to reveal whether the applicant or holder has submitted to a genetic test.

Amendments in §821.3(i) harmonize the rules with the statutory provisions in the Texas Occupations Code, Chapter 605 and eliminate unnecessary language.

An amendment to §821.3(m) changes the date of officer elections from the meeting held nearest August 31, to the first meeting after August 31 of odd-numbered years. The change simplifies the determination of the meeting date when elections will be held.

The amendment to §821.4(b)(4) allows the fee for certifying copies of public records to change over time without amending the rule.

The amendment to §821.5(b)(13) increases the cost of a facility accreditation in a single category. The proposed fee increase is needed to cover the cost of the service provided.

The amendment to §821.5(b)(16) combines the fee for the exams under one item. No fee increase is proposed. This change is related to the amendment in §821.5(b)(18). In its place, a new fee is added for license reinstatements following suspension of a license under the Family Code, as described in §821.49. The new fee is needed to cover the cost of the service.

The amendment to §821.5(b)(17) adds a new fee for upgrading or converting a temporary license, provisional license or student

registration after passing the examination. The proposed fee covers the cost of the service provided and eliminates the need for the applicant to reapply for a full license.

The amendment to §821.5(b)(18) eliminates the fee for the prosthetic/orthotic exam because there is no combination exam or combination exam fee. Fees are paid for each examination. This change is related to the amendment in §821.5(b)(16).

The amendment in §821.5(b)(19) deletes the word "and" after the returned check fee to allow additional fees to be listed. The change keeps the rule in *Texas Register* format.

The amendment to §821.5(b)(20) increases the fee for a written license verification to cover the cost of providing the service and to bring the cost in line with fees charged by other licensing boards.

The amendment to §821.5(b)(21) establishes a new fee for adding a new category to or dropping a category from an existing facility accreditation. The new fee covers the cost of providing the service covered under a new administrative procedure in §821.39.

The amendments in §821.5(b)(22) - (24) adds new fees for changing the name or location of an accredited facility, changing the ownership of an accredited facility and changing the designation of an on-site practitioner of an existing facility accreditation. The new fees cover the cost of providing the service covered under a new administrative procedure in §821.39.

In §821.6(c)(7), an amendment updates a reference to §821.2 because of amendments to the numbering of that section. The amendment will harmonize the rules.

The amendment to §821.6(e) adds a new subsection, which allows the board to delegate approval of initial license applications to a committee of the board or the executive director, subject to ratification by the board. The amendment is necessary to reduce the waiting time for obtaining a license. The board meets approximately three times per year, yet applications are submitted throughout the year.

Amendments to keep numbering sequences or lettering sequences correct after adding or deleting language in previous subsections can be found at §821.6(f)-(j).

In §821.6(g) and (h), catch titles are added which correct omissions.

In §821.6(g), the word "proposed" is inserted before the word "disapproval." The amendment corrects an omission.

In §821.6(g), the ten-day deadline for requesting a formal hearing is amended to 14 days. This change will harmonize this section with §821.39(f) concerning formal disciplinary actions.

In §821.6(g), amendments replace the word "department" with "board" and replace the word "disapprove" with "finally deny." The amendments correct errors in the existing rule.

The amendment to §821.7(b)(5) adds a reference to §821.27(f) concerning the statutory provisions expiring January 1, 2005. The addition corrects an omission and harmonizes the rules.

An amendment to §821.7(d) adds the words "or verifying" so that the rule applies to both verifying and copying the license. The amendment adds further clarification and regulation that is needed relating to verifying licenses.

Amendments to §821.7(d)(2) add wording that requires the licensee to sign and date any copy of a license, about verifying a license by accessing the board's web page, and adds a reference to the license verification fee in §821.5 relating to fees. The additional language is added to minimize license alterations and forgeries and to give direction to licensees and others seeking to verify a license.

In §821.9(b), the amendment eliminates the reference to §821.11 which is proposed for repeal.

An amendment to §821.9(d)(1) adds wording to clarify that the approval to take the examination is limited to three years and that applicants approved for a provisional license under §821.25 may not take an examination after January 1, 2005. The three-year limit appeared in subsection (d)(3) and is being moved to (d)(1). A reference to the examination registration form is moved to the next paragraph. The changes are intended to improve grammar and style.

In §821.9(d)(2), wording relating to the examination registration form is relocated here from the preceding paragraph and wording is added to provide information relating to when the examination applications will be sent to approved applicants and when the applicants should pay the exam fees. These changes clarifying the examination application procedures are intended to benefit applicants.

In §821.9(d)(3), the paragraph will be eliminated after its content is moved to paragraph (d)(1) in this section. The amendments are intended to improve grammar and style.

An amendment to §821.9(i)(1) clarifies that an applicant may re-take an examination twice. The number of retakes is clarified for the benefit of examination applicants.

Amendments to §821.9(j)(3) add references to the alternative clinical experience opportunity that expires January 1, 2005. The reference to another section of the rules is changed from §821.31 to §821.17. The amendments clarify the rule and correct the reference to another section of the rules.

In §821.17(b)(2), an amendment adds a reference to the alternative clinical experience that expires January 1, 2005. The amendment corrects and clarifies the rule.

An amendment in §821.17(f)(1) moves the placement of the reference to §821.31 relating to a professional clinical residency. The amendment corrects the wording and keeps the rules in *Texas Register* format.

Other amendments to §821.17(f)(1) add a reference to §821.17(c)(2) relating to applying for licensure with an associate degree, and delete the words "with an associates degree." Wording is also added at the end of this paragraph specifying that the 4,500 hours of clinical experience must be completed by January 1, 2005. The changes are intended to help readers comply with the time-limited opportunity to qualify with an associate degree, and harmonize the rules.

In §821.17(f)(2), an amendment replaces the words "orthotic residency is" with "requirements are" so the rule will apply to both a 1900-hour clinical residency and a 4,500-hour clinical experience. The amendment corrects an omission in the existing rule.

Other amendments in §821.17(f)(2) add the words "in Texas", delete the words "on or after January 1, 1999", and change the words "have been" to "be." These changes clarify that clinical experiences completed in Texas must be supervised by a licensee. The effective date of the requirement is being eliminated because it is no longer needed in the rule.

An amendment in §821.17(g)(1) moves the reference to §821.31 relating to a professional clinical residency to its proper location in the paragraph. The amendment improves grammar and style.

Other amendments to §821.17(g)(1) add a reference to paragraph (d)(2) relating to applying for licensure with an associate degree, and delete the words "with an associates degree." Wording is also added at the end of this paragraph specifying that the 4,500 hours of clinical experience must be completed by January 1, 2005. The changes are intended to help readers comply with the time-limited opportunity to apply with an associate degree, and harmonize the rules.

In §821.17(g)(2), an amendment replaces the words "prosthetic residency is" with "requirements are" so the rule will apply to both a 1900-hour clinical residency and a 4,500-hour clinical experience. The amendment corrects an omission in the existing rule.

Other amendments in §821.17(g)(2) add the words "in Texas", delete the words "on or after January 1, 1999", and change the words "have been" to "be." These changes clarify that clinical experiences completed in Texas must be supervised by a licensee. The effective date of the requirement is being eliminated because it is no longer needed in the rule.

An amendment in §821.17(h)(1) moves the reference to §821.31 relating to a professional clinical residency to its proper location in the paragraph. The amendment improves grammar and style.

Other amendments to §821.17(h)(1) add a reference to paragraph (e)(2) relating to applying for licensure with an associate degree and delete the words "with an associates degree." Wording is also added at the end of this paragraph specifying that the 4,500 hours of clinical experience must be completed by January 1, 2005. The changes are intended to help readers comply with the time-limited opportunity to qualify with an associate degree, and harmonize the rules.

In §821.17(h)(2), an amendment replaces the words "prosthetic/orthotic residency is" with "requirements are" so the rule will apply to both a 1900-hour clinical residency in each category and a 4,500-hour clinical experience in each category. The amendment corrects an omission in the existing rule.

Other amendments in §821.17(h)(2) delete the words "on or after January 1, 1999", and change the words "have been" to "be." The effective date of the requirement is being eliminated because it is no longer needed in the rule.

An amendment in §821.17(i)(1) moves the reference to §821.31 relating to a professional clinical residency to its proper location in the paragraph. The amendment improves grammar and style.

Other amendments to §821.17(i)(1) add a reference to §821.17 (d)(2) relating to applying for licensure with an associate degree, and delete the words "with an associates degree." Wording is also added at the end of this paragraph specifying that the 4,500 hours of clinical experience must be completed by January 1, 2005. The changes are intended to help readers comply with the time-limited opportunity to qualify with an associate degree, and harmonize the rules.

In §821.17(i)(2), an amendment replaces the words "prosthetic residency is" with "requirements are" so the rule will apply to both a 1900-hour clinical residency and a 4,500-hour clinical experience. The amendment corrects an omission in the existing rule.

Other amendments in §821.17(i)(2) delete the words "on or after January 1, 1999", and change the words "have been" to "be." These changes clarify that clinical experiences completed in Texas must be supervised by a licensee. The effective date of the requirement is being eliminated because it is no longer needed in the rule.

An amendment in §821.17(j)(1) moves the reference to §821.31 relating to a professional clinical residency to its proper location in the paragraph. The amendment improves grammar and style.

Other amendments to §821.17(j)(1) add a reference to §821.17(c)(2) relating to applying for licensure with an associate degree and delete the words "with an associates degree." Wording is also added at the end of this paragraph specifying that the 4,500 hours of clinical experience must be completed by January 1, 2005. The changes are intended to help readers comply with the time-limited opportunity to qualify with an associate degree, and harmonize the rules.

In §821.17(j)(2), an amendment replaces the words "orthotic residency is" with "requirements are" so the rule will apply to both a 1900-hour clinical residency and a 4,500-hour clinical experience. The amendment corrects an omission in the existing rule.

Other amendments in §821.17(j)(2) delete the words "on or after January 1, 1999", and change the words "have been" to "be." These changes clarify that clinical experiences completed in Texas must be supervised by a licensee. The effective date of the requirement is being eliminated because it is no longer needed in the rule.

An amendment in §821.19(a) adds a reference to the section of the Orthotics and Prosthetics Act relating to assistants. The amendment corrects an omission.

Amendments in §821.19(b)(1) and (2) add statements requiring an assistant to perform critical care events, as defined in §821.2, while under the direct supervision of a practitioner licensed in the appropriate category. The amendment corrects an omission and is necessary to protect the public.

Also in §821.19(b)(1) and (2), the word "may" is replaced by the word "shall" to emphasize that supervision is required for licensed assistants. Because licensed assistants may perform many high-level duties involving patient care, the requirement that practitioners supervise assistants is critical in protecting the public.

In §821.19(b)(4), a new paragraph is added requiring licensed assistants to work in a facility accredited by the board, or in a facility that is exempt from accreditation according to §605.260(e) of the Orthotics and Prosthetics Act. The amendment is intended to protect the public. Licensed practitioners are required to practice in accredited or exempt facilities; thus, assistants should also be required to comply.

An amendment in §821.19(c) eliminates the statement concerning the 181st day after the board's rules are finally adopted and published. With the elimination of subsection (d) in this section, the statement is no longer necessary.

An amendment in §821.19(c)(2) adds wording clarifying that the 1,000 hours of clinical residency for an assistant may be in orthotics or prosthetics. Because an assistant may perform many clinical and technical activities associated with the provision of prosthetic and orthotic services, it is important that the assistant be adequately prepared. By specifying that the 1,000 hours of residency is required in each discipline, future licensees will have to complete more training and preparation.

An amendment in §821.19(c)(2) adds wording clarifying that the clinical residency for assistants must be completed in a board-

accredited facility or in an exempt facility. The amendment is intended to protect the public. Licensed practitioners are required to practice in accredited or exempt facilities; thus, assistants should also be required to comply.

In §821.19(d) existing language concerning application by the 181st day after the board's initial rules are finally adopted and published is eliminated as it is obsolete. The opportunity expired in May 1999. In its place, new language is added describing what notification or documentation is required at the beginning and ending or termination of a clinical residency for an assistant. The new procedures described in the amendment are intended to improve protection of the public. The board needs to know where residents are being trained and who is accountable for the residents. The residents and the board need documentation of the number of hours completed that comply with §821.19, whenever a residency is completed or terminated.

In §821.21(c), subparagraph (3)(C) is eliminated. The effect will be that a person preparing for technician registration may not complete 1,000 hours of combined laboratory experience as an orthotic and prosthetic technician. Because a technician is an entry-level position into the professions, it is important that the technician be adequately prepared. By specifying that the 1,000 hours of laboratory experience is required in each discipline, future registrants will need to complete more training and preparation.

In §821.21(d) existing language concerning application for licensure by the 181st day after the board's initial rules are finally adopted and published is being eliminated because it is obsolete. The opportunity expired in May 1999.

In §821.23(b), the words "an applicant" is being changed to "a person" to harmonize the rule with the statutory language in the Texas Occupations Code, §604.257.

In §821.23(b)(2), adding new language requiring an applicant for a temporary license to apply for a license as a prosthetist, orthotist or prosthetist/orthotist under §821.15 or §821.17 harmonizes the rules with the statutory language in the Texas Occupations Code, §604.257, and directs the reader to the two sections relating to obtaining a non-temporary license.

In §821.23(b)(2), the language requiring an applicant for a temporary license to intend to remain in Texas is being eliminated. The amendment deletes unnecessary language.

In §821.23(b)(3), the existing language is being eliminated. There is no statutory requirement that the applicant be engaged in the educational or clinical residency requirements. The amendment eliminates unnecessary language.

In §821.23(b)(3), the existing language in subsection (b)(4) will become (b)(3) due to the elimination of the existing language in subsection (b)(3). The renumbering keeps the rules in line with *Texas Register* formatting.

In §821.23(c), the catch title is changed and references are added to meeting the requirements for a license as a prosthetist, orthotist or prosthetist/orthotist under §821.15, or §821.17. The amendments clarify the requirements for continued practice of orthotics or prosthetics in Texas and harmonize this subsection with (b)(2).

In §821.23(e)(2), the wording is changed to improve grammar and style.

In §821.25(a), changes are made to improve grammar and style.

In §821.25(b)(1), the words "in Texas" are added to specify that applicants for a provisional license must be practicing comprehensive care in this State. The amendment clarifies the status of the person who may apply for a provisional license.

In §821.25(b)(2), an amendment changes the reference from a section of the rules to the appropriate section of the Texas Orthotics and Prosthetics Act. The change is proposed to harmonize the rules with the statutory provisions and because the section of the rules in the reference is proposed for repeal.

In §821.25(b)(4)(A), the amendment separates existing paragraph (4) of subsection (b) into three subparagraphs. The new subparagraph (A) is created from existing language and the word "examination" is substituted for the incorrect word "education." The references to specific subsections in (c)-(e) in §821.9 are eliminated. The amendments correct errors in the existing rules.

A new subparagraph (B) in §821.25(b)(4) adds references to specific paragraphs in §821.17 and former subparagraph (B) becomes subparagraph (C). The amendments correct an error in the existing rules and keep the section in proper *Texas Register* format.

In §821.25(b)(4)(C), references to three subsections in §821.31 are eliminated. The change is needed to correct the reference.

The language in §821.25(b)(5) and (6) is being eliminated. There is no need to list the specific requirements of §821.17 in this section. The changes are needed to eliminate redundancies.

In §821.25(e)(3), a reference to the section relating to renewals is amended due to proposed changes in that section. The amendments harmonize the rules.

In §821.25(g), language is added clarifying that the provisional license holder must meet the requirements of §821.17 in order to continue practicing orthotics or prosthetics in Texas. The amendment will harmonize subsections (b) and (g) in this section.

In §821.25(h), amendments to the catch title make it shorter and more descriptive. The intent of the change is to improve grammar and style.

Amendments to §821.27(a) rephrase the purpose of the section and eliminate archaic language.

An amendment to §821.27(b)(3) changes the word "competed" to "completed." The amendment corrects an error.

In §821.27(b)(4)(B), a new subparagraph is being added to allow a person who is completing a clinical experience, rather than a clinical residency, to obtain a student registration. The amendment closes a gap in the existing rules. A student registration is more appropriate than a provisional license for a person completing a clinical experience. The amendment provides an administrative procedure for issuing a student registration and better protection to the public.

The former subparagraph (B) in §821.27(b)(4) is changed to subparagraph (C). The amendment keeps the rules in *Texas Register* format.

In §821.27(b)(4)(C), the amendment changes the reference from §821.17 to §821.9. The amendment corrects an error in the existing rules.

In §821.27(b)(4)(C), the words "or clinical experience" are added at the end of the subparagraph. The change harmonizes this subparagraph with (b)(4)(B).

In §821.27(c), the words "the clinical experience" are added and the phrase "is applying for or awaiting the results of" is eliminated. The amendment harmonizes the rules and eliminates unnecessary language.

In §821.27(d)(1), the words "the clinical experience" are added to harmonize the rules.

New §821.28 concerning upgrading a student registration, temporary license or provisional license provides an administrative procedure for obtaining a "regular" practitioner license after successful completion of the examination. Without the procedure, provisional licensees, temporary licensees and registered students who pass the exam would have to apply directly for the practitioner license. The upgrade procedure after passing the examination reduces paperwork and benefits licensees and board staff.

In §821.29(a)(1), (a)(2) and (b), amendments add statutory references. The amendments correct omissions.

Also in §821.29(b), an amendment adds regulatory language requiring board accreditation for all orthotic and prosthetic facilities, unless the facility meets the statutory exemptions. The amendment improves protection of the public and corrects an omission.

In §821.29(c)(1)(G), an amendment adds a requirement that a scaled floor plan of the facility be submitted with the application for accreditation. The requirement for the floor plan assists the board in assuring that the facility meets the minimum standards for accreditation.

In §821.29(c)(1)(H), an amendment adds wording to clarify that the practitioner in charge must be on site at the facility. The intent of the requirement is to protect the public. The board is concerned that under the existing rules, the practitioner in charge is "in name only."

Also in §821.29(c)(1)(H), an amendment adds a requirement that the on-site practitioner in charge may not hold a provisional license, temporary license or student registration. The intent of the requirement is to protect the public. The provisional licensee, temporary licensee or student registrant is not fully licensed or qualified to serve as the on-site practitioner in charge of a facility.

In §821.29(c)(1)(J), an amendment changes the qualifications of the person who signs the facility accreditation application form to the on-site practitioner in charge of the facility. The new language promotes compliance with the accreditation requirements and improves protection of the public.

In §821.29(c)(1)(K), an amendment adds a requirement to submit photographs of each room or hallway showing wheelchair accessibility and privacy for patients. The amendments recognize the needs of patients and allow a facility to demonstrate compliance without requiring an on-site visit by board staff. The amendments are intended to protect the public.

In §821.29(e)(5), an amendment adds an administrative procedure for changing the designation of the on-site practitioner. The amendment corrects an omission in the existing rules regarding board notification of changes in key personnel. The change helps the board protect the public.

Amendments in §821.29(e)(7) change the specification of the size of letters on the sign that must be posted in each facility concerning consumer complaints. To encourage compliance with the posting requirement, the board provides a notice to each facility with its accreditation certificate. The new language requires the printing on the notice to be equal to or exceed the size of the letters on the notice provided by the board. The amendment will harmonize the rule with the board's administrative procedure.

Amendments in §821.29(e)(8) add the word "any" before the word "change" and add a reference to the new fee in §821.5, relating to a change in the on-site practitioner in charge of an accredited facility. The amendments improve grammar and harmonize the rules.

In §821.29(h)(6), an amendment improves grammar.

In §821.29(j), language is added clarifying the reinstatement procedures. The amendment corrects errors and omissions.

In §821.29(k)(3), the amendments clarify that a suspension or revocation of the facility accreditation may affect, rather than affect, all facilities under the same owner, same name or same corporation. The amendment is needed to protect the public.

In §821.29(o), the existing requirement for a door separating the lab/fabrication area from other areas is amended to specify that the door be rigid. The amendment is necessary to protect the public.

In §821.29(r), an amendment adds an administrative procedure for adding either orthotics or prosthetics to an existing facility accreditation. The amendment corrects an omission in the existing rules and protects the public.

In §821.31(b), the amendments clarify that the 1,900 hours of clinical residency must be completed for each category to be licensed. The amendments also require the completion of each 1,900-hour residency within two consecutive years or the date each residency is started. The amendments clarify the requirements so applicants will clearly understand that to be licensed in both orthotics and prosthetics, two 1,900-hour residencies must be completed. Inclusion of the time limit in this section harmonizes the rules with section §821.27 concerning student registration.

In §821.31(f), the amendment changes the catch title. The amendment is intended to improve grammar and style.

In §821.31(f)(2) and (3), the phrase "or his or her designee" is eliminated. The language is unnecessary.

In §821.31(f)(4), the word "evaluated" is replace by "completed." The amendment eliminates a redundancy.

In §821.31(f)(4)(D), the amendments require that documentation regarding the number of hours of the clinical residency completed by the resident be provided to the resident at the time of termination or completion of the residency. The amendment also specifies that the documentation must indicate the number of hours completed, which comply with the section. The amendment will assure that residents receive documentation when completing all or part of a residency, which is required to qualify for a license. The documentation will also assist the board with protecting the public by assuring that only qualified persons receive a license.

In §821.33(a), the amendment eliminates the catch title and description of the purpose of the section. The language was unnecessary and archaic.

Amendments to keep numbering sequences or lettering sequences correct after deleting language can be found at §821.33(a)-(f).

In §821.33(b), amendments reword the language that is necessary due to changes in paragraph (2) of subsection (b).

In §821.33(b)(2), an amendment lists the items that must be provided by the renewal on the renewal application form. The amendment is needed to improve enforcement.

In §821.33(b)(5), the amendment corrects the reference to the Education Code concerning non-renewal of licenses for defaulting on a student guaranteed loan. The amendment is necessary to correct an error in the reference to the Education Code.

In §821.33(b)(6), the amendment changes the reference to the Family Code regarding suspension of a license. The amendment updates and harmonizes the rule.

In §821.33(d)(1), the amendment adds a requirement that a notice be sent to accredited facilities when an accreditation is expired more than 30 days. The amendment corrects an omission in the existing rules.

In §821.33(d)(2), the amendments clarify that the late renewal requirements apply to both persons and facilities. The amendments also change the last day of eligibility for applying for late renewal from one year past the license expiration date to any date after license expiration up to, but not including, the anniversary date of the license expiration. The amendments are needed to clarify the applicability of the late renewal requirements and to correct an error in the existing rule. The amendments conform to language recommended by the Sunset Commission.

In §821.33(d)(2), the amendments adds a requirement that when applying for late renewal, proof of the person's compliance with the continuing education requirements and a written description of how the person or facility complied with the Orthotics and Prosthetics Act after the license/accreditation expired must be submitted. The amendment is needed to protect the public and enforce the rules and the statutory requirements.

In §821.33(d)(2)(A) and (B), the amendments clarifies how late fees are determined. The amendments harmonize the rules with statutory requirements.

In §821.33(d)(2)(C), the amendments clarify when the next continuing education period begins after a license is issued under the late renewal requirements. The amendment corrects an omission concerning the next continuing education period, which licensees and the board need to know.

In §821.33(d)(3), the amendment adds wording that clarifies that a facility may not renew an accreditation that has been expired one year or more. The amendment corrects an omission concerning expired facility accreditations. The amendments conform to standard language recommended by the Sunset Commission.

In §821.33(d)(4), the amendment concerns a prohibition on the unlicensed practice of orthotics or prosthetics after a license expires. The amendment harmonizes the rules with §605.251 of the Texas Occupations Code.

In §821.33(d)(5), the amendment concerns a prohibition on the provision of orthotic or prosthetic patient care after a facility accreditation expires. The amendment harmonizes the rules with §605.251 of the Texas Occupations Code.

In §821.33(e)(3), the amendment adds regulatory language stating that a facility with an expired accreditation shall not imply or represent that the facility is accredited. The amendment harmonizes the rules with §605.251 of the Texas Occupations Code.

In §821.33(e)(4), the amendment adds language requiring a facility accreditation, which is expired for one year or more to be surrendered to the board. The amendment harmonizes the rule with §821.33(d)(2) and (d)(2)(B).

In §821.35(e)(1), language is added allowing increments of five minutes of continuing education to be counted as one-tenth of a credit. The amendment is needed for counting credits under or in excess of 50 minutes.

In §821.35(f)(2), the amendments describe the responsibilities of licensees to keep and submit a log or list of activities completed and the documentation needed by the board. The amendments are needed to clarify the licensee's responsibilities.

In §821.33(g), a new subsection is added concerning persons in default on student guaranteed loans. The amendment is needed to administer renewals under these circumstances.

Regarding §821.35(h), the amendments broaden the topics or subject areas for continuing education and allow the board to accept additional topics that benefit patient care or service delivery. The amendments are needed to allow licensees to use credits earned in appropriate subject matter toward the license renewal requirements.

In §821.35(j)(2), an amendment adds wording allowing the board to audit a sample or all licensees for compliance with the continuing education requirements. Due to the number of licensees, the board may determine that a sampling of licensees' continuing education credits does not assure compliance with the rules. The amendment is needed to allow more flexibility in determining compliance and protecting the public.

In §821.35(j)(2)(B), an amendment adds a distinction that copies of continuing education certificates must be submitted if the licensee's continuing education is audited.

In §821.35(k)(3), an amendment adds language clarifying the ending date of one continuing education period and the starting date of the next period whenever credits are earned during the three-month period after notice is given that the licensee failed to complete or report the required continuing education. The amendment is needed to clarify the administrative procedure.

In §821.35(m)(1)(A), an amendment allows the rule relating to continuing education for persons serving in the regular armed forces to apply to a licensee in the armed forces reserves or national guard if called to active duty. The amendment is needed so the provisions will apply to peacekeeping, homeland security, and bioterrorism forces in the United States and abroad.

Concerning §821.37(a), the amendments clarify who is responsible for notifying the board of a change of name, preferred mailing address, or physical address of a facility. The amendments relocate the deadline for notification of the change from subsection (b) to subsection (a). The amendments delete the existing catch title and language regarding the purpose of the section. The amendments eliminate and replace archaic language. The amendments are intended to improve compliance with the section.

Concerning §821.37(b), the amendments add a new catch title, delete existing language in subsection (b) and move existing language from subsection (c) to subsection (b). The amendments are intended to improve grammar, style and compliance.

Concerning §821.37(c), the amendments add a new catch title identifying the topic of the subsection and moves existing language from subsection (d) to subsection (c). Subsection (d) will be eliminated. Also, the amendments require that the name

change notification be sent to the board rather than the executive director, eliminate the requirement for "a duly executed affidavit," add new language clarifying the requirements for written notification of name changes, and add new language clarifying who must submit name change fees. The amendments improve grammar and style and eliminate archaic or unnecessary language. The amendments are also intended to improve compliance.

Concerning §821.39(a), the amendments delete the catch title and explanation of the purpose of the section. The former subsection (b) becomes (a). The amendment is intended to improve grammar and style and eliminate archaic language.

Also in §821.39(a), an amendment adds a reference to the statute, Texas Occupations Code, Chapter 605. The amendment corrects an omission.

Concerning §821.39(a)(4), an amendment adds wording indicating that anonymous complaints will be investigated if the complaint relates to a violation of the Orthotics and Prosthetics Act or the board's rules. The amendment is needed to clarify that complaints that are not within the board's jurisdiction will not be investigated. The amendment is needed to clarify the application of the rules.

Amendments to keep numbering sequences or lettering sequences correct after adding or deleting language can be found at §821.39(b)-(i).

In §821.39(b)(6), language is added specifying that the board may delegate authority to the executive director to dismiss complaints. The additional language is added to allow the board to exercise discretion in delegating its authority. An additional amendment rearranges the sentence structure of the existing language and improves grammar and style.

In §821.39(e)(1), an amendment replaces a reference to §34 of the statute with a reference to §605.354 of the statute. The amendment updates the rules to reflect the recodification of the statute from Texas Civil Statutes to the Texas Occupations Code.

In §821.39(e)(2), a new paragraph is added concerning the criteria to consider in determining the appropriate disciplinary action to be imposed in each case. The amendment is needed to provide a basis for decision-making and to reflect current policy and practice.

In §821.39(e)(2)(A), new language describes the severity levels for offenses under the Act and board rules. The amendment is needed to provide a basis for consistent decision-making and to reflect current policy and practice.

In §821.39(e)(2)(B)-(N), new subparagraphs are added concerning the criteria to consider in determining the appropriate disciplinary action to be imposed in each case. The amendment is needed to establish a basis for decisions and to reflect current policy and practice.

In §821.39(g)(1), an amendment adds wording that clarifies that the formal hearing is held only if requested. The amendment is needed to inform licensees and the public.

In §821.41(a), the amendments add a new catch title, delete the explanation of the purpose for the section and add a reference to the Texas Occupations Code, Chapter 605. The amendments eliminate archaic language and update and harmonize the rules with the statute.

In §821.41(d), the amendments delete the phrase "the board to deny" and add a list of the disciplinary actions the board may take for unprofessional or unethical conduct. The amendments harmonize the rules with the statute.

In §821.41(d)(8), the amendments eliminate a requirement for properly supervising "support" personnel and add a requirement for properly supervising clinical or technical personnel. The amendments remove unnecessary language and add more reasonable regulatory language that will provide public protection.

In §821.41(d)(26), adds regulatory language establishing that practicing orthotics in an unaccredited or non-exempt facility is unethical or unprofessional. The amendments reflect the requirements of §821.29 relating to the accreditation of orthotic and prosthetic facilities and §605.260 of the Orthotics and Prosthetics Act. The amendments harmonize the rules with the Act.

In §821.41(d)(27), adds regulatory language establishing that practicing prosthetics in an unaccredited or non-exempt facility is unethical or unprofessional. The amendments reflect the requirements of §821.29 relating to the accreditation of orthotic and prosthetic facilities and §605.260 of the Orthotics and Prosthetics Act. The rule harmonizes the rules with the Act.

In §821.41(d)(28), the amendment adds regulatory language establishing that it is unethical or unprofessional to fail to respond truthfully to a complaint filed with the board. The amendment is needed to correct an omission and to protect the public.

In §821.41(d)(29), new language was added that would allow the board to take disciplinary action for other unprofessional or unethical conduct. The amendment is needed to correct an omission and to protect the public.

In §821.41(e)(2)(A), an amendment adds language establishing that failure to perform services or provide products for which compensation has been received is a violation. The amendment is necessary to protect the public and to provide a basis for disciplinary action.

In §821.41(h), the catch title is changed from "violations" to "disciplinary actions." The new catch title more aptly describes the contents of the section.

Also in §821.41(h), the words "not renewed" are added, and the words "probated" and "reprimanded" are removed from the list of penalties that may be imposed. The amendments harmonize the rules with the Act, §605.353.

Also in §821.41(h), an amendment adds new sentence at the end of the subsection authorizing the executive director to issue a reprimand, a letter of concern, an advisory letter or a cease and desist letter. The additional enforcement actions available should be included in the rules.

In §821.43(a), the amendments change the statutory references from Texas Civil Statutes, Article 6252-13d to the Administrative Procedure Act, §2001 of the Texas Government Code, and the Texas Occupations Code, §53. The amendments update the rules to reflect the recodification of the Government and Occupations Codes.

In 821.43(b)(2), the statutory reference is updated.

In §821.43(b)(3), amendments are added describing the duties of the executive director concerning the required written notice. The additional language corrects an omission. The additional wording is needed to inform applicants and licensees of the administrative procedures.

In §821.43(b)(3)(A)-(D), the amendments describe what must be included in the required written notice. The additional wording corrects an omission. The additional wording is needed to inform applicants and licensees of the administrative procedures.

In §821.45(a), the amendments add wording to the subsection concerning the board's consideration of a default order. The amendments are intended to improve grammar and style.

In §821.47(a), the amendments delete the existing catch title and add a new one. The amendment provides a more descriptive title.

Concerning §821.49, the amendment changes the title of the section from "Suspension of License for Failure to Pay Child Support" to "Suspension of License Under the Family Code." The section title change is needed due to changes in the Family Code as a result of the 2001 Texas legislative session.

In §821.49(a), the amendment updates the reference to the Family Code. The amendment harmonizes the rules with the Family Code, as amended during the 2001 legislative session.

In §821.49(b), the amendment adds wording authorizing the board to suspend a license for failure to comply with child custody orders. The amendment harmonizes the rules with the Family Code, as amended during the 2001 legislative session.

In §821.49(b), an amendment replaces the specific legal term "obligor" with the simpler word "person." The amendment is needed to clarify that the section applies to persons who are obligated to pay child support or who are subject to child custody orders.

In §821.51(a), an amendment adds a reference to the Orthotics and Prosthetics Act. The amendment corrects an omission.

Statutory language is revised in §821.51(b).

In §821.53, the amendment replaces the word "an" with the word "any" at the beginning of the second sentence. The amendment is intended to improve grammar and style.

In §821.53, an amendment adds the phrase, "or other appropriate office" in the last sentence so the rule will not have to be amended later if the Office of Language Services undergoes a name change. The amendment adds flexibility to the rules.

In §821.55(1), the amendment replaces "prosthetists/orthotists licensed to practice prosthetics/orthotics" with "All licensees, registrants and accredited facilities." The amendment covers the range of the persons or entities regulated by the board that must comply with this section. The amendment is needed to correct an omission and to protect the public.

In §821.55(2), amendments change the language specifying the size of letters on the sign that must be posted in each facility concerning consumer complaints. To encourage compliance with the posting requirement, the board provides a notice to each facility with its accreditation certificate. The new language requires the printing on the notice to be equal to or exceed the size of the letters on the notice provided by the board. The amendment will harmonize the rule with the board's administrative procedure and with §821.29(e)(7).

In §821.57(a), the amendments replace the catch title and simplify the wording of the introductory sentence. The amendments improve grammar and style.

Also in §821.57, new language is added to subsection (c) and the existing language in (c) becomes new subsection (d). The new language describes the administrative procedure for accepting or denying a petition for rulemaking and establishes a time frame for taking action after the board receives the petition. The amendments correct omissions.

In §821.57(b)(5), new language is added which relates to the procedure for the submission of the petition to the board.

The repeals of §821.11 and §821.13 are proposed as a result of the sections being obsolete. The provisions in these sections expired and are being eliminated because the latest application date under these sections was May 8, 1999, the 181st day after the board's initial rules were adopted. The repeals eliminate obsolete provisions.

Donna S. Flippin, Executive Director, for the board, has determined that for each year of the first five-year period the sections will be in effect, fiscal implications for state government are anticipated to be $20,000. Revenues generated from licensing fees will offset the costs and process of administering the program. There will be no fiscal implications for local government.

Ms. Flippin also has determined that for each year of the first five years the sections are in effect, the public benefit as a result of enforcing or administering the sections will be to insure the appropriate regulation of the orthotic and prosthetic personnel and facilities. The anticipated cost to micro or small businesses or persons who are required to comply with the sections as proposed will be the upgrade fee after passing an examination for students, provisional and temporary licenses, the late renewal fee for individuals, the reinstatement fee for individuals who reinstate a license following suspension under the Family Code, an increase in the single-category facility accreditation fee and the additional fees for changing the information on a facility accreditation. There may be additional costs incurred by personnel and licensees in order to comply with the amendments relating to supervision of licensed assistants while performing critical care events, a requirement to notify the board before a clinical residency for an assistant may begin, a requirement that a temporary or provisional licensee may not be designated or utilized as the on-site practitioner in charge, a requirement to submit a fee when notifying the board in writing of a change in the designation of the on-site practitioner in charge, requiring a new application for a facility if the accreditation has expired for one year or more, and a requirement that the clinical residency program director provide appropriate documentation to the resident upon termination of a residency. There will be no anticipated effect on local employment.

Comments on the proposal may be submitted in writing by mail to Donna Flippin, Executive Director, Texas Board of Orthotics and Prosthetics, Professional Licensing and Certification Division, 1100 West 49th Street, Austin, Texas, 78756-3183, by fax to Donna Flippin, (512) 834-4518, or by e-mail to *donna.flippin@tdh.state.tx.us*. Comments will be accepted for 30 days following publication in the *Texas Register*.

22 TAC §§821.1 - 821.7, 821.9, 821.15, 821.17, 821.19, 821.21, 821.23, 821.25, 821.27 - .29, 821.31, 821.33, 821.35, 821.37, 821.39, 821.41, 821.43, 821.45, 821.47, 821.49, 821.51, 821.53, 821.55, 821.57

The amendments and new section are proposed under Texas Occupations Code, Chapter 605, which provides the Texas Board of Orthotics and Prosthetics with the authority to adopt rules concerning the regulation of orthotists and prosthetists.

The amendments and new section affect the Texas Occupations Code, Chapter 605.

§821.1. Introduction.

(a) Purpose. This chapter implements the Texas Orthotics and Prosthetics Act, Texas Occupations Code, Chapter 605, [~~Civil Statutes, Article 8920,~~] concerning prosthetic and orthotic regulation.

(b) Content. These sections cover definitions; powers and duties of the board; organization of the board; fees; application requirements and procedures for licensing prosthetists and orthotists; application requirements for provisionally licensing prosthetists and orthotists; application requirements for temporary licensing prosthetists and orthotists; application requirements for licensing orthotist and prosthetist assistants; application requirements for registering orthotist and prosthetist technicians; application requirements for registering orthotist and prosthetist students; upgrading a student registration, temporary license or provisional license; application requirements for accreditation of prosthetic and orthotic facilities; issuance of licenses, temporary licenses, registrations, and accreditations, exemptions to licensure, registration and accreditation; continuing education for license renewal; display of license; registration or accreditation; renewal of license, registration or accreditation; changes in name or address; professional and ethical standards; violations, complaints and disciplinary actions; licensing or registration of persons with criminal backgrounds; and petition for rule making.

§821.2. Definitions.

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly suggests otherwise. Words and terms defined in the Orthotics and Prosthetics Act shall have the same meaning in these rules:

(1) Act--The Orthotics and Prosthetics Act, Texas Occupations Code, Chapter 605 [~~Civil Statutes, Article 8920~~].

(2) - (16) (No change.)

(17) Licensed orthotist (LO)--A person licensed under this Act who practices orthotics and represents the person to the public by a title or description of services that includes the term "orthotics," "orthotist," "brace," "orthosis," "orthoses," "orthotic," or a similar title or description of services.

(18) (No change.)

(19) Licensed physician - a physician licensed and in good standing with the Texas State Board of Medical Examiners.

(20) [~~19~~] Licensed prosthetist (LP)--A person licensed under this Act who practices prosthetics and represents the person to the public by a title or description of services that includes the term "prosthetics," "prosthetist," "prosthesis," "prostheses," "prosthetic," "artificial limbs," or a similar title or description of services.

(21) [~~(20)~~] Licensed prosthetist assistant (LPA)--A person licensed under this Act who helps and is supervised at a prosthetic and/or orthotic facility by a licensed prosthetist responsible for the assistant's acts.

(22) [~~(21)~~] Licensed prosthetist/orthotist (LPO)--A person licensed under this Act who practices both prosthetics and orthotics and represents the person to the public by a title or description of services that includes the terms "prosthetics/orthotics," "prosthetist/orthotist," "prosthetic/orthotic," "artificial limbs," "brace," "prosthesis," "prostheses," "orthosis," "orthoses," or a similar title or description of services.

(23) [~~(22)~~] Licensed prosthetist/orthotist assistant (LPOA)--A person licensed under this Act who assists and is supervised at a prosthetic and orthotic facility by a licensed prosthetist/orthotist or a licensed prosthetist and licensed orthotist responsible for the assistant's acts.

(24) [~~(23)~~] Licensee--Includes a person or facility holding a current [~~to whom a~~] license, registration or accreditation [~~was~~] issued by the board, to engage in an activity regulated under this Act.

(25) [~~(24)~~] Orthosis--A custom-fabricated or custom-fitted medical device designed to provide for the support, alignment, prevention, or correction of neuromuscular or musculoskeletal disease, injury, or deformity. The term does not include a fabric or elastic support, corset, arch support, low-temperature plastic splint, a truss, elastic hose, cane, crutch, soft cervical collar, orthosis for diagnostic or evaluation purposes, dental appliance, or other similar device carried in stock and sold by a drugstore, department store, or corset shop.

(26) [~~(25)~~] Orthotic facility--A physical site, including a building or office, where the orthotic profession and practice normally take place.

(27) [~~(26)~~] Orthotics--The science and practice of measuring, designing, fabricating, assembling, fitting, adjusting, or servicing an orthosis under an order from a licensed physician, chiropractor, or podiatrist for the correction or alleviation of neuromuscular or musculoskeletal dysfunction, disease, injury, or deformity.

(28) [~~(27)~~] Orthotist in charge--An orthotist who is designated on the application for accreditation as the one who has the authority and responsibility for the facility's compliance with the Act and rules concerning the orthotic practice in the facility.

(29) [~~(28)~~] Person--An individual, corporation, partnership, association, or other organization.

(30) [~~(29)~~] Practitioner --A [~~Until January 1, 1999, a person who is eligible for licensure under the Act as a prosthetist, orthotist, or prosthetist/orthotist. After January 1, 1999, a~~] person licensed under the Act as a prosthetist, orthotist, or prosthetist/orthotist.

(31) [~~(30)~~] Profession of prosthetics or orthotics--Allied health care medical services used to identify, prevent, correct, or alleviate acute or chronic neuromuscular or musculoskeletal dysfunctions of the human body that support and provide rehabilitative health care services concerned with the restoration of function, prevention, or progression of disabilities resulting from disease, injury, or congenital anomalies. Prosthetic and orthotic services include direct patient care, including consultation, evaluation, treatment, education, and advice to maximize the rehabilitation potential of disabled individuals.

(32) [~~(31)~~] Prosthesis--A custom-fabricated or fitted medical device that is not surgically implanted and is used to replace a missing limb, appendage, or other external human body part, including an artificial limb, hand, or foot. The term does not include an artificial eye, ear, finger, or toe, a dental appliance, a cosmetic device, including an artificial breast, eyelash, or wig, or other device that does not have a significant impact on the musculoskeletal functions of the body.

(33) [~~(32)~~] Prosthetics--The science and practice of measuring, designing, fabricating, assembling, fitting, adjusting, or servicing a prosthesis under an order from a licensed physician, chiropractor, or podiatrist.

(34) [~~(33)~~] Prosthetic facility--A physical site, including a building or office, where the prosthetic profession and practice normally take place.

(35) [~~(34)~~] Prosthetic/Orthotic facility--A physical site, including a building or office, where the prosthetic and orthotic professions and practices normally take place.

(36) [~~(35)~~] Prosthetist in charge--A prosthetist who is designated on the application for accreditation as the one who has the authority and responsibility for the facility's compliance with the Act and rules concerning the practice of prosthetics in the facility.

(37) [~~(36)~~] Prosthetist/Orthotist in charge--A prosthetist/orthotist who is designated on the application for accreditation as the one who has the authority and responsibility for the facility's compliance with the Act and rules concerning the practice of prosthetics and orthotics in the facility.

(38) [~~(37)~~] Registered orthotic technician--A person registered under this Act who fabricates, assembles, and services orthoses under the direction of a licensed orthotist, licensed prosthetist/orthotist, licensed orthotist assistant, or licensed prosthetist/orthotist assistant responsible for the acts of the technician.

(39) [~~(38)~~] Registered prosthetic technician--A person registered under this Act who fabricates, assembles, and services prostheses under the direction of a licensed prosthetist, licensed prosthetist/orthotist, licensed prosthetist assistant, or licensed prosthetist/orthotist assistant responsible for the acts of a technician.

(40) [~~(39)~~] Registered prosthetic/orthotic technician--A person registered under this Act who fabricates, assembles, and services prostheses and orthoses under the direction of a licensed prosthetist, a licensed orthotist, a licensed prosthetist/orthotist, or a licensed prosthetist assistant, licensed orthotist assistant, or licensed prosthetist/orthotist assistant responsible for the acts of the technician.

(41) [~~(40)~~] Texas resident--A person whose home or fixed place of habitation to which one returns after a temporary absence is in Texas.

§821.3. Board's Operation.

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

(f) Policy against discrimination. The board shall discharge its statutory authority without discrimination based on a person's race, color, disability, gender, genetic information [~~sex~~], religion, age, or national origin.

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

(i) Reimbursement for expense.

(1) [~~A board member is entitled to a lodging and meals per diem payment at the board member rate set by the latest General Appropriations Act passed by the Texas Legislature.~~]

[~~(2)~~] A board member is entitled to compensation for lodging, meals and transportation expenses, at the rate designated [~~for state employees~~] by the latest General Appropriations Act passed by the Texas Legislature.

(2) [~~(3)~~] Payment to board members of per diem and transportation expenses shall be requested on official state travel vouchers that the executive director has approved.

(3) [~~(4)~~] A board member is entitled to a compensatory per diem as authorized by Government Code, §659.032.

(4) [~~(5)~~] The associate commissioner for health care quality and standards of the department, or his or her designee, shall approve board-approved requests prepared on appropriate forms from staff for out-of-state travel for board activities.

(5) [~~(6)~~] Attendance at conventions, meetings, and seminars must be clearly related to the performance of board duties and show benefit to the state.

(j) - (l) (No change.)

(m) Elections.

(1) At the meeting held after [~~nearest to~~] August 31 of the odd-numbered years, the board shall elect by a majority vote of those members present and voting, a presiding officer and a secretary.

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

(n) - (o) (No change.)

§821.4. Public Information.

(a) (No change.)

(b) Requests for information. The public may obtain copies of board newsletters, brochures, pamphlets, press releases and other board publications by written request to the attention of the executive director or the Public Information Committee at the board's current mailing address.

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

(4) Upon written request, the executive director will certify public records of the board. The cost for certifying copies of public records provided pursuant to the Open Records Act shall be determined by the department for each [~~$5.00 per~~] record or document. This cost shall be in addition to other costs charged for providing the requested document or record, including, but not limited to, copying, retrieving, or mailing of the document or record.

(5) (No change.)

(c) (No change.)

§821.5. Fees.

(a) (No change.)

(b) Schedule of fees. The board has established the schedule of fees as follows:

(1) - (12) (No change.)

(13) prosthetic or orthotic facility accreditation or accreditation renewal --$400 [~~$350~~];

(14) - (15) (No change.)

(16) orthotic or prosthetic examination--shall be determined by the Texas Department of Health (department) and shall consist of the examination fee in accordance with the current examination contract plus an administrative fee;

(17) upgrade for student registrant, provisional licensees and temporary licensees after passing the examination: [~~prosthetic examination--shall be determined by the department and shall consist of the examination fee in accordance with the current examination contract plus an administrative fee~~]

(A) one category--$200;

(B) two categories--$300 ;

(18) license reinstatement following suspension of a license under the Family Code--the renewal fee for the license or registration and an additional $100 [~~prosthetic/orthotic examination (when taken on the same or consecutive days)--shall be determined by the department and shall consist of the examination fee in accordance with the current examination contract plus an administrative fee~~];

(19) returned check--$25; [~~and~~]

(20) written license/certification verification--$25 [~~10~~] each; [~~.~~]

(21) adding orthotics or prosthetics to a facility accreditation issued in one category, including the designation of a practitioner in charge for the new category--$400;

(22) changing the location or name of an accredited facility--$400;

(23) changing the ownership of an accredited facility--$400: and

(24) changing the name of the on-site practitioner in charge of an accredited facility--$100.

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

§821.6. General Application Procedures.

(a) Purpose. The purpose of this section is to set out the application procedures, provided for in the Texas Orthotics and Prosthetics Act, (Act), Texas Occupations Code, §§605.252-605.255 and §§605.257-605.259 [~~Act, under §§23-25 and §§28-30~~]. Unless the context clearly shows otherwise, use of the terms license, licensure, and licensing shall apply to both licenses and registrations.

(b) (No change.)

(c) Required application materials.

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

(7) The technician applicant must sign a statement acknowledging that he or she may only practice in accordance with the definition for registered orthotic technician, registered prosthetic technician, or registered prosthetic/orthotic technician, as set out in §821.2(38)-(40) [~~(37)-(39)~~] of this title (relating to Definitions), under the supervision of a licensed prosthetist, licensed orthotist, or licensed prosthetist/orthotist whose license is current, otherwise the technician is subject to disciplinary action as set forth in §821.39 of this title. This statement must include the names and signatures of the clinical supervisors and must have been executed within 30 days of the date the applicant submitted the application to the board.

(8) (No change.)

(d) (No change.)

(e) Determination of eligibility. The board shall make the final determination on the eligibility of all applicants. The board may delegate approval of applications for licensing or registration to the executive director or a committee of the board. All applications approved by a committee or the executive director are subject to ratification at the next regular meeting of the board.

(f) [~~(e)~~] Disapproved applications. Should the board disapprove an application, the reasons for disapproval will be stated in writing. The applicant may file further information for the board's consideration regarding the applicant's qualifications for the license. The board may disapprove an application if the applicant:

(1) has not met the eligibility and application requirements for the license for which application was made;

(2) has failed to pass the examination prescribed in §821.9 of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist), if required to qualify for the license for which application was made;

(3) has failed to remit required fees;

(4) has failed or refused to properly complete or submit application form(s) or endorsement(s) or has knowingly presented false or misleading information on the application form, or other form or documentation required by the board to verify the applicant's qualifications for a license;

(5) has obtained or attempted to obtain a license issued under the Act by bribery or fraud;

(6) has made or filed a false report or record made in the person's capacity as a prosthetist, orthotist, prosthetist/orthotist, prosthetist assistant, orthotist assistant, prosthetist/orthotist assistant, prosthetic technician, orthotic technician, prosthetic/orthotic technician;

(7) has intentionally or negligently failed to file a report or record required by law;

(8) has intentionally obstructed or induced another to intentionally obstruct the filing of a report or record required by law;

(9) has engaged in unprofessional conduct including the violation of the prosthetic and orthotic standards of practice of established by the board in §821.41 of this title (relating to Professional Standards and Disciplinary Provisions);

(10) has developed an incapacity that prevents prosthetic or orthotic practice with reasonable skill, competence, or safety to the public as the result of:

(A) an illness;

(B) drug or alcohol dependency; or

(C) another physical or mental condition or illness.

(11) has failed to report a known violation of the Act by another person to the department;

(12) has violated a provision of the Act, a rule adopted under the Act, an order of the board previously entered in disciplinary proceedings, or an order to comply with a subpoena issued by the board;

(13) has had a license revoked, suspended, or otherwise subjected to adverse action or been denied a license by another licensing authority in another state, territory, or country;

(14) has been convicted of or pled nolo contendere to a crime directly related to prosthetic and/or orthotic practices;

(15) has been excluded from participation in Medicare, Medicaid, or other federal or state cost-reimbursement programs due to fraudulent activities; or

(16) has committed a prohibited act under the Act, §§605.351-605.353 [~~§22, on or after October 1, 1998~~].

(g) [~~(f)~~] Applications proposed for disapproval. If the board determines that the application should not be approved, the executive director shall give the applicant written notice of the reason for the proposed disapproval and of the opportunity for a formal hearing as set out in §821.39(h) of this title. Within fourteen [~~ten~~] days after receipt of the written notice, the applicant shall give written notice to the executive director to waive or request a hearing. If the applicant fails to respond within fourteen [~~ten~~] days after receipt of the notice of opportunity or if the applicant notifies the executive director that the hearing be waived, the board [~~department~~] shall finally deny [~~disapprove~~] the application.

(h) [~~(g)~~] Reapplication after denial. An applicant whose application has been disapproved under subsection (f) [~~(e)~~](4)-(16) of this section may reapply after one year from the disapproval date and shall submit a current application, the application fee and proof, satisfactory to the board, of compliance with the requirements of these rules and the provisions of the Act in effect at the time of reapplication.

(i) [~~(h)~~] Defaulters on Texas guaranteed student loans. The board will issue an initial license to a qualified applicant who has defaulted on a Texas guaranteed student loan. The board will not renew the license until a repayment plan has been reached with the Texas

Guaranteed Student Loan Corporation (TGSLC) and a copy of the certification of the repayment agreement from TGSLC is filed with the board office.

(j) [~~(i)~~] Application processing.

(1) The board shall comply with the following procedures in processing applications for a license.

(A) The following times shall apply from receipt of a completed application and acceptance date for filing or until the date a written notice is issued stating the application is deficient and additional specific information is required. A written notice of application approval may be sent instead of the notice of acceptance of a complete application. The times are as follows:

(i) letter of acceptance of application for renewal--21 days; and

(ii) letter of application deficiency--21 days.

(B) The following times shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The times for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. The times are as follows:

(i) letter of approval--42 days; and

(ii) letter of denial of license or registration--90 days.

(2) The board shall comply with the following procedures in processing refunds of fees paid to the board.

(A) In the event an application is not processed in the times stated in paragraph (1) of this subsection, the applicant has the right to request reimbursement of fees paid in that particular application process. The applicant should apply to the executive director for reimbursement. If the executive director does not agree that the time has been violated or finds that good cause existed for exceeding the time, the request will be denied.

(B) Good cause for exceeding the time is considered to exist if the number of applications for licensure, registration or renewal exceeds by 15% or more, the applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the board in the application process caused the delay, or another condition exists giving the board good cause for exceeding the time.

(3) If the executive director denies a request for reimbursement under paragraph (2) of this subsection the applicant may appeal to the board for a timely resolution of a dispute arising from a violation of the times. The applicant shall give the board written notice, at the board's address, that the applicant requests full reimbursement of fees paid because his or her application was not processed within the applicable time. The executive director shall submit a written report of the facts related to the processing of the application and of good cause for exceeding the applicable time. The board shall provide written notice of the decision to the applicant and the executive director. The board shall decide an appeal in favor of the applicant if the applicable time was exceeded and good cause was not established. If the board decides the appeal in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(4) The times for contested cases related to the denial of licensure, registration or renewal are not included with the times listed in paragraph (1) of this subsection. The time for conducting a contested case hearing runs from the date the board receives a written hearing request until the board's decision is final and appealable. A hearing may be completed within three to nine months, but may be shorter or longer depending on the particular circumstances of the hearing, the workload of the department and the scheduling of board meetings.

§821.7. General Licensing Procedures.

(a) (No change.)

(b) Issuance of licenses.

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

(5) A student registration shall be issued or renewed for a two year period, unless issued or renewed under §821.27(e) or (f) of this title (relating to Student Registration).

(c) License and license display.

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

(d) Copying or verifying the license.

(1) (No change.)

(2) A licensee shall only allow his or her license to be copied for licensure verification by employers, licensing boards, professional organizations and third party payers for credentialing and reimbursement purposes. The licensee shall sign, date and clearly mark copies with the word "COPY" across the face of the document. Any [~~Other~~] persons [~~and/or agencies~~] may verify a license by accessing the board's web page or contacting [~~contact~~] the board's office in writing or by phone to verify licensure. The license verification fee as set out in §821.5 of this title (relating to Fees) must be paid before any written verification is provided.

(e) - (g) (No change.)

§821.9. Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist.

(a) (No change.)

(b) Required examination. To qualify for a license, an applicant must pass a competency examination, unless the applicant qualified for licensure under [~~§821.11 of this title (relating to Licensing by Exemption from the License Requirements),~~] §821.15 of this title (relating to Acquiring Licensure as a Uniquely Qualified Person), or the applicant holds a license in a state that has licensing requirements that are equal to or exceed the requirements of §821.17 of this title (relating to Licensing by Examination).

(c) (No change.)

(d) Applications for examination.

(1) The board shall notify an applicant whose license application has been approved for the examination. Approval to take the examination shall be limited to the three-year period after the date of the board's notification to the applicant, unless specifically extended by action of the board. An applicant who was approved for the examination under §821.25 of this title (relating to Provisional License) may not take the examination after January 1, 2005. [~~The board or its designee shall forward an examination registration form to the approved applicants.~~]

(2) The board or its designee shall forward an examination registration form to the approved applicants at least 30 days before a scheduled examination. An applicant who wishes to take a scheduled examination must complete the registration form and return it [~~with the appropriate fee~~] to the board or its designee by the established deadline. The applicant shall submit the examination fees as set out in §821.5 of this title (relating to Fees) at the time specified by the board or its designee.

[(3) Applicants who fail to apply for and take the licensure examination within a three year period after the executive director mails an examination approval notice to him or her may have that approval withdrawn by action of the board.]

(e) - (h) (No change.)

(i) Failures.

(1) An applicant who fails the initial examination prescribed by the board may take two [a] subsequent examinations [examination] after paying the examination fees [fee].

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

(j) Qualifications for initial examination. The applicant must:

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

(3) be within 700 hours of completing the clinical residency or clinical experience requirements as described in §821.17 [§821.31] of this title (relating to Licensing by Examination [Standards, Guidelines, and Procedures for a Professional Clinical Residency]). The entire clinical residency or clinical experience must be completed before the applicant may be issued a license.

§821.15. Acquiring Licensure as a Uniquely Qualified Person.

(a) Purpose. The purpose of this section is to describe the unique qualifications a person must possess to qualify for licensure as a prosthetist, orthotist or prosthetist/orthotist under the Orthotics and Prosthetics Act, (Act) §605.254(a)(2) [§23(e)].

(b) Unique qualifications. A uniquely qualified person means a resident of the State of Texas who, through education, training and experience, is as qualified to perform prosthetic and/or orthotic care as those persons who obtain licensure pursuant to the Act, §605.252 [§23(a)].

(1) (No change.)

(2) The board will not approve a person as possessing unique qualifications who has not provided comprehensive orthotic care and/or comprehensive prosthetics care to the extent required by the Act, §605.254(a) [§23(d) and §821.11 of this title (relating to Licensing by Exemption from the License Requirements)].

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

§821.17. Licensing by Examination.

(a) (No change.)

(b) General requirements. To qualify for a license an applicant must successfully complete:

(1) (No change.)

(2) the clinical experience (if completed before January 1, 2005) or residency requirements for the requested license; and

(3) (No change.)

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

(f) Post-graduate requirements for the orthotist license.

(1) The applicant must submit an affidavit, signed by the orthotist(s) or prosthetist/orthotist(s) who directly supervised the applicant, attesting to the applicant's successful completion of not less than 1,900 hours of clinical orthotic residency as described in §821.31 of this title (relating to Standards, Guidelines and Procedures for a Professional Clinical Residency), or 4,500 hours of post graduate clinical experience if applying under subsection (c)(2) of this section [with an associates degree] before January 1, 2005 [, as described in §821.31 of this title (relating to Standards, Guidelines and Procedures for a Professional Clinical Residency)]. The 4,500 hours of clinical experience must be completed by January 1, 2005.

(2) If any of the clinical requirements are [orthotic residency is] completed in Texas [on or after January 1, 1999], the supervising orthotist(s) or prosthetist/orthotist(s) must be [have been] licensed in accordance with this title.

(g) Post-graduate requirements for the prosthetist license.

(1) The applicant must submit an affidavit, signed by the prosthetist(s) or prosthetist/orthotist(s) who directly supervised the applicant, attesting to the applicant's successful completion of not less than 1,900 hours of clinical prosthetic residency as described in §821.31 of this title, or 4,500 hours of post graduate clinical experience if applying under subsection (d)(2) of this section [with an associates degree before January 1, 2005, as described in §821.31 of this title]. The 4,500 hours of clinical experience must be completed by January 1, 2005.

(2) If any of the clinical requirements are [prosthetic residency is] completed in Texas [on or after January 1, 1999], the supervising prosthetist(s) or prosthetist/orthotist(s) must be [have been] licensed in accordance with this title.

(h) Post-graduate requirements for the prosthetist/orthotist license.

(1) The applicant must submit an affidavit, signed by the prosthetist(s) and orthotist(s) or prosthetist/orthotist(s) who directly supervised the applicant, attesting to the applicant's successful completion of not less than 1,900 hours of clinical orthotic residency and not less than 1,900 hours of clinical prosthetic residency as described in §821.31 of this title, or 4,500 hours of post graduate clinical experience in each discipline if applying under subsection (e)(2) of this section [with an associates degree before January 1, 2005, as described in §821.31 of this title]. The 4,500 hours of clinical experience in each discipline must be completed by January 1, 2005.

(2) If any of the clinical requirements are [prosthetic/orthotic residency is] completed in Texas [on or after January 1, 1999], the supervising prosthetist(s) and orthotist(s) or prosthetist/orthotist(s) must be [have been] licensed in accordance with this title.

(i) Additional post-graduate requirements in prosthetics for an applicant licensed as an orthotist.

(1) The applicant must submit an affidavit, signed by the prosthetist(s) or prosthetist/orthotist(s) who directly supervised the applicant, attesting to the applicant's successful completion of not less than 1,900 hours of clinical prosthetic residency as described in §821.31 of this title, or 4,500 hours of post-graduate clinical experience if applying under subsection (d)(2) of this section [with an associates degree before January 1, 2005, as described in §821.31 of this title]. The 4,500 hours of clinical experience in prosthetics must be completed by January 1, 2005.

(2) If any of the clinical requirements are [prosthetic residency is] completed in Texas [on or after January 1, 1999], the supervising prosthetist(s) or prosthetist/orthotist(s) must be [have been] licensed in accordance with this title.

(j) Additional post-graduate requirements in orthotics for an applicant licensed as a prosthetist.

(1) The applicant must submit an affidavit, signed by the orthotist(s) or prosthetist/orthotist(s) who directly supervised the applicant, attesting to the applicant's successful completion of not less than 1,900 hours of clinical orthotic residency as described in §821.31

of this title, or 4,500 hours of post graduate clinical experience if applying under subsection (c)(2) of this section [~~with an associates degree before January 1, 2005, as described in §821.31 of this title~~]. The 4,500 hours of experience in orthotics must be completed by January 1, 2005.

(2) If any of the clinical requirements are [~~orthotic residency is~~] completed in Texas [~~on or after January 1, 1999~~], the supervising orthotist(s) or prosthetist/orthotist(s) must be [~~have been~~] licensed in accordance with this title.

§821.19. Licensed Prosthetist Assistant, Licensed Orthotist Assistant, or Licensed Prosthetist/Orthotist Assistant.

(a) Purpose. The purpose of this section is to establish the scope of practice and the qualifications for licensure for a licensed assistant under the Orthotics and Prosthetics Act, (Act), §605.255.

(b) Scope of practice.

(1) A licensed orthotist assistant provides ancillary patient care services under the supervision of a licensed orthotist or licensed prosthetist/orthotist. The supervising licensed orthotist or supervising licensed prosthetist/orthotist is responsible to the board and the public for the acts or omissions of the licensed orthotist assistant. A licensed assistant may only perform critical care events, as defined in §821.2 of this title (relating to Definitions), while under the direct supervision of a practitioner licensed in the appropriate category. Other than as set forth in this subsection, the supervising licensed orthotist or supervising licensed prosthetist/orthotist shall [~~may~~] supervise and direct the licensed orthotist assistant as the supervisor determines. However, the responsibility of the supervisor always specifically extends to having disciplinary action taken against the license of the supervising licensed orthotist or supervising licensed prosthetist/orthotist for violations of the Act or these rules committed by the licensed assistant.

(2) A licensed prosthetist assistant provides ancillary patient care services under the supervision of a licensed prosthetist or licensed prosthetist/orthotist. The supervising licensed prosthetist or supervising licensed prosthetist/orthotist is responsible to the board and the public for the acts or omissions of the licensed prosthetist assistant. A licensed assistant may only perform critical care events, as defined in §821.2 of this title, while under the direct supervision of a practitioner licensed in the appropriate category. Other than as set forth in this subsection, the supervising licensed prosthetist or supervising licensed prosthetist/orthotist shall [~~may~~] supervise and direct the licensed prosthetist assistant as the supervisor determines. However, the responsibility of the supervisor always specifically extends to having disciplinary action taken against the license of the supervising licensed prosthetist or supervising licensed prosthetist/orthotist for violations of the Act or these rules committed by the licensed assistant.

(3) (No change.)

(4) Assistants may only practice in a facility accredited under §821.29 of this title (relating to Accreditation of Prosthetic and Orthotic Facilities), or a facility that is exempt under the Act, §605.260(e).

(c) Qualifications for licensure as an assistant. [~~The following education and experience are required if applying for an assistant license after the 181st day after the date the board's initial rules are finally adopted and published.~~] The applicant must submit evidence satisfactory to the board of having completed the following:

(1) (No change.)

(2) a clinical residency for assistants of not less than 1,000 hours in prosthetics or 1,000 hours in orthotics, completed in a period of not more than six consecutive months, in a [~~prosthetic and orthotic~~] facility that is accredited under [~~meets~~] §821.29 of this title (relating to Accreditation of Prosthetic and Orthotic Facilities) or a facility that is exempt under the Act, §605.260(e). The resident shall practice under the direct supervision of a licensed prosthetist, licensed orthotist or licensed prosthetist/orthotist, depending on the type of residency. A licensed assistant may supervise a clinical resident, provided a licensed orthotist, licensed prosthetist or licensed prosthetist/orthotist assumes responsibility for the acts of the licensed assistant and the clinical resident. The supervisor's license must be in the same discipline being completed by the clinical resident.

(A) - (E) (No change.)

(d) Beginning and ending a clinical residency for an assistant. Before undertaking a clinical residency for an assistant, the supervisor and clinical resident must notify the board by filing a complete supervision agreement with the board on a form prescribed by the board. The supervisor shall provide the clinical resident and the board with written documentation upon beginning, terminating or completing a clinical residency. If terminating or completing a residency, the written documentation shall indicate the number of hours, which comply with this section that were completed by the clinical resident. [~~Qualifications for licensure as an assistant under time-limited conditions. If applying on or before the 181st day after the date the board's initial rules are finally adopted and published, the applicant must:~~]

[~~(1) be a Texas resident as defined in §821.2 of this title (relating to Definitions) at the time of application; and~~]

[~~(2) submit evidence satisfactory to the board of having practiced within the scope of practice of a prosthetist assistant, prosthetist/orthotist assistant or orthotist assistant, as set out in subsection (b) of this section, in Texas for at least three consecutive years. Evidence may include, but is not limited to, W-2 forms, and affidavits from supervisors, employers, physicians, other health care professionals and patients familiar with the applicant's practice as an assistant~~].

§821.21. Technician Registration.

(a) Purpose. The purpose of this section is to describe the eligibility requirements for a registration as a prosthetic technician or an orthotic technician issued under the Orthotics and Prosthetics Act, (Act), Texas Occupations Code, §605.259 [~~§25~~].

(b) (No change.)

(c) General requirements for technician registration. To qualify for a registration as a technician, an applicant must submit:

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

(3) documentation, acceptable to the board, showing that the applicant has not less than one thousand hours of laboratory experience as:

(A) a prosthetic technician. The experience claimed must meet the definition of the "registered prosthetic technician" as described in §821.2 of this title (relating to Definitions); or

(B) an orthotic technician. The experience claimed must meet the definition of the "registered orthotic technician" as described in §821.2 of this title. [~~;~~]

[~~(C) a prosthetic/orthotic technician. The experience claimed must meet the definition of the "registered prosthetic/orthotic technician" as described in §821.2 of this title.~~]

[~~(d) Special requirements requiring application on or before the 181st day after the board adopts rules. The board shall grant a registration to an applicant who meets the following qualifications.~~]

[~~(1) The applicant must apply for a technician registration on or before the 181st day after rules are adopted.~~]

[(2) The applicant must reside in Texas at time of application for a technician registration.]

[(3) The applicant must provide evidence, satisfactory to the board, that the person practiced as a technician as defined in §821.2 of this title in Texas for three consecutive years preceding the date of application.]

§821.23. Temporary License.

(a) Purpose. The purpose of this section is to describe the eligibility requirements for a temporary license as a prosthetist, orthotist, or prosthetist/orthotist issued under the Orthotics and Prosthetics Act, (Act), Texas Occupations Code, §605.257 [§29].

(b) General requirements. To qualify for a temporary license, a person [an applicant] must:

(1) have become a Texas resident as defined in §821.2 of this title (relating to Definitions), within the 12 month period preceding application for a temporary license;

(2) apply for a license as a prosthetist, orthotist or prosthetist/orthotist under §821.15 of this title (relating to Acquiring Licensure as a Uniquely Qualified Person) or §821.17 (relating to License by Examination); and [intend to remain in Texas];

(3) [be actively engaged in completing the education requirements in subsections (c), (d), or (e) in §821.17 of this title (relating to Licensing by Examination), or clinical residency requirements in subsections (f), (g), or (h) in §821.31 of this title (relating to Standards, Guidelines, and Procedures for a Professional Clinical Residency); and]

[(4)] have either:

(A) practiced orthotics regularly since January 1, 1996; or

(B) been licensed as a prosthetist, orthotist, or prosthetist/orthotist by the state governmental licensing agency in the state in which the applicant resided immediately preceding the applicant's move to Texas. The licensing requirements in that state must be equal to or exceed the requirements of this title.

(c) Requirements for continued practice in Texas [Examination required]. To continue practicing prosthetics and/or orthotics the temporary license holder must meet the requirements of either §821.15 of this title or §821.17 of this title and pass the appropriate board examination as set out in §821.9 of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist). The examination must be passed while the temporary license is current and not expired.

(d) (No change.)

(e) Renewal requirements. A temporary license may be renewed once for one additional one year period if the applicant:

(1) (No change.)

(2) is registered to take the next scheduled examination or has taken an [took or is scheduled to take an] examination under §821.9 of this title during the year immediately preceding the date of the application for temporary license renewal; or

(3) (No change.)

(f) (No change.)

§821.25. Provisional License.

(a) Purpose. This section describes [The purpose of this section is to describe] the eligibility requirements for a provisional license as a prosthetist or orthotist issued under the Orthotics and Prosthetics Act, (Act), Texas Occupations Code, §605.263 [§28]. This section and all [the] provisional licenses issued under this section expire January 1, 2005.

(b) General requirements. To qualify for a provisional license an applicant must:

(1) be practicing comprehensive prosthetic and/or orthotic care in Texas, and not be in violation of the Act or these rules;

(2) not meet the requirements for licensing as a prosthetist or orthotist by October 1, 1998, as described in the Act, §605.254(b) [§821.13 of this title (relating to License by Examination under Special Conditions Requiring Application by the 181st Day After Rules Are Adopted), or §821.9 of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist)];

(3) not be exempt under §§605.301-605.305 [§21] of the Act;

(4) be actively engaged in completing the:

(A) examination [education] requirements in [subsections (c), (d), or (e) in] §821.9 of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist);[or,]

(B) education requirements in subsections (c), (d) or (e) of §821.17 of this title (relating to Licensing by Examination); or

(C) clinical residency requirements in [subsections (f), (g), or (h) in] §821.31 of this title (relating to Standards, Guidelines, and Procedures for a Professional Clinical Residency);

[(5) have completed an associate degree from a college or university accredited by a regional accrediting organization such as the Southern Association of Schools and Colleges that included at a minimum:]

[(A) six semester hours of anatomy and physiology;]

[(B) six semester hours of chemistry or physics; and]

[(C) three semester hours of trigonometry or higher mathematics;]

[(6) have at least 4,500 hours of post graduate clinical experience in either:]

[(A) prosthetics under direct supervision of a licensed prosthetist; or]

[(B) orthotics under the direct supervision of a licensed orthotist.]

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

(e) Renewal requirements.

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

(3) The procedures described in §821.33(b)(3)-(6) [(c)(4)-(6)] and (c)-(g) [(d)-(g)] of this title (relating to License Renewal) shall apply to the renewal of a provisional license.

(f) (No change.)

(g) Examination required. To continue practicing prosthetics and/or orthotics on or after January 1, 2005, the provisional license holder must meet the requirements of §821.17 of this title (relating to Licensing by Examination and pass the appropriate board examination as set out in §821.9 of this title. The examination must be passed on or before January 1, 2005, while the provisional license is current and not expired.

(h) Expiration date [~~of provisional license section~~]. This section expires January 1, 2005.

§821.27. Student Registration.

(a) Purpose. Student registration provides [~~The purpose of student registration is to provide~~] the person practicing the prosthetic and/or orthotic profession with legal authorization while fulfilling the postgraduate requirements for licensure by examination.

(b) Eligibility. The board shall issue or renew a student registration certificate to a person who:

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

(3) has completed [~~competed~~] the academic requirements for a license as a prosthetist, an orthotist, or prosthetist/orthotist, as described in §821.17 of this title (relating to Licensing by Examination); and

(4) is actively engaged in either:

(A) (No change.)

(B) completing the clinical experience described in subsections (c)(1), (d)(1) or (e)(1) of §821.17 of this title; or

(C) applying for or awaiting the results of the appropriate examination, as set out in §821.9 [~~§821.17~~] of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist) and has completed the clinical residency or clinical experience.

(c) The board shall refuse to issue or renew a student registration if the person is not actively engaged in completing the professional clinical residency, the clinical experience, or [~~is applying for or awaiting the results of~~] the examination.

(d) Issuance.

(1) An applicant may be issued one initial student registration in each area: prosthetics, orthotics, or both, depending on the type of clinical residency or clinical experience. The applicant shall note on the application form if the residency is in prosthetics, orthotics, or both.

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

(e) - (i) (No change.)

§821.28. Upgrading a Student Registration, Temporary License or Provisional License.

(a) Application of section. Unless the content clearly indicates otherwise, the term licensee, when used in this section shall include a student registrant, a temporary licensee and a provisional licensee. The term license shall include a student registration, temporary license or provisional license.

(b) Requirements. A license may be upgraded to the regular renewable practitioner license after the licensee:

(1) meets the requirements of §821.17 of this title (relating to License by Examination);

(2) passes the appropriate examination, as set out in §821.9 of this title (relating to Examinations for Licensure as a Prosthetist, Orthotist, or Prosthetist/Orthotist); and

(3) submits the license upgrade fee, as set out in §821.5 of this title (relating to Fees).

(c) Notice to eligible licensees. The board shall send a notice to a licensee who passes the exam of the procedure and the fee required for upgrading a license.

§821.29. Accreditation of Prosthetic and Orthotic Facilities.

(a) Requirement for practice setting of licensees.

(1) A person licensed under the Orthotics and Prosthetics [~~this~~] Act, (Act), Texas Occupations Code, Chapter 605, who practices in Texas shall practice only in facilities accredited under the Act, unless the type of practice is exempted by the Act, §§605.301-605.305 [~~§21~~], or the facility is exempted by the Act, §605.260(e) [~~§26(e)~~].

(2) A facility shall not be required to achieve accreditation under this section if the facility or person(s) providing health care services at the facility do not perform or hold itself or themselves out as performing or offering to perform prosthetics and/or orthotics as defined in the Act, §605.002 [~~§2~~], or §821.2 of this title (relating to Definitions).

(b) Purpose of facility accreditation. The purpose of accreditation is to identify for prospective patients, referral sources, and third-party payers which prosthetic and/or orthotic facilities meet the board's requirements. This section is adopted under the Act, §605.260. All facilities where orthotics and prosthetics are provided by persons licensed or registered under this title must be accredited under these rules, unless the facility is exempted under the Act, §605.260(e).

(c) Accreditation application.

(1) Accreditation applications must include the following information:

(A) - (F) (No change.)

(G) a scaled floor plan indicating the total square feet in [~~of~~] the facility;

(H) the name and Texas license number of the prosthetist, orthotist, or prosthetist/orthotist who is designated as the on-site practitioner in charge and his or her notarized signature. A person who holds a temporary or provisional license or a student registration may not serve as the on-site practitioner in charge;

(I) the name and Texas license number of other licensees of this Act who practice in the facility; [~~and~~]

(J) the signature of the on-site practitioner(s) in charge of the facility; and [~~person who submits the accreditation application that has been notarized~~]

(K) photographs of each room or hallway clearly showing wheelchair accessibility and privacy for patients.

(2) - (6) (No change.)

(d) (No change.)

(e) Requirements for accredited facilities.

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

(5) An accredited facility must be under the clinical on-site direction of a prosthetist, orthotist, or prosthetist/orthotist licensed by the board in the discipline in which the facility sought accreditation. The person shall supervise the provision of prosthetics or orthotics in accordance with the Act and rules and shall be considered the person in charge. To change the designation of the on-site practitioner(s) in charge, the facility shall notify the board in writing of the name and license number of the new on-site practitioner(s) and the date the effective date of the change. The written notice shall be accompanied by the appropriate fee as set out in §821.5 of this title (relating to Fees). The notice and fee shall be submitted to the board before the change is effective.

(6) (No change.)

(7) A facility accredited under the Act shall always prominently display a sign in letters equal to or larger in size or font as the sign provided by the board to each accredited facility [at least one inch in height], containing the name, mailing address and telephone number of the board, a statement informing consumers that complaints against licensees of the facility may be directed to the board, and the toll-free telephone number for presenting complaints to the board about a person or facility regulated or requiring regulation under the Act.

(8) An accredited facility is required to report to the board any change regarding the on-site prosthetist, orthotist, or prosthetist/orthotist who is clinically directing the facility within 30 days after it occurs. The information provided to the board shall be accompanied by the appropriate fee as set out in §821.5 of this title (relating to Fees).

(9) - (10) (No change.)

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

(h) Renewal of accreditation.

(1) - (5) (No change.)

(6) The board shall issue an accreditation renewal to a facility that [who] has met the requirements for renewal. It shall be affixed to or displayed with the original accreditation and is the property of the board.

(i) (No change.)

(j) Reinstatement of accreditation. When a facility fails to renew its accreditation by the expiration date [within the renewal month], the facility is subject to the procedures and fees as follows:

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

(3) If the facility accreditation has been expired for more than one year, the facility may not renew the accreditation [by paying the required renewal fee and a restoration fee that is double the renewal fee]. The facility must submit an application for accreditation as described in subsection (c) of this section in order to obtain board accreditation.

(k) Disciplinary actions.

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

(3) A revocation or suspension of an accreditation may affect [affects] all facilities accredited under the same name, the same owners, or the same corporation [one primary accreditation].

(4) (No change.)

(l) - (n) (No change.)

(o) Safety.

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

(4) Lab/Fabrication area must be separated from other areas by walls and/or rigid doors and have adequate ventilation and lighting.

(5) - (6) (No change.)

(p) - (q) (No change.)

(r) Adding a category to a facility accreditation. To add the prosthetic or orthotic category to a facility accreditation, which is not expired, suspended or revoked, an application shall be completed and submitted to the board on a form provided by the board. The application shall be accompanied by the appropriate fee as set out in §821.5 of this title.

§821.31. Standards, Guidelines and Procedures for a Professional Clinical Residency.

(a) (No change.)

(b) Length of clinical residency. The residency shall consist of at least 1,900 hours in orthotics or prosthetics, including a research project. The 1,900 hours in each discipline must be completed in a period of not more than two consecutive years.

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

(f) Responsibilities of the [The] program director [or his or her designee responsibilities].

(1) (No change.)

(2) The program director [or his or her designee] shall maintain documentation of residents' agreements.

(3) The program director [or his or her designee] shall supervise residents during patient care. Direct supervision of critical care events is required. Indirect supervision of clinical procedures, except critical care events, is allowed throughout the residency. The supervision must be provided by a practitioner licensed in Texas in the discipline being taught. Overall assurance of quality patient care is the ultimate responsibility of the supervising practitioner.

(4) Evaluation of a resident's ability to assume graded and increasing responsibility for patient care must be completed [evaluated] quarterly. This determination is the program director's responsibility, in consultation with members of the teaching staff. The facility administration shall assure that, through the director and staff, each program:

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

(D) provides documentation to the resident, at least quarterly, and to the board upon request and at the termination or completion of the residency, regarding the number of hours of residency that comply with the requirements established in this section that have been completed by the resident.

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

§821.33. License Renewal.

(a) [Purpose. The purpose of this section is to set out the rules governing license renewal.]

[(b)] Application. This section applies to licensees and registrants of the board. Unless the text clearly says otherwise, use of the term licensee shall include both licensees and registrants, and use of the term license shall include both licenses or registrations.

(b) [(c)] General. Paragraph [Paragraphs] (1) [and (2)] of this subsection does [do] not apply to renewal of a provisional or temporary license or a student registration.

(1) When issued, an initial license is valid until the licensee's next birth month, unless the issue date would occur within six months of the licensee's birth month. In those cases the license shall be issued for the one to six-month period plus the next full year. After the initial license period, a licensee must renew the license biennially (every other year).

(2) The license renewal form for licensees shall require the provision of the preferred mailing address, primary employment address and telephone number, and misdemeanor and felony convictions. The supervising licensed prosthetist or orthotist shall sign the license renewal form for the licensed assistant or registered student and show on the form whether the supervisor and supervisee have complied with these rules. [The renewal date of a license shall be the last day of the licensee's birth month.]

(3) Licensees are responsible for renewing the license before the expiration date and shall not be excused from paying additional fees or penalties. Failure to receive notification from the executive director before the expiration date of the licensee shall not excuse failure to file for renewal or late renewal.

(4) The board shall not renew the license of the licensee who is violating the Act or board rules at the time of application for renewal. The renewal of a license shall not be granted to a licensee for whom a contested case is pending, but shall be governed by the Government Code, §2001.054.

(5) The board shall not renew a license or registration if Education Code, §57.491 [~~§57.91~~] (Loan Default Ground for Nonrenewal of Professional or Occupational License) prohibits renewal.

(6) The board shall deny renewal of the license or registration if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, §232.002 (Suspension of License [~~for Failure to Pay Child Support or Comply with Subpoena~~]).

(c) [~~(d)~~] License renewal requirements.

(1) At least 45 days before the expiration date of a person's license, the executive director shall send notice to the licensee at the address in the board's records, of the expiration date of the license, the amount of the renewal fee due and a license renewal form that the licensee must complete and return to the board with the required renewal fee. The return of the completed renewal form following the requirements of paragraph (3) of this subsection shall be considered confirmation of the receipt of renewal notification.

(2) The license renewal form for licensees shall require the provision of the preferred mailing address, primary employment address and telephone number, and misdemeanor and felony convictions. The supervising licensed prosthetist or orthotist shall sign the license renewal form for the licensed assistant and show on the form whether the supervisor and supervisee have complied with these rules.

(3) A licensee has renewed the license when the licensee has mailed the renewal form, the required renewal fee, and the statement of continuing education, if required, to the executive director before the expiration date of the license. The postmark date shall be considered as the date of mailing. The current license will be considered active until the renewal is issued or finally denied.

(4) A licensee must comply with applicable continuing education requirements to renew a license including the audit process described in §821.35 of this title (relating to Continuing Education). Continuing education shall not be required if the applicant is renewing a temporary or provisional license or a student registration.

(5) The board shall issue a license certificate to a licensee who has met the renewal requirements.

(d) [~~(e)~~] Late renewal requirements.

(1) The executive director shall inform a person or facility that [~~who~~] has not renewed a license after a period of more than 30 days after the expiration of the license of the amount of the fee required for late renewal and the date the license expired.

(2) A person or facility whose license has expired [~~for not more than one year~~] may renew the license before the first anniversary date of the license expiration by submitting the license renewal form, the person's proof of completion of continuing education as set out in §821.35 of this title, a statement describing how the person or facility complied with the Orthotics and Prosthetics Act after the license expired, and the appropriate late renewal fee to the executive director. The renewal is effective if mailed to the executive director on or before the first anniversary of the license expiration date. The postmark date shall be considered as the date of mailing.

(A) If paid less than 91 days after the expiration date, the fee due is equal to one and one-half times the renewal fee as set out in §821.5 of this title (relating to Fees).

(B) If paid 91 days or more after the expiration date but before the first anniversary of the expiration date, the fee due is equal to two times the renewal fee as set out in §821.5 of this title.

(C) After the license is renewed the next continuing education reporting period starts on the date the certificate is renewed and continues until the next expiration date.

(3) A person or facility whose license has been expired more than one year may not renew the license. The person or facility may obtain a new license by complying with the current requirements and procedures for obtaining an original license.

(4) After a license is expired and until a person has renewed the certificate, a person may not practice orthotics or prosthetics in violation of the Act.

(5) After an accreditation is expired and until the facility has renewed the accreditation, the facility may not provide orthotic or prosthetic patient care in violation of the Act.

(e) [~~(f)~~] Expiration of license.

(1) A person whose license has expired may not use the title or represent or imply that he or she has the title of "licensed orthotist," "licensed prosthetist," "licensed prosthetist/orthotist," "licensed orthotist assistant," "licensed prosthetist assistant," "licensed prosthetist/orthotist assistant," or use the letters "LO," "LP," "LPO," "LOA," "LPA," or "LPOA," and may not use facsimiles of those titles.

(2) A person who fails to renew a license after one year is required to surrender the license certificate and identification card to the board.

(3) A facility that fails to renew its accreditation shall not represent or imply that the facility is accredited by the board.

(4) A facility that fails to renew its accreditation after one year is required to surrender the accreditation certificate to the board.

(f) [~~(g)~~] Active duty. If a licensee fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America serving outside the State of Texas on the license expiration date, the licensee may renew the license in accordance with this subsection.

(1) The licensee, the licensee's spouse, or an individual having power of attorney from the licensee may request renewal of the license. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the licensee was on active duty serving outside the State of Texas on the license expiration date shall be filed with the board along with the renewal form.

(4) A copy of the power of attorney from the licensee shall be filed with the board along with the renewal form if the individual having the power of attorney executes documents required in this subsection.

(5) A licensee renewing under this subsection shall pay the applicable renewal fee, but not the reinstatement fee or a penalty fee.

(6) A licensee renewing under this subsection shall be required to submit the same amount of continuing education hours as required for regular renewal unless the licensee shows to the satisfaction of the board that a hardship existed which prevented the licensee from obtaining the continuing education hours. Hardships may include medical reasons, combat duty, or assignment to a location where continuing education activities were not available.

(g) Defaulters on Texas guaranteed student loans. The board will not renew the license until a repayment agreement has been reached with the Texas Guaranteed Student Loan Corporation (TGSLC) and a copy of the certification of the repayment agreement from TGSLC is filed with the board office.

§821.35. Continuing Education.

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

(e) Determination of continuing education credits.

(1) For seminars, lectures, presentations, symposia, workshops, conferences and similar activities, 50 minutes shall be considered as one credit and increments of five minutes shall be considered as one-tenth of a credit.

(2) (No change.)

(f) Requirements. Licensees shall attend and complete continuing education each renewal period unless the licensee is exempted under subsection (m) of this section.

(1) (No change.)

(2) Licensees shall be responsible for maintaining a log or other list of continuing education credits earned by the licensee and proof of completion of his or her own continuing education credits, which might include certificates, transcripts from certifying agencies or associations, letters from program sponsors concerning the licensee's attendance and participation, or other documentation satisfactory to the board verifying the licensee's attendance or participation.

(3) (No change.)

(g) (No change.)

(h) Acceptable topics. The hours [~~Of the total hours required, 80%~~] must be directly related to prosthetics, orthotics, physical or occupational therapy, orthopedic, podiatric, pedorthic, physical medicine or other [~~prosthetic or orthotic~~] subjects approved by the board which benefit patient care or service delivery [~~depending on the type of license held, and 20% or less may be related to other topics. If the license is in prosthetics and orthotics, a combination of prosthetic and orthotic topics is allowed~~].

(i) (No change.)

(j) Reporting of continuing education credit.

(1) (No change.)

(2) All licensees may be audited or a [~~A~~] representative sample of the licensees renewing during each month may [~~shall~~] be selected at random for auditing continuing education credits. The following procedures shall apply to the audit.

(A) (No change.)

(B) If selected for an audit, the licensee shall submit copies of certificates, transcripts or other documentation satisfactory to the board, verifying the licensee's attendance, participation and completion of the continuing education credits claimed on the report form.

(C) (No change.)

(3) (No change.)

(k) Failure to complete the required continuing education at renewal time.

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

(3) Credits earned to complete the continuing education requirements for renewal during the additional three months shall only be applied to that continuing education period. Credit may not be carried over to the next period. The next continuing education reporting period starts on the day after the continuing education requirements were fulfilled and continues until the next expiration date.

(l) (No change.)

(m) Qualifying exemptions from the continuing education requirements.

(1) The following licensees are exempt from the requirements of this section if the qualifying event occurred during the 24 months immediate preceding the license expiration date. The licensee is responsible for submitting an affidavit stating the licensee meets the criteria for the exemption accompanied by proof satisfactory to the board:

(A) a licensee who served in the regular armed forces of the United States of America or who served in the armed forces reserves and was called to active duty for a period of more than 60 days during a continuing education period;

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

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

(n) - (o) (No change.)

§821.37. Change of Name and Address.

(a) Notification required. Applicants, licensees, registrants and accredited facilities are responsible for notifying the board of any change(s) of name or preferred mailing address. Accredited facilities are responsible for notifying the board of any change(s) in facility name, preferred mailing address or physical address. Written notification to the board shall be made within 30 days of any change(s). [~~Purpose. The purpose of this section is to set out the responsibilities and procedures for name and address changes.~~]

(b) Address changes. [~~The licensee shall notify the board of a name or preferred mailing address change within 30 days of the change(s).~~]

[~~(c)~~] [~~Notification of address changes shall be made in writing and mailed to the executive director.~~] Address changes shall include the name, mailing address, and zip code [~~codes~~].

(c) [~~(d)~~] Name changes. Before the board will issue another license certificate and identification card, notification of name changes must be mailed to the board [~~executive director~~]. Notification shall include [~~a duly executed affidavit and~~] a copy of a marriage certificate, court decree evidencing the change, or a Social Security card reflecting the licensee's or registrant's new name. The licensee, registrant or accredited facility shall [~~return previously issued license certificates and identification cards and~~] remit the appropriate license, registration or facility accreditation certificate replacement fee as set out in §821.5 of this title (relating to Fees).

§821.39. Complaints.

(a) [~~Purpose. The purpose of this section is to set forth the procedures for processing complaints.~~]

[~~(b)~~] Filing of complaints.

(1) Anyone may complain to the department alleging that a person has violated the Orthotics and Prosthetics Act, (Act), Texas Occupations Code, Chapter 605 [~~Act~~] or these rules.

(2) A person wishing to file a complaint against a person licensed by the board or other person shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the executive director's office. The mailing address is, Texas Board of Orthotics and Prosthetics, 1100 West 49th Street, Austin, Texas 78756-3183. Telephone: (512) 834-4520.

(3) Upon receipt of a complaint, the executive director shall send to the complainant an acknowledgment letter and, if additional information is needed, the board's complaint form, for the complainant to complete and return to the executive director. If the complaint is made by a visit to the executive director's office, the form may be given to the complainant then.

(4) The department shall investigate anonymous complaints if the complaint provides sufficient information and if the information relates to a violation of the Act or this chapter [~~to do so~~].

(b) [~~(c)~~] Investigation of complaints.

(1) The executive director is responsible for resolving complaints.

(2) The department shall investigate a complaint as requested by the executive director, and report the findings to the executive director.

(3) If the executive director determines that the complaint does not come within the board's jurisdiction, the executive director shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency.

(4) The executive director, on behalf of the board, shall, at least as frequently as quarterly, notify the complainant and the respondent of the status of the complaint until its final disposition.

(5) The executive director may recommend that a license be revoked, suspended, or application be denied, or that the licensee be placed on probation or that other appropriate action as authorized by law be taken.

(6) The board may delegate the authority to the executive director to dismiss a complaint. The [~~If the executive director determines insufficient grounds exist to support the complaint, the~~] executive director shall dismiss the complaint and give written notice of the dismissal to the complainant, respondent, and other interested parties if the executive director determines that insufficient grounds exist to support the complaint.

(7) The executive director may issue letters of warning or advisory letters for minor violations of the Act or these rules. These letters may be used as evidence at a disciplinary hearing held concerning conduct of a person committed after receipt of the letter.

(c) [~~(d)~~] Board assistance in processing complaints.

(1) The presiding officer may appoint one board member who is a licensed orthotist and one board member who is a licensed prosthetist to help the executive director in processing complaints. The board may overrule an appointment only upon the vote of four board members to do so.

(2) The presiding officer may appoint one or more licensed prosthetists and orthotists who are not board members to serve as consultants to the executive director. These appointments are subject to the approval by a majority of the board. The consultants may not be paid for their services.

(3) The executive director may call upon one appointed board member and one or more consultants for assistance to resolve a particular complaint, as needed.

(4) Board members who participate in processing a complaint will not participate in the decision concerning a final order in that matter.

(5) An appointed board member or consultant will review the complaint and the proposed action by the executive director when revocation, suspension, or denial of licensure is proposed.

(d) [~~(e)~~] Board oversight of processing complaints.

(1) The executive director will prepare and present a report reflecting the status of the complaints received to the board at each board meeting.

(2) The report will include the number of complaints received, the nature of the complaints made, action taken on the complaint, and the extent to which appointed board members or consultants have helped in processing complaints.

(3) The board will either approve or not approve the executive director's report and provide guidance to help the executive director in processing complaints as appropriate.

(e) [~~(f)~~] Formal disciplinary actions.

(1) The board may take the following formal disciplinary action for a violation of the Act or these rules: deny a license, registration, or facility accreditation; suspend or revoke a license, registration, or facility accreditation; probate the suspension of a license, registration, or facility accreditation; issue a reprimand to a licensee, registrant, or accredited facility, or impose a civil penalty pursuant to the Act, §605.354 [~~§34~~].

(2) The board shall take into consideration the following factors in determining the appropriate action to be imposed in each case:

(A) Severity of the offense, as follows:

(i) Severity Level I violations are those that have or had no significance or a minor significance on health or safety.

(ii) Severity Level II violations are those that have or had the potential to cause an adverse impact on the health or safety of a patient or client, but did not actually have an adverse impact.

(iii) Severity Level III violations are those that have or had an adverse impact on the health and safety of a patient or client;

(B) the danger to the public;

(C) the number of repetitions of offenses;

(D) the length of time since the date of the violation;

(E) the number and type of disciplinary actions taken against the licensee, registrant or accredited facility;

(F) the length of time the licensee has practiced orthotics or prosthetics;

(G) the length of time the registrant has practiced orthotics or prosthetics or worked as a technician,

(H) the length of time the facility has provided orthotics or prosthetics;

(I) the actual damage, physical or otherwise to the patient, client or other person in the workplace;

(J) the deterrent effect of the penalty imposed;

(K) the effect of the penalty upon the livelihood of the licensee, registrant or accredited facility;

(L) any efforts for rehabilitation by the licensee or registrant;

(M) any corrections or changes in the operation of or the staffing of the facility; and

(N) any other mitigating or aggravating circumstances.

(3) [~~2~~] Before institution of formal disciplinary action the department shall give written notice by certified mail, return receipt requested, and regular mail, of the facts or conduct alleged to warrant the proposed action, and the licensee, registrant, or accredited facility shall be given an opportunity to show compliance with the requirements of the Act and these rules.

(4) [~~(3)~~] The written notice will be sent to the last reported address on record for the licensee, registrant, or accredited facility, and state that a request for a formal hearing must be received, in writing, within 14 days of the date of the notice, or the right to a hearing shall be waived and the action shall be taken by default. Notice sent to the last reported address is deemed received by the licensee, registrant, or accredited facility, and a default order may be entered upon failure to timely request a hearing whether or not the notice was received.

(f) [~~(g)~~] Informal hearings.

(1) A licensee, registrant, or accredited facility may request that the executive director consider holding an informal hearing. The executive director has the discretion to grant or deny this request, and will grant the request only if it appears that an informal hearing may resolve the disciplinary matter.

(2) An assigned board member or consultant may attend the informal hearing if requested to do so by the executive director.

(3) The complainant and other interested parties with knowledge of relevant facts will be notified if an informal hearing is to be held, and may attend.

(4) The informal hearing will be conducted in the manner established by the executive director and consistent with department procedures. Parties will be afforded a reasonable opportunity to present their position regarding the matter at issue.

(g) [~~(h)~~] Formal hearings.

(1) If requested in accordance with subsection (e) of this section, a [~~A~~] formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001, and 25 Texas Administrative Code, Chapter 1 (Texas Board of Health).

(2) Copies of the formal hearing procedures are indexed and filed in the executive director's office, Professional Licensing and Certification Division, 1100 West 49th Street, Austin, Texas 78756-3183, and are available for public inspection during regular working hours.

(h) [~~(i)~~] Agreed orders.

(1) Disciplinary actions may be resolved by agreed order any time.

(2) The executive director may negotiate the terms of an agreed order with the licensee, registrant, or accredited facility; however, the agreed order is not effective until accepted by the board.

(i) [~~(j)~~] Probation. Any reasonable term or condition of probation may be included in an order.

§821.41. Professional Standards and Disciplinary Provisions.

(a) General. This section is adopted under the Orthotics and Prosthetics Act, (Act), §605.353 [~~Purpose. The purpose of this section is to set forth the bases for which a license, registration, or facility accreditation may be denied, revoked, suspended, probated, reprimanded, or for which a civil penalty may be imposed~~].

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

(d) Unprofessional or unethical conduct. A license, registration, or facility accreditation may be denied, revoked, suspended, probated, reprimanded, or a civil penalty may be imposed for unprofessional or unethical conduct, as defined in subsections (b) and (c) of this section. Other action which may cause [~~the board to deny~~] a license, registration, or facility accreditation to be denied, not renewed, revoked, suspended, or a civil penalty to be imposed include, but are not limited to:

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

(8) intentionally or negligently failing to supervise and maintain supervision of clinical or technical [~~support~~] personnel, licensed or unlicensed, in compliance with the Act and these rules, or negligently failing to provide on-site supervision for an accredited facility, if designated as the practitioner in charge of the facility;

(9) - (24) (No change.)

(25) fitting a prosthesis or orthosis inaccurately or modifying the prescription without authorization from the prescribing physician; [~~and~~]

(26) providing orthotic care in a non-exempt facility that is not accredited in orthotics by the board; [~~other unprofessional or unethical conduct.~~]

(27) providing prosthetic care in a non-exempt facility that is not accredited in prosthetics by the board;

(28) failing to truthfully respond in a manner that fully discloses all information in an honest, materially responsive and timely manner to a complaint filed with or by the board; and

(29) other unprofessional or unethical conduct.

(e) Gross negligence or malpractice. A license, registration, or facility accreditation may be denied, revoked, suspended, probated, reprimanded, or a civil penalty may be imposed for gross negligence or malpractice, which includes, but is not limited to, the following.

(1) (No change.)

(2) Performing an act or omission constituting malpractice, such as:

(A) failing to perform services or provide products for which compensation has been received or failing to perform services or provide products with reasonable care, skill, expedience, and faithfulness;

(B) (No change).

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

(h) Disciplinary actions [~~Violations~~]. A license, registration, or facility accreditation may be denied, not renewed, revoked, suspended, [~~probated, reprimanded,~~] or a civil penalty may be imposed for violations of this Act or these rules. The executive director may issue a reprimand, a letter of concern, an advisory letter, or a cease and desist letter.

§821.43. Licensing Persons with Criminal Backgrounds.

(a) Purpose. The purpose of this section is to comply with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the Texas Occupations Code, Chapter 53 [Texas Civil Statutes, Article 6252-13d (Suspension, Revocation, or Denial of License to Persons with Criminal Backgrounds; Guidelines and Application of Law)]. This section is designed to establish guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain licenses. Unless the text clearly says otherwise, use of the term licensee shall include both licensees and registrants, and use of the term license shall include both licenses or registrations.

(b) Guidelines. The board may deny an application or revoke, suspend, or place on probation an existing license or registration if an applicant, licensee, or registration holder has been convicted of a crime (felony or misdemeanor) according to the following guidelines.

(1) (No change.)

(2) The factors and evidence listed in the Texas Occupations Code, Chapter 53, [Texas Civil Statutes, Article 6252-13c §4 (Eligibility of Persons with Criminal Backgrounds for Certain Occupations, Professions, and Licenses)] shall be considered in determining eligibility for a license or registration.

(3) The executive director will review the criminal convictions and determine what disciplinary action should be taken, and may ask that an appointed board member or consultant help in making the decision. The executive director shall give written notice to the person that the board intends to deny, suspend, or revoke the license after hearing in accordance with the provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the Texas Occupations Code, Chapter 53. The written notice must in include:

(A) the reasons for the decision;

(B) notice that the person, after exhausting administrative appeals, may file an action in district court of Travis County, Texas for review of the evidence presented to the department and its decision;

(C) notice that the person must begin the judicial review by filing a petition with the court within 30 days after the board's action is final and appealable; and

(D) notice of the earliest date the person may appeal.

(c) (No change.)

§821.45. Default Orders.

(a) If a right to a hearing is waived under §821.39 of this title (relating to Complaints), the board shall consider approving an order taking appropriate disciplinary action against the licensee or applicant as described in the written notice to the licensee or applicant.

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

§821.47. Surrender of License.

(a) Voluntary surrender [Surrender by licensee].

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

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

§821.49. Suspension of License Under the Family Code [for Failure To Pay Child Support].

(a) This section carries out the provision of the Family Code, Chapter 232 (Suspension of License [for Failure to Pay Child Support or Comply with a Subpoena]).

(b) On receipt of a final court or attorney general's order suspending a license due to failure to pay child support or failure to comply with a court order related to child custody, the executive director shall immediately determine if the board has issued a license to the person [obligor] named on the order, and, if a license has been issued:

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

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

§821.51. Civil Penalty.

(a) A person who violates the Texas Orthotics and Prosthetics Act, (Act), Texas Occupations Code, Chapter 605 is subject to a civil penalty of $200 for the first violation and $500 for each subsequent violation. At the request of the board, the attorney general shall bring an action in the name of the state to collect a civil penalty under this section.

(b) Each day a violation of the Act, §605.251 and §§605.351-605.353 [§22] continues is a separate violation for the purpose of this section.

(c) (No change.)

§821.53. Program Accessibility.

Board programs will be available in the English language. Any [An] individual may access the board's programs including board meetings and examinations in a language other than English if the individual provides an interpreter or translator at the individual's expense. The Office of Language Services, or other appropriate office within the department is contacted for assistance with unique foreign language requests.

§821.55. Consumer Notification.

Display of notice of licensure shall be as follows.

(1) All licensees, registrants and accredited facilities [Prosthetists/orthotists licensed to practice prosthetics/orthotics] shall prominently display a notice in a waiting room or other area where it shall be visible to the patients. This notice shall be posted at all facilities where the licensee(s) practices and all board accredited facilities. This does not include facilities that the licensee visits to treat patients, such as hospitals, nursing homes or patients' homes.

(2) The notice shall be printed on a sign in letters equal to or larger in size or font as the sign provided by the board to each accredited facility [or surface measuring at least 8-1/2 inches by 11 inches, having a white background and black letters of at least 24 points, bold print, with at least 0.5 points between lines]. Script or calligraphy prints are not allowed. The notice shall be worded according to the following specifications.

Figure: 22 TAC §821.55(2) (No Change.)

§821.57. Petition for the Adoption of a Rule.

(a) General. The following procedures shall apply to [Purpose. The rule's purpose is to delineate the Texas Board of Orthotics and Prosthetics' procedures for] the submission, consideration, and disposition of a petition to the board to adopt a rule.

(b) Submission of the petition.

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

(5) The executive director shall submit the petition to the board for its consideration and disposition at the first regular board meeting scheduled after receipt of the petition. If the next meeting is within 10 days of the date the petition is received, the executive director shall submit the petition to the board at the next regular meeting of the board.

(c) Denial or acceptance of the petition. The board may deny or accept the petition in whole or in part.

(1) If the board denies the petition, the executive director will notify the petitioner in writing of the board's action to deny and state the reason(s) for the denial.

(2) If the board accepts the petition the board will initiate the rule making process within 120 days from the date of submission of the petition under the Administrative Procedures Act, Government Code, Chapter 2001, Subchapter B.

(d) [~~(c)~~]Subsequent petitions to adopt the same or similar rule. The executive director may refuse to forward subsequent petitions for the adoption of the same or similar rule submitted within six months after the date of the initial petition.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205228
Stanley E. Thomas
Presiding Officer
Texas Board of Orthotics and Prosthetics
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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22 TAC §821.11, §821.13

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

The repeals are proposed under Texas Occupations Code, Chapter 605, which provides the Texas Board of Orthotics and Prosthetics with the authority to adopt rules concerning the regulation of orthotists and prosthetists.

The repeals affect the Texas Occupations Code, Chapter 605.

§821.11. Licensing by Exception form the License Requirements.
§821.13. License by Examination under Special Conditions Requiring Application by the 181st Day After Rules Are Adopted.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205229
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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 56. FAMILY PLANNING

The Texas Department of Health (department) proposes the adoption of new §§56.1-56.19 and the repeal of §§56.101-56.104, 56.201-56.209, 56.301-56.306, 56.401-56.404, 56.501-56.525, 56.601-56.607, 56.701-56.703, 56.801-56.802, and 56.901-56.904 and concerning the Family Planning Program. Specifically, the new sections concern applicability of family planning requirements; definitions; purposes; family planning advisory committee; maximum rates and specific codes; range of methods; abortion statement; requirements for reimbursement of family planning services; records retention; prompt service; freedom of choice; confidentiality; eligibility for family planning services; consent; family planning for adolescents; and civil rights.

Government Code, Chapter 2110 requires that each state agency adopt rules on advisory committees. The rules must state the purpose of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will automatically be abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1998, the board adopted §56.104 of this title (relating to Family Planning Advisory Committee). The committee has provided advice to the Texas Board of Health (board) and the department relating to comprehensive family planning services. Section 56.104 states that the committee will automatically be abolished on January 1, 2003. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until January 1, 2007.

New §56.4 updates provisions relating to the operation of the committee. Specifically, the new section provides that the committee shall continue in existence until January 1, 2007; provides that the committee shall appoint the presiding officer; and establishes the Informational and Educational Subcommittee.

Government Code, §2001.039 also requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 56.101-56.104, 56.201-56.209, 56.301-56.306, 56.401-56.404, 56.501-56.525, 56.601-56.607, 56.701-56.703, 56.801-56.802, and 56.901-56.904 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, all the existing rules in Chapter 56 are being repealed, and new rules are being proposed to make them more accessible, understandable, and usable.

The department published a Notice of Intention to Review the sections as required by Government Code §2001.039 in the *Texas Register* on May 19, 2000 (25 TexReg 4598). No comments were received.

Cindy Jones, Ph.D., R.N., has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of administering the sections as proposed. The repeal of existing sections and the adoption of the new sections make no substantive changes that would require increased funding or that would generate new revenue, and no changes to the operations of state or local governments as providers of family planning services are anticipated.

Dr. Jones has determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of enforcing or administering the sections will be increased access to and understanding of program requirements, policies, and procedures after repeal of the current rules and creation of a comprehensive Family Planning Program Manual for

providers. Program providers should experience indirect benefits and impacts because organizing most program requirements in a program manual will enable the department to respond more quickly and with greater flexibility to changes in medical and clinical practice and to provide more detail and clarity to program providers. Outdated and contradictory requirements also have been repealed. There are no anticipated costs to micro-businesses or small businesses because no substantive changes in services that would require increased funding or that would generate increased program income are being proposed, and no changes to providers' operations are anticipated. There are no anticipated economic costs to persons who are required to comply with the sections as proposed, because the new sections are intended only to simplify, consolidate, update, and streamline current requirements. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Cindy Jones, Ph.D., R.N., Texas Department of Health, Bureau of Women's Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7796, fax (512) 458-7203. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

25 TAC §§56.1- 56.19

The adoption of the new sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.1. Applicability of Family Planning Requirements.

The requirements in each section apply to Titles V, X, XIX (Medicaid), and XX family planning programs unless otherwise specified within the section. Family planning contractors are also required to observe all guidelines and operating procedures outlined in the Family Planning Program Policies Manual and/or Title V Manual as required by their contracts. In addition to the requirements set out in Chapter 56, Title XIX (Medicaid) providers must comply with the terms and conditions of the Provider Agreement signed by all providers as a condition of participation in the Texas Medical Assistance Program.

§56.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings.

(1) Board--The Texas Board of Health.

(2) Client--Any individual seeking assistance from a Texas Department of Health contractor or provider to meet their family planning goals.

(3) Committee--The Family Planning Advisory Committee.

(4) Contraception--The means of pregnancy prevention. Methods include permanent methods and temporary methods.

(5) Contractor--Any entity that contracts with the Texas Department of Health to provide Title V, X, and/or XX family planning services.

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

(7) DHS--The Texas Department of Human Services.

(8) Family planning--The process of establishing the preferred number and spacing of one's children, selecting the means to achieve the goals, and effectively using that means.

(9) Family planning services--A public health care system targeting low-income women, men, and adolescents that is designed to enable people voluntarily to limit their family size or to space their children.

(10) Intended pregnancy--Pregnancy a woman reports as timed well or desired at the time of conception.

(11) Medicaid--Title XIX of the Social Security Act.

(12) Provider--Any entity that receives Texas Department of Health funding to provide family planning services.

(13) Region--Any of the public health regions established by the Texas Department of Health.

(14) Title V family planning program--Grants for the provision of family planning services under the Maternal and Child Health Act, 42 United States Code §701 et seq.

(15) Title X family planning program--Grants for the provision of family planning services under the Public Health Service Act, 42 United States Code §300 et seq.

(16) Title XIX family planning program--Family planning services provided under Title XIX (Medicaid) of the Social Security Act, 42 United States Code §1396 et seq.

(17) Title XX family planning program--Grants for the provision of family planning services provided under the Social Services Block Grant, 42 United States Code §1397 et seq.

§56.3. Purposes.

The purposes of family planning services are:

(1) to affect positively the outcome of future pregnancies;

(2) to increase the proportion of intended pregnancies; and

(3) to improve the health status of Texas communities.

§56.4. Family Planning Advisory Committee.

(a) An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Family Planning Advisory Committee.

(2) The committee is established under the Health and Safety Code, §11.016 which allows the board to establish advisory committees.

(3) The committee shall comply with the requirements of 42 United States Code §300a-4, 42 Code of Federal Regulations §59.6, and the Title X Program Guidelines for Project Grants for Family Planning Services by appointment of a subcommittee to review and approve informational and educational materials developed or made available under Title X of the Public Health Service Act.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, relating to state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board and program staff in the area of comprehensive family planning services. The committee process affords the opportunity for participation in the development, implementation, and evaluation of the program by persons broadly representative of all significant elements of the population to be served, and by persons in the community knowledgeable about the needs for family planning services.

(d) Tasks.

(1) The committee shall evaluate, on an ongoing basis, the family planning needs of the state and the family planning program; make recommendations for the program's improvement; and review and make recommendations regarding proposed rules, policy revision and development.

(2) The committee shall advise the board concerning rules relating to the family planning program.

(3) The committee shall carry out any other tasks given to the committee by the board.

(e) Committee abolished. By January 1, 2007, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of 15 members.

(1) The composition of the committee shall include five family planning consumer representatives and ten non-consumer representatives. The composition of the committee shall reflect the diversity of the state's citizens and consumers, with regard to ethnicity, race, age, gender, geographic location, and economic status. Each member shall represent all the citizens of the state in all the committee's deliberations and decisions.

(2) The members of the committee shall be appointed by the board as follows:

(A) five family planning consumers, with at least one male representative; and

(B) ten non-consumer members, including the following:

(i) two primary care physicians currently licensed by the Texas State Board of Medical Examiners and currently involved in the delivery of family planning services. One physician must be certified by the American College of Obstetricians and Gynecologists or its equivalent and one physician must have a practice that includes adolescents;

(ii) one women's health care nurse practitioner with family planning experience, currently licensed by the Board of Nurse Examiners for the State of Texas;

(iii) four family planning provider agency administrators;

(iv) one reproductive health educator;

(v) one presiding officer of the Regional Coordinating Chairpersons' Subcommittee;

(vi) one representative of client self support services from DHS.

(g) Terms of office. The term of office of each member shall be six years, except for the presiding officer of the Regional Coordinating Chairpersons' Subcommittee, who shall be appointed for a two-year term.

(1) Members shall be appointed for staggered terms so that the terms of members shall expire on December 31st of each even-numbered year.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The committee shall select from its members the presiding officer and assistant presiding officer.

(1) Each officer shall serve until December 31st of each even-numbered year. Each officer may holdover until his or her replacement is elected.

(2) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled by vote of the committee.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) Meetings. The committee shall meet at least semiannually to conduct committee business.

(1) A meeting may be called by agreement of department staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A simple majority of the members of the committee shall constitute a quorum for the purpose of transacting official business.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(7) The agenda for each committee meeting shall include an opportunity for any person to address the committee on matters relating to committee business. The presiding officer may establish procedures for such public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the members are assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the

term for which the member is appointed because of illness or disability, is absent from more than half of the committee and subcommittee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(k) Staff. Staff support for the committee and its subcommittees shall be provided by the department.

(l) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once a quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer may also appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(4) The committee shall have a standing subcommittee to coordinate the activities of family planning providers at a regional level. The Regional Coordinating Chairpersons' Subcommittee (RCCS) shall be comprised of chairpersons of the Regional Coordinating Committees (RCC). The regional committees shall be comprised of representatives from the family planning providers in the region.

(A) The RCCS shall elect a presiding officer (chairperson) and assistant presiding officer from its membership to serve a two-year term to begin serving on January 1 of each odd-numbered year. Each officer shall serve until December 31st of each even-numbered year.

(B) The presiding officer shall preside at all committee meetings at which he or she is in attendance, call meetings in accordance with this section, appoint workgroups of the committee as necessary, and cause proper reports to be made to the committee.

(C) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of the presiding officer becomes vacant, the assistant presiding officer will serve until a successor is elected to complete the unexpired portion of the term of the office of presiding officer.

(D) A member shall not serve consecutive terms as presiding officer and/or assistant presiding officer.

(E) RCCS members are elected from each of the Regional Coordinating Committees to serve two-year terms to begin serving on January 1 of each even-numbered year. Each member shall serve until December 31st of each even numbered year. A member shall serve no more than two consecutive terms.

(5) The committee shall appoint a standing subcommittee of five to nine members who are broadly representative of the state to review and approve prior to their distribution, as required by federal law, Title X informational and educational material developed or made available under the project. The subcommittee will be known as the Informational and Educational Subcommittee.

(A) The Reproductive Health Educator from the committee shall serve as the presiding officer.

(B) Members will serve two-year terms to begin serving on January 1 of each odd-numbered year. Each member shall serve until December 31st of each even-numbered year.

(C) A member shall serve no more than two consecutive terms. Any vacancies shall be filled by appointment of the committee.

(D) The Informational and Educational Subcommittee may delegate responsibility for the review of the factual, technical, and clinical accuracy to appropriate project staff. However, final approval of the Informational and Educational materials rests with the committee.

(6) The Informational and Educational Subcommittee must:

(A) consider the educational and cultural backgrounds of the individuals to whom the materials are addressed;

(B) consider the standards of the population or community to be served with respect to such materials;

(C) review the content of the material to assure that the information is factually correct;

(D) determine whether the material is suitable for the population or community to which it is to be made available; and

(E) establish a written record of its determinations.

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board, the status of any rules which were recommended by the committee to the board, and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) The report shall cover the meetings and activities in the immediately preceding 12 months and shall be filed with the board by January 31st of each year. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process and following the department requirements.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by department staff.

§56.5. Maximum Rates and Specific Codes.

For payment of purchased counseling, educational, medical, and sterilization family planning services funded by grants under Titles V, X, and XX, maximum rates are established by the department according to specific diagnosis and procedure codes. The Texas Health and Human Services Commission sets fees, charges, and rates for family planning services provided under Title XIX (Medicaid).

§56.6. Range of Methods.

All Federal Drug Administration (FDA) approved methods of contraception must be made available to the client, either directly or by referral to another provider of contraceptive services. All brands of the different contraceptive methods need not be made available, but each major contraceptive category must be made available.

§56.7. Abortion Statement.

Abortion is not considered a method of family planning and is not eligible for reimbursement under Title V, Title X, Title XIX (Medicaid), or Title XX family planning.

§56.8. Requirements for Reimbursement of Family Planning Services.

The department shall reimburse Title XIX providers and family planning contractors for services provided in compliance with program standards, policies and procedures, and contract requirements unless payment is prohibited by law.

§56.9. Records Retention.

Providers must maintain for the time period specified by the department all records pertaining to client services, contracts, and payments. Title XIX (Medicaid) record retention requirements are found in 1 Texas Administrative Code §354.1003 (relating to Retention of Records). The department contractors must follow contract provisions and the department's Retention Schedule for Medical Records. All records relating to services must be accessible for examination at any reasonable time to representatives of the department and as required by law.

§56.10. Prompt Service.

Medicaid clients requesting family planning assistance must be offered services within 30 days of request.

§56.11. Freedom of Choice.

Clients have the right to freely choose family planning methods and sources for services. Clients must not be subjected to any coercion to receive services.

§56.12. Confidentiality.

The department and providers must ensure the safeguarding of client family planning information. Clients must give written permission prior to the release of any personally identifying information. This shall not be interpreted to limit access to client records by department staff or their authorized representatives.

(1) The provider must ensure client confidentiality and provide safeguards for clients against the invasion of personal privacy.

(2) All personnel (both paid and volunteer) must be informed during orientation of the importance of keeping information about a client confidential.

(3) Clients' records must be monitored to ensure access is limited to appropriate staff.

(4) The client's preference of methods of follow-up contact must be documented in the client's record.

(5) Each client must receive verbal assurance of confidentiality and an explanation of what confidentiality means.

§56.13. Eligibility for Family Planning Services.

Eligibility is determined following the requirements specified in the Family Planning and Title V Policy Manuals. Title XIX (Medicaid) eligibility is determined by the guidelines set by the Texas Department of Human Services. Individuals who receive Medicaid are eligible for family planning medical, counseling, and educational services. Providers must not deny family planning services to eligible clients because of their inability to pay for services.

§56.14. Consent.

A client who is a minor may request and consent to family planning services without the consent of the minor's parent, managing conservator, or guardian as authorized by federal and state law and regulations. A provider may not require consent for family planning services from the spouse of a married client.

§56.15. Family Planning for Adolescents.

(a) Adolescents age 17 and younger must be provided individualized family planning counseling and family planning medical services that meet their specific needs within 2 weeks of request.

(b) The provider must ensure that:

(1) counseling for adolescents encourages them to discuss their family planning needs with a parent, an adult family member, or other trusted adult;

(2) counseling for adolescents includes information on use of all medically approved birth control methods including abstinence;

(3) appointment schedules are flexible enough to accommodate access for adolescents requesting services;

(4) for the adolescent electing a non-prescriptive method, full participation in family planning medical services is encouraged but may be deferred by the client; and

(5) the adolescent is assured that all services are confidential and that any necessary follow-up contact will also protect the client's privacy.

§56.16. Civil Rights.

The department and providers make family planning and genetic services available without regard to marital status, parenthood, handicap, age, color, religion, sex, ethnicity, or national origin. The provider must comply with Title VI of the Civil Rights Act of 1964 (Public Law 88-352); §504 of the Rehabilitation Act of 1973 (Public Law 93-112); The Americans with Disabilities Act of 1990 (Public Law 101-336), including all amendments to each; and all regulations issued pursuant to these Acts.

§56.17. Contract Requirements for the Title XIX (Medicaid) Family Planning Genetics Program.

(a) A genetic service agency provider may contract with the department for Title XIX reimbursement for family planning genetic diagnostic and counseling services under the following conditions.

(1) The medical director of the genetic services agency provider is a clinical geneticist (MD or DO). The clinical geneticist must meet the criteria established by the American Board of Medical Geneticists (ABMG).

(2) A team of professionals provides the genetic diagnostic and counseling services. The team must consist of at least a clinical geneticist and at least one of the following: a nurse (RN), a genetic associate (MS), a social worker (MSW), a medical geneticist (PhD), or a genetic counselor (MS). The members of the team must meet the criteria established by ABMG or work under the direct supervision of a clinical geneticist. Administrative and support staff may also be involved.

(3) The agency provider's records must contain multiple indexing for easy retrieval of information (by client name, by client number, and by syndrome, according to the International Classification of Diseases (current edition) with Clinical Modifications), and must comply with the department's records requirements.

(4) The agency provider must arrange for full medical referral services since genetic disorders often encompass several health problems. Independent consultant, laboratory, and radiology services must be billed through the genetic services agency provider under contract with the department.

(5) Genetic counseling must be provided face-to-face by a clinical geneticist or under the direct supervision of a clinical geneticist.

(6) Services provided by a specialized genetics agency provider must be under a written subcontractual agreement with the prime contractor. The department has the right to approve all subcontractual agreements.

(7) Any applicable state licensure or certification requirements must be met.

(b) Clinical laboratories that are part of the genetic services agency provider and external clinical laboratories used by genetic services agency providers must be directed by a clinical laboratory geneticist as defined by the ABMG. In some cases, the department may approve selected laboratory tests to be conducted by regular clinical laboratories if these laboratories demonstrate the ability to perform these tests. All clinical laboratories must be certified by Title XVIII for services provided and further approved for participation in the Title XIX program.

§56.18. Family Planning Genetics Services Provided.

Family planning genetics services must be prescribed by a physician (MD or DO) and have implications for reproductive decisions. Services may include the following, based on the client's needs:

(1) health history and detailed family genetic history;

(2) medical genetics physical examination;

(3) psychosocial assessment;

(4) medical genetics counseling;

(5) psychosocial genetic counseling;

(6) follow-up counseling;

(7) amniocentesis; and

(8) laboratory services.

§56.19. Limitations of Family Planning Genetics Services.

For the Title XIX Family Planning Genetics Program, the following types of services are not allowed:

(1) genetic services for conditions that usually do not have serious psychosocial or medical implications for the client; and

(2) prenatal diagnosis for sex determination of the fetus alone without implications for genetic diseases.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205147
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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CHAPTER 56. FAMILY PLANNING
SUBCHAPTER A. PROGRAM INFORMATION

25 TAC §§56.101- 56.104

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.101. Applicability of Family Planning Requirements.
§56.102. Definition.
§56.103. Purposes.
§56.104. Family Planning 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 August 7, 2002.

TRD-200205148
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER B. CLIENT RIGHTS AND ELIGIBILITY

25 TAC §§56.201- 56.209

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.201. Prompt Service.
§56.202. Freedom of Choice.
§56.203. Priorities.
§56.204. Confidentiality.
§56.205. Eligibility for Family Planning Services.
§56.206. Voluntary Services.
§56.207. Consent.
§56.208. Civil Rights.
§56.209. Client Contributions or Donations.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205149
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Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER C. PROVIDER PROGRAM REQUIREMENTS

25 TAC §§56.301 - 56.306

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.301. Qualifications of Agency Providers.
§56.302. Types of Providers.
§56.303. Family Planning Agency Provider Contract.
§56.304. Obligation to Provide Services.
§56.305. Subcontracts and Physician Agreements.
§56.306. Client Copayment.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205150
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Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER D. PURCHASED SERVICES

25 TAC §§56.401 - 56.404

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.401. Purchased Counseling and Educational Services.
§56.402. Medical Services.
§56.403. Elective Sterilization.
§56.404. Maximum Rates and Specific Codes.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205151
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Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER E. FAMILY PLANNING AGENCY STANDARDS TITLES V, X, XIX, AND XX

25 TAC §§56.501 - 56.525

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.501. Standards for Eligibility and Client Payments (Title XX).
§56.502. Distinction Between Service Delivery Standards and Requirements for Reimbursement of Family Planning Services.
§56.503. Client Assessment: Health History, Physical Examination, and Laboratory Tests.
§56.504. Education and Counseling.
§56.505. Written Informed Consent.
§56.506. Office or Medical Clinic Visits.
§56.507. Management and/or Referral for Abnormal Findings.
§56.508. Provision of Contraceptive Method.
§56.509. Family Planning Services for Adolescents.
§56.510. Pregnancy Testing.
§56.511. Documentation.
§56.512. Range of Methods.
§56.513. Confidentiality.
§56.514. Privacy.
§56.515. Timeliness.
§56.516. Protection against Discrimination.
§56.517. Voluntary Participation.
§56.518. Client Understanding.
§56.519. Staff Qualifications.
§56.520. Staff Development.
§56.521. Emergencies.
§56.522. Community Participation/Outreach/Education.
§56.523. Provider Protocols.
§56.524. Accessibility to Services.
§56.525. Quality Assurance.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205152
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Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER F. ADMINISTRATIVE REQUIREMENTS FOR AGENCY PROVIDERS

25 TAC §§56.601 - 56.607

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.601. Eligibility Determination.
§56.602. Billing.
§56.603. Billing Deadlines.
§56.604. Use of Reimbursements.
§56.605. Donated Services Billed.
§56.606. Payment Limited to Private Pay Amount.
§56.607. Records Retention.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205153
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER G. GENETIC SERVICES

25 TAC §§56.701 - 56.703

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.701. Contract Requirements for the Title XIX Family Planning Program.

§56.702. Services Provided.

§56.703. Limitations of Services.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205154
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER H. FAMILY PLANNING PROGRAM SERVICES PROVIDED BY TEXAS DEPARTMENT OF HEALTH DIRECT DELIVERY STAFF, FAMILY HEALTH SERVICES NURSES, AND CONTRACTED HEALTH PROVIDERS

25 TAC §56.801, §56.802

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.801. Direct Services Provided by Texas Department of Health Direct Delivery Staff.

§56.802. Family Planning Services Provided by Texas Department of Health Family Health Services Nurses and Contracted Health Providers.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205155
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER I. TEXAS DEPARTMENT OF HEALTH AIDS PREVENTION

25 TAC §§56.901 - 56.904

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

The repeals of existing sections are proposed under Health and Safety Code, §12.001. That section provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeals affect Health and Safety Code, Chapter 33; Human Resources Code, Chapter 32; and implement Government Code §2001.039.

§56.901. Patient Education.

§56.902. Basic HIV Risk Assessment.

§56.903. Human Immunodeficiency Virus (HIV) Testing and Counseling.

§56.904. Protection of Confidentiality.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205156
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 401. SYSTEM ADMINISTRATION SUBCHAPTER L. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

25 TAC §§401.681 - 401.693

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

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeals of §§401.681 - 401.693 of Chapter 401, Subchapter L, concerning TDMHMR In-Home and Family Support Program. New §§411.401 - 411.414 of new Chapter 411, Subchapter I, concerning the same, which would replace the repealed sections, are contemporaneously proposed in this issue of the *Texas Register*.

The repeals would allow for the adoption of new sections governing the same matters.

Cindy Brown, chief financial officer, has determined that for each year of the first five years the proposed repeals are in effect, the

proposed repeals do not have foreseeable implications relating to cost or revenue of the state or local governments.

Debra Hendrich, coordinator, TDMHMR In-Home and Family Support Program, has determined that, for each year of the first five years the proposed repeals are in effect, the public benefit expected as a result of the adoption of the new rules is the promulgation of clear and distinct requirements for administering the TDMHMR In-Home and Family Support Program. It is anticipated that there would be no economic cost to persons required to comply with the proposed repeals.

It is anticipated that the proposed repeals will not affect a local economy.

It is anticipated that the proposed repeals will not have an adverse economic effect on small businesses or microbusinesses because the rules did not place requirements on small or microbusinesses.

Written comments on the proposal may be sent to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

These sections are proposed for repeal under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and §535.002(a), which requires TDMHMR to adopt rules, procedures, and standards to implement and administer Chapter 535 of the Texas Health and Safety Code.

These proposed sections would affect Chapter 535 of the Texas Health and Safety Code.

§401.681. Purpose.

§401.682. Application.

§401.683. Definitions.

§401.684. Allowable and Unallowable Services.

§401.685. Eligibility Determination.

§401.686. Processing and Evaluating Requests and Distributing Assistance.

§401.687. Administrative Implementation.

§401.688. Appeal.

§401.689. Program Standards and Quality Management.

§401.690. Data Collection.

§401.691. Exhibit.

§401.692. References.

§401.693. Distribution.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205234
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 206-5216

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CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES

SUBCHAPTER I. TDMHMR IN-HOME AND FAMILY SUPPORT PROGRAM

25 TAC §§411.401 - 411.414

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§411.401 - 411.414 of new Chapter 411, Subchapter I, concerning TDMHMR In-Home and Family Support Program. Existing §§401.681 - 401.693 of Chapter 401, Subchapter L, concerning the same, which the new sections would replace, are contemporaneously proposed for repeal in this issue of the *Texas Register*.

The proposed new rules describe the requirements for administering the TDMHMR In-Home and Family Support Program.

Currently, TDMHMR In-Home and Family Support Program assistance may be used only for those needs related to an eligible person's mental disability. The proposed new rules would allow assistance to be used for needs related to an eligible person's co-occurring physical disability as well. Additionally, the proposed new rules would permit eligible persons and families to use assistance to pay for items that directly support the person to live in his/her natural home, that integrate the person into the community, or that promote the person's self-sufficiency.

In the proposed new rules the definition of "emergency" would be expanded to include a documented impending psychiatric hospitalization of a person. The list of allowable costs would be revised to be consistent with related codes used by administering agencies and would include vendor fiscal intermediary fees as well as limitations on certain costs. Residency eligibility would be expanded to include a person leaving an institutional setting and moving into a home in the community. The proposed new rules would not contain the requirement to assess a $1 copayment for persons and families with income below 105% of the Texas median income level. The procedures for determining need eligibility would be clarified and expanded.

The proposed rules would require the issue of employment-related expenses to be addressed in cases in which the type and amount of services to be purchased with assistance would result in the person or family being considered an employer. The rules would also require administering agency staff and the person or family to identify the specifications for an architectural modification project and the required contractor qualifications. The written plan would require two additional statements; one concerning a person or family being a child support obligor and another concerning the resolution of any disputes with a provider, vendor, or contractor who is paid with assistance. The approval process for the written plan would be expanded and include a 10-day time frame for the administering agency to act.

The proposed new rules would permit program funds to be used for program indirect costs and would identify the penalties that an administering agency may impose on a recipient if the recipient does not comply with his/her written plan. Additionally, the rules would explicitly state which determinations made by the administering agency could be appealed by the person or family. Data collection requirements for administering agencies would no longer be contained in rule.

Cindy Brown, chief financial officer, has determined that for each year of the first five years the proposed new rules are in effect, enforcing or administering the rules does not have foreseeable

significant implications relating to cost or revenue of the state or local governments because the proposed new rules are not significantly different from the rules proposed for repeal.

Debra Hendrich, coordinator, TDMHMR In-Home and Family Support Program, has determined that, for each year of the first five years the proposed new rules are in effect, the public benefit expected is the promulgation of clear and distinct requirements for administering the TDMHMR In-Home and Family Support Program. It is anticipated that there would be no additional economic cost to persons required to comply with the proposed new rules because the rules do not impose any more requirements on such persons than those contained in the rules proposed for repeal.

It is anticipated that the proposed new rules will not affect a local economy because the rules do not significantly alter the requirements contained in the rules proposed for repeal.

It is anticipated that the proposed new rules will not have an adverse economic effect on small businesses or microbusinesses because the rules do not place requirements on small or microbusinesses.

Written comments on the proposal may be sent to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

These sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and §535.002(a), which requires TDMHMR to adopt rules, procedures, and standards to implement and administer Chapter 535 of the Texas Health and Safety Code.

These proposed sections would affect Chapter 535 of the Texas Health and Safety Code.

§411.401. Purpose.

The purpose of this subchapter is to describe the requirements for administering the TDMHMR In-Home and Family Support Program.

§411.402. Application.

This subchapter applies to administering agencies designated by TDMHMR to administer the TDMHMR In-Home and Family Support Program.

§411.403. Definitions.

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

(1) Adaptive aid--A device that enables a person to perform or participate in daily living activities or to control his or her living environment.

(2) Administering agency--An entity that TDMHMR designates to administer the TDMHMR In-Home and Family Support Program in a specified area.

(3) Assistance--A subsidy granted under the TDMHMR In-Home and Family Support Program to a person or family to expend on items that meet the criteria described in §411.404(a)(1)-(2) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations).

(4) Assistive technology--A product, device, or equipment that is used to maintain, increase, or improve the functional capabilities of a person to perform or participate in daily living activities or to control his or her living environment.

(5) Co-payment percentage--The percentage of assistance that the recipient must pay for an item.

(6) Date of eligibility--The documented date that the administering agency determines the person or family is eligible for assistance in accordance with §411.407 of this title (relating to Eligibility Determination).

(7) Developmental delay--Pursuant to the Interagency Council on Early Childhood Intervention's rules governing early childhood intervention §621.22(9) of this title (relating to Definitions), a significant variation in normal development in one or more of the following areas as measured and determined by appropriate diagnostic instruments or procedures administered by an interdisciplinary team and by informed clinical opinion:

(A) cognitive development;

(B) physical development, including vision and hearing, gross and fine motor skills, and nutrition status;

(C) communication development;

(D) social and emotional development; and

(E) adaptive development.

(8) Emergency--A documented:

(A) life-threatening situation of a person;

(B) impending out-of-home placement of a person; or

(C) impending psychiatric hospitalization of a person.

(9) Family--Those individuals who live with the person in the person's natural home, and who may include:

(A) the person's family members (as defined);

(B) the person's guardian; and

(C) no more than three unrelated individuals or individual groups. For the purposes of this subchapter, an individual group is two or more individuals who are related to each other.

(10) Family member--An individual who is related to the person by blood, marriage, or adoption.

(11) Guardian--An individual appointed by a court of competent jurisdiction to be guardian of the person in accordance with the Texas Probate Code, Chapter XIII.

(12) Local authority--An entity designated by the commissioner in accordance with the Texas Health and Safety Code, §533.035(a).

(13) Mental disability--Mental retardation, mental illness, pervasive developmental disorder, or developmental delay.

(14) Mental illness--Pursuant to the Texas Health and Safety Code, §571.003, an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that:

(A) substantially impairs a person's thought, perception of reality, emotional process, or judgement; or

(B) grossly impairs behavior as demonstrated by recent disturbed behavior.

(15) Mental retardation--Pursuant to the Texas Health and Safety Code, §591.003, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(16) Natural home--The place the person lives in the community, either independently or with his or her family, in which natural support systems, such as family, friends, and services available to the general population, are available to the person.

(17) Other support program--Any form of local, state, or federal support or service, other than assistance provided through the TDMHMR In Home and Family Support Program, or any support or service provided with public or private funds to people with mental or physical disabilities or their families.

(18) Over-the-counter medication--A medication, including a vitamin and mineral supplement, that can be sold legally without a doctor's prescription.

(19) Person--As appropriate to the context in which the term is used, the individual with a mental disability:

(A) who lives independently and who intends to apply or who has applied for assistance; or

(B) whose family intends to apply for assistance or whose family has applied for assistance.

(20) Pervasive developmental disorder--A disorder beginning in childhood, including autism, that meets the criteria for pervasive developmental disorder established in the most recent edition of the Diagnostic and Statistical Manual (DSM).

(21) Physical disability -A physical impairment that:

(A) is likely to continue indefinitely;

(B) results in substantial functional limitations in one or more of the following areas of major life activity:

(i) self-care;

(ii) receptive and expressive language;

(iii) learning;

(iv) mobility;

(v) self-direction;

(vi) capacity for independent living;

(vii) economic self-sufficiency; and

(C) reflects the need for care, treatment, services or supports, which are of lifelong or extended duration and which are individually planned and coordinated.

(22) Recipient--A person or family who currently receives assistance.

(23) Restraint device--Chemical, physical, or mechanical means used to restrict free movement of a part or the whole person to control physical activity for the purpose of preventing or managing maladaptive behavior. The term does not include assistive technology and adaptive aids.

(24) Specialized nutritional product--A food product or supplement that is medically necessary and prescribed by a physician to treat a specific symptom of a mental disability or physical disability.

(25) Third-party resource--Funding available to the person or family (e.g., public or private insurance, foster care reimbursements, trust, court settlement), that is not from any other support program (as defined).

(26) Vendor fiscal intermediary--An individual or agency who provides payroll and tax services for a recipient who is an employer, as determined in accordance with §411.408(d) of this title (relating to Applying for Assistance and Processing Applications).

§411.404. TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations.

(a) The TDMHMR In-Home and Family Support Program was developed pursuant to the Texas Health and Safety Code, Chapter 535, to provide assistance to eligible persons and families to expend on items that meet the following criteria.

(1) The item meets a need that exists solely because of the person's mental disability or co-occurring physical disability and:

(A) directly supports the person to live in his or her natural home;

(B) integrates the person into the community; or

(C) promotes the person's self-sufficiency.

(2) The item is:

(A) not listed as an unallowable cost in §411.406 of this title (relating to Unallowable Costs); and

(B) not paid for in full or reimbursed in full by a third-party resource.

(b) The TDMHMR In-Home and Family Support Program provides assistance to eligible persons and families in accordance with this subchapter and to the extent funds are available.

(c) The TDMHMR In-Home and Family Support Program does not provide assistance solely to improve the living conditions of eligible persons or families living at or below the poverty level. Assistance is neither an entitlement nor an income supplement.

(d) The TDMHMR In-Home and Family Support Program is a program of last resort; therefore, assistance may not be used to supplant items available to an eligible person or family through any other support program or third-party resource. However, assistance may be used to:

(1) supplement items provided through any other support program;

(2) supplement items paid for or reimbursed by a third-party resource; or

(3) to assist eligible persons and families who are currently waiting for items to be provided through any other support program.

§411.405. Allowable Costs.

(a) Assistance may be used to pay for any item described in this section if the item meets the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations).

(1) Special equipment as follows:

(A) therapy equipment;

(B) motorized or hand-powered lift;

(C) mobility equipment;

(D) medical equipment; and

(E) assistive technology (as defined).

(2) Architectural modifications to the person's natural home as follows:

(A) ramp, porch, or sidewalk;

(B) handrail;

(C) room construction; and

(D) house renovation.

(3) Health services as follows:

(A) therapy;

(B) diagnostic service;

(C) medication, with the limitations described in subsection (c) of this section;

(D) surgery;

(E) laboratory service;

(F) dental;

(G) non-durable or disposable supply;

(H) adaptive aid (as defined); and

(I) specialized nutritional product, with the limitations described in subsection (c) of this section.

(4) Counseling and training services as follows:

(A) counseling;

(B) behavior therapy;

(C) independent or daily living training; and

(D) family or caregiver training.

(5) Community inclusion services and activities as follows:

(A) support for participation in after-school activities;

(B) job coach service;

(C) support for participation in summer activities;

(D) behavioral coach service;

(E) remedial education for an adult;

(F) specialized child care for children age 13 years and older; and

(G) specialized child care for children under age 13 years, with limitations described in subsection (c) of this section.

(6) Home care services as follows:

(A) home health aide service;

(B) homemaker service; and

(C) personal assistant service.

(7) Transportation as follows:

(A) transportation for evaluation and treatment;

(B) out-of-town room and board for evaluation and treatment;

(C) public transportation;

(D) state-reimbursed mileage rate;

(E) short-term vehicle rental; and

(F) major vehicle repair, with limitations described in subsection (c) of this section.

(8) Respite care as follows:

(A) in-home respite; and

(B) out-of-home respite.

(9) Housing-related expenses, with limitations described in subsection (c) of this section, as follows:

(A) housing start-up, which is rent and rent deposit, utilities and utilities deposit, and minimal furniture and appliances;

(B) housing; and

(C) temporary residence.

(10) Other items as agreed upon by the person or family and administering agency that meet the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations).

(b) If an eligible person or family is considered an employer as determined in accordance with §411.408(d) of this title (relating to Applying for Assistance and Processing Applications), then assistance may also be used to pay for vendor fiscal intermediary fees that are related to the person or family being an employer of a service provider who is paid with assistance.

(c) Limitations are placed on the following costs listed in subsection (a) of this section.

(1) Psychoactive medications are limited to no more than a two-month supply per fiscal year.

(2) Allowable costs for specialized nutritional products are limited to those costs in excess of routine food costs.

(3) Allowable costs for specialized child care for a child under the age of 13 years are limited to those costs in excess of the prevailing rate for routine child care.

(4) Allowable costs for major vehicle repair are limited to costs necessary for the vehicle to be legally operational. Major vehicle repair does not include routine vehicle maintenance.

(5) Housing-related expenses are limited to no more than two months per fiscal year.

§411.406. Unallowable Costs.

Assistance may not be used to pay for any item listed in this section:

(1) purchase or long-term lease of a vehicle, or routine vehicle maintenance;

(2) an expense that is incurred before the written plan is approved;

(3) income or property tax;

(4) abortion or emergency room service;

(5) a segregated service or activity (i.e., a service or activity that is targeted solely to persons with a mental disability or physical disability), except for health services and counseling and training services as described in §411.405(a)(3)-(4) of this title (relating to Allowable Costs);

(6) any insurance premium;

(7) a burial or funeral expense;

(8) food that is not a specialized nutritional product;

(9) routine shelter, routine utilities, routine home repair, routine home appliance, routine home furnishing, and yard work;

(10) over-the-counter medication;

(11) architectural modifications to any building except the person's natural home;

(12) an expense related to the person's recreation;

(13) school tuition or fee, or any educational support item required by law to be provided by the public school system;

(14) school tuition or fee, or any educational support item for a child who is enrolled in private school or who is home-schooled;

(15) restraint device (as defined);

(16) routine child-care for a child under the age of 13 years;

(17) personal computer;

(18) any service provided by an individual under the age of 18 years or by an individual who resides in the same household as the person; and

(19) general medical care that is not related to a mental disability or co-occurring physical disability, as determined by TDMHMR, including but not limited to:

(A) physical examination;

(B) cancer treatment;

(C) heart disease treatment;

(D) sleep apnea treatment; and

(E) treatment for diabetes.

§411.407. Eligibility Determination.

(a) A person or family is eligible for assistance if the administering agency determines that the requirements of the diagnosis, residency, financial, and need factors as described in this subsection are met. Eligibility for assistance must be re-determined each fiscal year that a person or family receives assistance.

(1) Diagnosis factor.

(A) The person must:

(i) have a mental illness diagnosed within the previous 12 months;

(ii) have a diagnosis of mental retardation;

(iii) have a diagnosis of pervasive developmental disorder; or

(iv) be younger than four years of age and:

(I) have a developmental delay diagnosed within the previous 12 months; or

(II) determined to be eligible for early childhood intervention services.

(B) The person meets the requirements of the diagnosis factor if:

(i) the person or family submits a diagnosis or evaluation from a practitioner licensed or certified in a relevant profession that indicates the person meets the requirement in subparagraph (A) of this paragraph. The administering agency may require additional evaluations or documentation; or

(ii) a professional staff of the administering agency who is licensed or certified in a relevant profession determines that the person meets the requirement in subparagraph (A) of this paragraph. The administering agency may require additional evaluations or documentation.

(2) Residency factor.

(A) The person must be currently living in his or her natural home, or the person must be leaving an institutional setting and moving into a home in the community. The person or family must reside in the administering agency's specified service area, regardless of whether the person receives educational or other services in the specified service area of another administering agency.

(B) The person or family applying for assistance meets the requirements of the residency factor if:

(i) the person's natural home or intended home in the community is not:

(I) an establishment that furnishes room, board, and general supervision in which four or more unrelated individuals reside;

(II) a residential facility certified or licensed to provide services that include, but are not limited to, 24-hour supervision, home management, meals, transportation, and social and recreational activities (e.g., Intermediate Care Facility for the Mental Retarded (ICF/MR), state mental retardation facility); or

(III) an inpatient facility (e.g., state mental health facility, general or psychiatric hospital); and

(ii) the person or family resides in the administering agency's specified service area, as determined by a utility statement, lease agreement, or other appropriate documentation.

(3) Financial factor.

(A) The financial factor is based on the current adjusted gross income or net earnings of:

(i) the person who is age 18 years or older and the person's spouse, if any; or

(ii) the biological or adoptive parents of a person who is under age 18 years.

(B) A person or family applying for assistance meets the requirements of the financial factor if the current adjusted gross income or net earnings is less than 150% of the current Texas median income level, as determined by appropriate documentation (e.g., previous year's federal income tax return, current pay stubs). The Texas median income levels are established annually by the Texas Department of Human Services (TDHS) in effect on September 1 of each fiscal year.

(C) If a person or family meets the requirements of the financial factor, then the administering agency staff must document and inform the person or family of the co-payment percentage determined in accordance with the In-Home and Family Support Program Income Copayment Schedule as found in §48.2703(d) of Title 40 (relating to Income Eligibility), which is a sliding scale that uses the current prevailing Texas median income levels.

(i) A person's or family's co-payment percentage is zero if the current adjusted gross income or net earnings is less than 105% of the prevailing Texas median income level.

(ii) A person's or family's co-payment percentage is above zero if the current adjusted gross income or net earnings is between 105% and 150% of the prevailing Texas median income levels.

(4) Need factor.

(A) The person or family may not be receiving funds through the Texas Department of Human Services' In-Home and Family Support Program. The person may not be enrolled in a comprehensive support program, including but not limited to any of the following programs:

(i) Home and Community-based Services (HCS) Program;

(ii) Home and Community-based Services - OBRA (HCS-O) Program;

(iii) Mental Retardation Local Authority (MRLA) Program;

(iv) Community Living Assistance Support Services (CLASS);

(v) Community Based Alternatives (CBA);

(vi) Program for People Who Are Deaf-Blind with Multiple Disabilities;

(vii) Medically Dependent Children Program (MDCP); or

(viii) Consolidated Waiver Program.

(B) The person or family must have a need that can be met with an item:

(i) that is listed as an allowable cost in §411.405 of this title (relating to Allowable Costs);

(ii) that meets the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations); and

(iii) that is not available from any other support program.

(C) The administering agency staff will determine if the person or family applying for assistance meets the requirements of the need factor by consulting with the person or family and reviewing the results of the person's current evaluations, program plans, and medical reports, as well as researching other support programs in accordance with this subparagraph. For each identified item that meets the requirements in subparagraphs (B)(i) and (B)(ii) of this paragraph, the administering agency staff must determine if the person or family may be eligible to receive the item from any other support program.

(i) If the administering agency determines the person or family may be eligible to receive the item from any other support program, then the administering agency will provide the person or family with information on and referral to the other support program.

(ii) Denial of assistance for a specific item.

(I) The administering agency will deny assistance for a specific item if it determines that:

(-a-) the person or family is eligible to receive the item from an other support program and that the item is currently available from the other support program; or

(-b-) the person or family has not requested or applied for the item from the other support program after the administering agency provided the person or family with information on and referral to the other support program.

(II) Denial of assistance for a specific item under this clause does not constitute denial of assistance for other items that meet the requirements of subparagraph (B) of this paragraph.

(III) A person or family who has been denied assistance for a specific item under this clause is entitled to appeal the denial in accordance with §411.411 of this title (relating to Appeal).

(D) Meeting the requirements of the need factor.

(i) A person or family applying for assistance meets the requirements of the need factor if the administering agency:

(I) determines the person or family is not receiving funds through the Texas Department of Human Services' In-Home and Family Support Program;

(II) determines the person is not enrolled in a comprehensive support program; and

(III) determines the person or family would not be eligible to receive the item from any other support program or confirms with the person or family that the person or family is not eligible to receive the item from any other support program.

(ii) The administering agency may determine that the person or family meets the requirements of the need factor while an other support program's determination of the person's or family's eligibility is pending. The administering agency must confirm with the person or family that the person's or family's eligibility determination is pending.

(iii) The administering agency may determine that the person or family meets the requirements of the need factor while the person or family is waiting for the item to be provided by an other support program. The administering agency must confirm with the person or family that the person or family is on record as waiting for the item to be provided by the other support program.

(b) The administering agency staff may grant eligibility for assistance to a person or family in an emergency (as defined) without first determining if the person meets the requirements of the diagnosis factor (as described in subsection (a)(1) of this section), only if the requirements of the residency, financial, and need factors (as described in subsection (a)(2)-(4) of this section) have been met.

(1) Assistance disbursed for an emergency under this subsection may be for no more than 60 days and is limited to the extent necessary to resolve that emergency. A written plan must be developed in accordance with 411. 409(a) of this title (relating to Written Plan and Disbursing Assistance) and will address only those issues and items necessary to resolve the emergency.

(2) If eligibility for assistance is granted for an emergency under this subsection, then the administering agency must determine and document if the person meets the requirements for the diagnosis factor within 30 days after disbursement of assistance.

(3) If the administering agency determines that the person does not meet the requirements for the diagnosis factor, then the administering agency staff must immediately terminate assistance.

(c) A person or family who has been determined not eligible for assistance is entitled to appeal the determination in accordance with §411.411 of this title (relating to Appeal).

(d) A person or family may not appeal a decision by the administering agency staff to deny assistance for any item listed as an unallowable cost in §411.406 of this title (relating to Unallowable Costs).

§411.408. Applying for Assistance and Processing Applications.

(a) Applying for assistance. Application for assistance must be made by the person or the person's family. If the person lives independently, then the person must be age 18 years or older to apply for assistance unless the person is or has been married or has had the disability of minority removed pursuant to the Texas Family Code, Chapter 31.

(1) The administering agency may not discriminate against any person or family on the basis of race, color, national origin, religion, sex, age, disability, political affiliation, or sexual orientation.

(2) Within 30 days after a person or family applies for assistance, the administering agency is responsible for determining if the

person or family is eligible for assistance in accordance with §411.407 of this title (relating to Eligibility Determination). The person or family is responsible for providing all necessary information for the administering agency to determine eligibility in a timely manner.

(b) Processing applications. The administering agency must process applications in chronological order according to persons' and families' date of eligibility as defined in §411.403(6) of this title (relating to Definitions). If more than one person or family has the same date of eligibility, then chronological order is based on the date of application.

(c) Record of waiting for assistance. If TDMHMR In-Home and Family Support Program funds are not available on a person's or family's date of eligibility, then the person's name is placed on record as waiting for assistance in the same order that the applications are processed. A family waiting for assistance is identified on the record by the name of the person on whose behalf the application for assistance is made.

(1) The administering agency must maintain a record of persons and families waiting for assistance continually from one fiscal year to the next.

(2) Persons and families on record as waiting for assistance must notify the administering agency within 10 days after a change in any eligibility factor (i.e., diagnosis, residency, financial, or need), as described in §411.407 of this title (relating to Eligibility Determination). If there has been a change in an eligibility factor, then the administering agency must determine if the person or family is eligible for assistance in accordance with §411.407 of this title (relating to Eligibility Determination) within 30 days after notification.

(3) The administering agency must contact persons and families on record as waiting for assistance annually to determine if there has been a change in any of their eligibility factors.

(d) Person or family considered an employer. Depending upon which provider is selected and the amount of services to be provided, an eligible person or family may be considered an employer, and thus responsible for employment-related expenses. To assist the person or family in determining whether the person or family is an employer, the administering agency will provide the person or family with a copy of "Learning Your Responsibilities As An Employer," which is referenced as Exhibit A in §411.412(1) of this title (relating to Exhibits).

(e) Selecting provider or vendor and negotiating provider rates.

(1) The provider of a service and the prescriber of a service or item must have all certifications, registrations, licenses. and permits that are required by state law. The administering agency must establish additional minimum qualifications for providers of services and prescribers of services or items.

(2) The administering agency staff and the person or family must identify the required provider or vendor qualifications or product specifications for each item to be paid with assistance.

(3) The selection of provider or vendor must be negotiated between the person or family and the administering agency based upon the provider's or vendor's qualifications and ability to provide the item.

(4) The provider rate, negotiated between the selected provider and the person or family, is subject to approval by the administering agency. If the person or family determines that the person or family is an employer in accordance with subsection (d) of this section, then the negotiated rate for the service must include all employment-related expenses as approved by the administering agency.

(f) Architectural modifications: Pre-approval, soliciting competitive bids, and selecting a contractor or individual to perform the work.

(1) Pre-approval.

(A) Architectural modifications to be made to a person's natural home that is not owned by the person or family require the written approval of the property owner or property manager and pre-approval of the administering agency.

(B) Architectural modifications to be made to a person's natural home that is owned by the person or family do not require written approval of the property owner nor pre-approval of the administering agency.

(2) Soliciting competitive bids.

(A) The administering agency staff and the person or family must identify the:

(i) required contractor qualifications or required qualifications for the individual who will perform the work; and

(ii) specifications for an architectural modification project.

(B) Using the required qualifications and project specifications the person or family is responsible for soliciting and obtaining bids in accordance with this paragraph.

(i) For costs between $250 and $600--three oral bids.

(ii) For costs over $600--three written bids.

(iii) If only one bid is received, then the person or family must provide documentation to be included in the written plan verifying that no other contractor or individual is available to perform the work.

(iv) A person or family is exempt from soliciting or obtaining bids for good cause, as determined by the administering agency and documented in the written plan.

(3) Selecting a contractor or individual to perform the work. The selection of contractor or individual to perform the work must be negotiated between the person or family and the administering agency based upon best value. All relevant factors must be considered in determining best value, including, as appropriate, price, quality, reliability, promptness, and warranty.

§411.409. Written Plan and Disbursing Assistance.

(a) Written plan. When TDMHMR In-Home and Family Support Program funds are available, the administering agency staff must ensure a written plan is developed and approved in accordance with this subsection. A written plan is current only for the fiscal year for which it is developed.

(1) The administering agency staff must meet with the person or family to develop a written plan. The written plan must include:

(A) the name of the person;

(B) the name of the administering agency staff who developed the written plan;

(C) a description of:

(i) the person's or family's need, as determined by the need factor;

(ii) each item listed as an allowable cost in §411.405 of this title (relating to Allowable Costs) that has been identified to meet that need;

(iii) how each item meets the criteria described in §411.404(a) of this title (relating to TDMHMR In-Home and Family Support Program--Criteria, Purpose, and Limitations); and

(iv) the goal(s) and desired outcome(s);

(v) how each item will assist in achieving the goal(s) and outcome(s); and

(vi) how each item will positively impact the mental disability or co-occurring physical disability;

(D) a specific description of:

(i) each item to be paid for with assistance (e.g., equipment model number, type of training or counseling), including method of delivery;

(ii) the quantity, frequency, and duration of each item;

(iii) the cost or rate of each item; and

(iv) the amount and frequency of payment, and designation of payee (i.e., recipient or administering agency);

(E) other support programs that are appropriate for the person or family and that the person or family has contacted, and the outcome of that contact (e.g., ineligible, denied, waiting list) as required in §411.407(a)(4)(C) of this title (relating to Eligibility Determination);

(F) a description of the required provider or vendor qualifications for each item to be paid with assistance and a statement by the person or family and administering agency staff that the selected provider or vendor meets the required qualifications or, if assistance will pay for architectural modifications, a description of the project's specifications and the required contractor qualifications or required qualifications for the individual who will perform the work and a statement by the person or family and administering agency staff that the selected contractor or individual meets the required qualifications;

(G) the co-payment percentage and amount of co-payment,

(H) a statement by the person or family that the person or family agrees to submit a receipt for each item purchased with assistance within 30 days after purchase and that the receipt will, at a minimum:

(i) state the cost of the item and the co-payment amount;

(ii) include the date or dates the item was provided, purchased, or delivered;

(iii) include the name and address of the provider or vendor or, for architectural modifications, the name and address of the contractor or the individual performing the work; and

(iv) be marked as paid;

(I) a statement by the person or family that the person or family agrees to comply with the written plan and that the person or family understands noncompliance with the written plan may result in:

(i) immediate termination of assistance;

(ii) liability for restitution of assistance received; and

(iii) ineligibility for assistance;

(J) a description of how the administering agency will monitor the person's or family's compliance with the written plan, including:

(i) identifying the administering agency staff responsible for monitoring;

(ii) identifying documentation requirements for the person or family, such as maintaining a detailed provider log, obtaining and submitting receipts;

(iii) identifying monitoring activities, such as conducting home visits or face-to-face visits with the person or family, ensuring receipts are submitted and documented in accordance with paragraph (1)(H) of this subsection, ensuring accurate completion of provider logs, reviewing receipts to ensure assistance is used to purchase approved items within 90 after disbursement of assistance; and

(iv) identifying the frequency of monitoring activities;

(K) a statement by the persons or family that the person or family understands the person or family:

(i) may not use assistance to purchase any item that has not been approved in the written plan;

(ii) must return any unused assistance to the administering agency by the earliest of the following dates:

(I) within 30 days after purchasing the item(s);

(II) within 30 days after the person or family or administering agency determines that assistance for the item is no longer needed; or

(III) within 30 days after the end of the fiscal year; and

(iii) may not use a provider or vendor who has not been approved in the written plan, or for architectural modifications, a contractor or individual to perform the work who has not been approved in the written plan;

(L) a statement by the person or family that, if the person or family is a child support obligor, the person or family is not more than 30 days delinquent in paying child support or is in compliance with a written repayment agreement or court order as to any existing delinquency;

(M) a statement by the person or family that the person or family understands the person or family is responsible for resolving any disputes with a provider, vendor, contractor, or individual who is paid with assistance;

(N) a statement by the person or family that the person or family understands it is a felony of the third degree to make or cause to be made a statement or representation the person or family knows to be false or to solicit or accept assistance for which the person or family knows the person or family is not eligible; and

(O) the signatures of the administering agency staff and the person or family who developed the written plan and the date it was signed.

(2) The administering agency must designate a staff member who is responsible for approving written plans. Within 10 days after receipt of a written plan, the staff member must approve the written plan, disapprove the written plan, or approve the written plan with changes.

(A) If the staff member disapproves the written plan, then the staff member must provide written information regarding the reasons for disapproval and the requirements for re-submission.

(B) If the staff member approves the written plan with changes, then the staff member must provide written information regarding the necessary changes.

(3) The administering agency must provide the person or family with a copy of the approved written plan.

(b) Disbursement of assistance. Following approval of the written plan, the administering agency will disburse assistance in accordance with the written plan and this subsection. The amount of assistance disbursed to the recipient does not include the amount of the person's or family's co-payment.

(1) Assistance of up to $3600 per fiscal year will be provided to the person or family or to the provider, vendor, contractor, or individual performing work on behalf of the person or family and disbursed in a lump sum or on a periodic basis. Assistance provided under this paragraph may not be encumbered from one fiscal year to the next.

(2) In addition to assistance provided under paragraph (1) of this subsection, assistance of up to $3600 per lifetime of the person may be provided to the person or family for special equipment or for architectural modifications as described in §411.405(a)(1)-(2) of this title (relating to Allowable Costs).

(A) If available, assistance provided under this paragraph may be encumbered from one fiscal year to the next to pay for purchases that are not completed or received by the end of the fiscal year in which they were approved.

(B) Special equipment purchased with assistance is the property of the recipient and may not be inventoried by the administering agency or TDMHMR.

(C) Architectural modifications purchased with assistance belong to the property owner, and may not inventoried by the administering agency or TDMHMR.

(3) On a case-by-case basis, the TDMHMR commissioner or designee may grant assistance in excess of that described in paragraphs (1) and (2) of this subsection.

(c) Disbursement of assistance for an emergency. Assistance may be disbursed for an emergency to an eligible person or family on record as waiting for assistance. Assistance disbursed for an emergency under this subsection may be for no more than 60 days and is limited to the extent necessary to resolve the emergency. A written plan must be developed in accordance with subsection (a) of this section and will address only those issues and items necessary to resolve the emergency. The person or family will remain on record as waiting for assistance if the person or family continues to be eligible for assistance after the emergency is resolved.

(d) Change in a recipient's eligibility factor. A recipient must notify the administering agency within 10 calendar days after a change in any eligibility factor (i.e., diagnosis, residency, financial, or need), as described in §411.407(a) of this title (relating to Eligibility Determination) has occurred. When notified of a change in an eligibility factor, the administering agency must determine if the recipient continues to be eligible for assistance in accordance with §411.407 of this title (relating to Eligibility Determination) within 30 days after notification. If the administering agency determines that the recipient is no longer eligible for assistance, then the administering agency must immediately terminate assistance. A recipient whose assistance has been terminated in accordance with this subsection is entitled to appeal the determination of ineligibility in accordance with §411.411 of this title (relating to Appeal).

(e) Follow-up evaluation.

(1) Following completion of assistance within the fiscal year. No later than 30 days after completion of assistance within the fiscal year in which it was disbursed, the administering agency staff will provide written notification to the recipient stating that the recipient is responsible for contacting the administering agency within 30 days after receipt of the notification to arrange for a follow-up evaluation. If the follow-up evaluation indicates:

(A) the stated goal(s) and outcome(s) have been achieved, then assistance will cease and the person or family will exit the program; or

(B) the stated goal(s) and outcome(s) have not been achieved or an additional need has been identified, then staff will determine if the person or family meets the requirements of the need factor in accordance with §411.407(a)(4) of this title (relating to Eligibility Determination) and, if funds are available, amend the written plan.

(2) End of the fiscal year. No later than 90 days prior to the end of the fiscal year, the administering agency staff will provide written notification to the recipient stating that the recipient is responsible for contacting the administering agency within 30 days after receipt of the notification to arrange for a follow-up evaluation. If the follow-up evaluation indicates:

(A) the stated goal(s) and outcome(s) have been achieved, then assistance will cease and the person or family will exit the program; or

(B) the stated goal(s) and outcome(s) have not been achieved or an additional need has been identified, then staff will re-determine if the person or family is eligible for assistance in accordance with §411.407(a) of this title (relating to Eligibility Determination) and, if funds are available, develop a new written plan in accordance with subsection (a) of this section.

§411.410. Administrative Implementation.

(a) Programmatic and fiscal accountability. Each administering agency must maintain programmatic and fiscal records documenting its implementation of the TDMHMR In-Home and Family Support Program so that TDMHMR is able to conduct fiscal audits and programmatic reviews. The administering agency must retain programmatic and fiscal records or five years.

(b) Quality improvement. The administering agency must develop and implement quality improvement activities and processes to identify and address operational problems and areas needing improvement.

(c) Program indirect costs. The administering agency may use TDMHMR In-Home and Family Support Program funds to pay for indirect costs related to the program (e.g., salary, benefits, office space, and equipment for program staff). The percentage of program funds used for indirect costs may not exceed the percentage allowed by TDMHMR.

(d) Penalties.

(1) The administering agency may impose the following penalties on a recipient if the recipient does not comply with his or her written plan:

(A) immediate termination of assistance;

(B) restitution of assistance received; and

(C) ineligibility for further assistance.

(2) A recipient who has been penalized in accordance with paragraph (1) of this subsection is entitled to appeal the determination to impose penalties in accordance with §411.411 of this title (relating to Appeal).

(e) Coordination with Texas Department of Human Services' In Home and Family Support Program (TDHS-IHFS Program).

(1) On a quarterly basis TDMHMR will coordinate with the TDHS-IHFS Program to assure that no recipient is receiving funds from the TDHS-IHFS Program. TDMHMR will refer discrepancies to the appropriate administering agency for resolution.

(2) Each administering agency is responsible for the ongoing coordination with the TDHS office in the administering agency's service area to ensure that persons and families receiving funds through the TDHS-IHFS Program are not also receiving assistance from the TDMHMR In-Home and Family Support Program.

§411.411. Appeal.

(a) Determinations subject to appeal. Only the following administering agency determinations may be appealed:

(1) the determination to deny assistance for a specific item under §411.407(a)(4)(C)(ii)(III) of this title (relating to Eligibility Determination);

(2) the determination that a person or family is not eligible for assistance under §411.407(c) of this title (relating to Eligibility Determination);

(3) the determination that a recipient is no longer eligible for assistance under §411.409(d) of this title (relating to Written Plan and Disbursing Assistance); and

(4) the determination to impose penalties under §411.410(d) of this title (relating to Administrative Implementation).

(b) Written notification. Within 10 working days after making any determination described in subsection (a) of this section, the administering agency must provide written notification to the person or family that includes:

(1) the administering agency's determination and the reason(s) for the determination;

(2) a statement that the person or family may appeal the determination;

(3) the procedures for requesting an appeal, including the required information;

(4) a statement that the request for appeal must be received within 30 calendar days after receipt of the written notification; and

(5) a description of the appeal and review process contained in "The TDMHMR In-Home and Family Support Program Appeal and Review Process," which is referenced as Exhibit B in §411.412(2) of this title (relating to Exhibits).

(c) Appeal and review process.

(1) Appeal and appeal decision. The appeal is conducted in accordance with §401.464(g) of this title (relating to Notification and Appeals Process) and include a review of this subchapter and policies governing the TDMHMR In-Home and Family Support Program. The administering agency will notify the appellant in writing of the appeal decision in accordance with §401.464(h). The notification must include:

(A) the appeal decision;

(B) a statement that the appellant has the right to have the appeal decision reviewed by the Office of Legal Services at TDMHMR Central Office if the appellant disagrees with the appeal decision; and

(C) the procedures for requesting a review, including the time frames and required information as described in paragraph (2) of this subsection.

(2) Review and final decision. If the appellant disagrees with the appeal decision, then the appellant may request a review by the Office of Legal Services at TDMHMR Central Office. A request for review must be submitted to TDMHMR, Director of Legal Services, P.O. Box 12668, Austin, Texas, 78711-2668, and received within 10 working days after the appellant receives the appeal decision. The written request must include the appellant's name, address, telephone number with area code, the name of the administering agency, a copy of the appeal decision, and an explanation of why the appellant does not agree with the appeal decision.

(A) The appellant may choose to have the reviewer conduct the review:

(i) by telephone conference with the appellant and a representative from the administering agency providing verbal testimony and submitting documentation; or

(ii) by desk review with the appellant and a representative from the administering agency submitting documentation.

(B) The review will be conducted no sooner than 10 working days after receipt of the request for review and be completed no later than 30 working days after receipt of the request unless an extension is granted by the director of legal services

(C) The review will include an examination of:

(i) the appeal decision;

(ii) all verbal testimony if the review was conducted by telephone conference;

(iii) all documentation submitted by the appellant and the administering agency; and

(iv) this subchapter and policies governing the TDMHMR In-Home and Family Support Program.

(D) The reviewer may consult with TDMHMR staff who administer the TDMHMR In-Home and Family Support Program and staff who are responsible for the policy contained in the rules governing the program.

(E) The reviewer will make a final decision that will uphold, reverse, or modify the appeal decision.

(F) Within five working days after the review, the reviewer will send written notification of the final decision to the appellant and the administering agency.

(G) The administering agency will take appropriate action consistent with the final decision.

§411.412. Exhibits.

The following exhibits are referenced in this subchapter, copies of which are available by contacting TDMHMR, Policy Development, P.O. Box 12668, Austin, TX 78751:

(1) Exhibit A --"Learning Your Responsibilities As An Employer"; and

(2) Exhibit B--"The TDMHMR In-Home and Family Support Program Appeal and Review Process."

§411.413. References.

Reference is made in this subchapter to the following statutes and rules:

(1) Texas Health and Safety Code, Chapter 535, §533.035(a), §571.003, and §591.003;

(2) Texas Family Code, Chapter 31;

(3) Texas Probate Code, Chapter XIII;

(4) TAC §48.2703(d) of Title 40 (relating to Income Eligibility); and

(5) TAC §621.22(9) of this title (relating to Definitions).

§411.414. Distribution.

This subchapter shall be distributed to:

(1) members of the Texas Mental Health and Mental Retardation Board;

(2) executive, management, and program staff of TDMHMR Central Office;

(3) executive directors of all administering agencies; and

(4) advocacy organizations.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205235
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 206-5216

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 19. OIL SPILL PREVENTION AND RESPONSE

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §19.2, §19.4

The General Land Office (GLO) proposes amendments to 31 TAC §19.2 relating to Definitions and §19.4 relating to Waiver. The GLO intends these amendments to modify and clarify the types of oil-handling facilities for which operators must obtain discharge prevention and response certificates; provide regulatory relief to facility operators; and decrease the GLO's cost to administer the facility certification program.

The GLO proposes to amend the definition of the term "facility" in §19.2(a)(5) to be the same as the definition of the terms "facility" or "terminal facility" in the Oil Spill Prevention and Response Act of 1991 (OSPRA), Tex. Nat. Res. Code, Chapter 40. OSPRA defines the terms "facility" and "terminal facility" as synonyms. The current definition of facility in §19.2 includes oil-handling facilities located "at any place where a discharge of oil from the facility could enter or pose an imminent threat to coastal waters." This language will be deleted from the definition of facility, so only facilities located at waterfront or offshore locations will be required to obtain certificates. To determine whether a facility requires a certificate, an operator will only need to determine whether the facility is characterized as waterfront or offshore, and definitions for those terms are proposed for addition to §19.2. The GLO is proposing this change to give the regulated community greater certainty in determining whether a facility needs a certificate to operate. The administrative burden of GLO staff will also be decreased, because the regulated community will typically not need to consult with the GLO to determine whether a facility requires a certificate. Hence, GLO staff will be able to devote more time to ensuring that oil-handling facilities that need certificates are adequately fulfilling their responsibilities to prevent and respond to unauthorized discharges of oil. With this change, a few facilities that currently have certificates will no longer require them, because they would not be characterized as waterfront or offshore. These few facilities could still come under the jurisdiction of OSPRA if they are the source of an unauthorized discharge of oil into coastal waters, so they are encouraged to continue their efforts to prevent oil spills and plan to respond should a spill occur. The current definition of facility also contains explanatory language which relates to whether an operator of particular oil-handling equipment is required to obtain a discharge prevention and response certificate. All such provisions on whether a facility operator is required to obtain a certificate will be included in proposed new §19.12 of Subchapter B. The GLO is concurrently proposing to repeal §19.12 and replace it with a new §19.12 relating to facility certification requirements.

The GLO proposes to amend the definition of "Coastal Facility Designation Line" in §19.2(a)(21) to delete the two sentences related to contacting the GLO to determine whether facility certification is required. The effect of this proposed change will be that the coastal facility designation line simply gives notice to an operator of an oil-handling facility located seaward of the line that he may need to obtain a discharge prevention and response certificate.

The GLO proposes new definitions in §19.2(a) for the terms "offshore" in paragraph (22) and "waterfront" in paragraph (23). The proposed new definitions for the terms "offshore" and "waterfront" and the new facility certification requirements concurrently being proposed in Subchapter B provide clearer standards for facility operators to determine independently whether they need to obtain a certificate. The GLO will, however, continue to provide guidance to any facility operator seeking to determine whether he needs to obtain a discharge prevention and response certificate. The proposed definition of offshore at paragraph (22) means at a location on submerged lands below mean high tide in coastal waters. The proposed definition of waterfront is based on the GLO's determination that an oil-handling facility within 100 yards of coastal waters should be considered waterfront. The GLO's experience in responding to unauthorized discharges of oil has shown that a discharge of oil could readily flow 100 yards and enter coastal waters.

The proposed amendment to §19.4 modifies the requirements for submitting information to the GLO to obtain a waiver from the facility certification requirements. The GLO has determined that

submittal of a United States Geological Survey (USGS) Quad map does not provide useful information in determining whether a waiver should be granted. Thus, the requirement to submit a USGS Quad map with the waiver request has been deleted from §19.4(a)(2)(C). The article "a" has been added before "vicinity map" in subparagraph (C) to make the phrase grammatically correct.

Greg Pollock, Deputy Commissioner of the GLO's Oil Spill Prevention and Response Division, has determined that for each year of the first five years the sections as proposed are in effect there will be no fiscal implications for the state or units of local governments as a result of enforcing or administering the sections.

Mr. Pollock has determined the proposed amendments do not contain any additional regulatory requirements, so there will be no additional economic costs to persons required to comply with the regulations. The public benefit of the proposed amendments will be to clarify the types of facilities for which operators must obtain discharge prevention and response certificates. This will enhance compliance with the regulations, which promote prevention of and adequate response to unauthorized discharges of oil. There will be no effect on small businesses.

The GLO has determined a local employment impact statement on these proposed amendments is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

In accordance with the Coastal Coordination Act, Tex. Nat. Res. Code, §§33.201 et seq., the GLO has determined this proposed rulemaking concerns an action subject to the Texas Coastal Management Program (CMP). Because the proposed rule governs aspects of the prevention of, response to, or remediation of a coastal oil spill, 31 TAC §505.11(b)(1) requires the rule to be consistent with the goals and policies of the CMP. Mr. Pollock has determined the proposed rule is consistent with the CMP because it will facilitate compliance with the GLO's regulations on oil spill prevention and response. The proposed rule will further the policy promulgated at 31 TAC §501.14(e)(1), which states "[t]he GLO regulations for certification of vessels and facilities that handle oil shall be designed to ensure that vessels and facilities are capable of prompt response and adequate removal of unauthorized discharges of oil." The GLO invites the public to submit comments on the consistency of the proposed rule with the CMP during the public comment period.

The GLO has evaluated the proposed amendments to determine whether Texas Government Code, Chapter 2007, is applicable and a detailed takings impact assessment required. The GLO has determined the proposed rule does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined the proposed rule changes would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments.

Comments may be submitted to Ms. Melinda Tracy, Texas Register Liaison, Texas General Land Office, Legal Services Division, P.O. Box 12873, Austin, Texas 78711-2873.

The amended sections are proposed under OSPRA, Tex. Nat. Res. Code, Title 2, Chapter 40, Subchapter A, §40.007(a), which gives the commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA, and §40.117 in Subchapter C, which authorizes the commissioner of the GLO to adopt regulations relating to standards for discharge prevention and response capabilities of terminal facilities.

OSPRA, Tex. Nat. Res. Code, Title 2, Chapter 40, Subchapter C, §§40.109-40.113 are affected by the proposed amendments.

§19.2. Definitions.

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

(1) Coastal waters--All tidally influenced waters extending from the head of tide in the arms of the Gulf of Mexico seaward to the three marine league limit of Texas' jurisdiction; and non-tidally influenced waters extending from the head of tide in the arms of the Gulf of Mexico inland to the point at which navigation by regulated vessels is naturally or artificially obstructed. The term includes the entirety of the Gulf Intracoastal Waterway (GIWW) within Texas, and the following waters: starting from Echo, Texas, located in Orange County, and proceeding south on the Sabine River to the intersection with the GIWW, thence westerly along the GIWW, including Adams Bayou, to 0.7 miles upstream of IH-10, and Cow Bayou, to IH-10. This includes the Neches River in Orange County to 7.0 miles upstream of IH-10. Then along the GIWW towards Port Arthur, including Taylors Bayou south of Highway 73. From Port Arthur along the GIWW to, and including, East Bay, Trinity Bay, Cedar Bayou to 1.4 miles upstream of IH-10 in Harris/Chambers County, Lynchburg Canal to 29 degrees 41'00"N, 94 degrees 59'00"W, San Jacinto River in Harris County to the Lake Houston Dam, and the Houston Ship Channel to the turning basin. Tidal tributaries of the Houston Ship Channel include: Buffalo Bayou to .25 miles upstream of Shepherd Drive, Brays Bayou to the Broadway Street Bridge, Sims Bayou to Highway 225, Vince Bayou to North Ritchie Street, Hunting Bayou to I-10, Greens Bayou to I-10, Boggy Bayou to Highway 225, Tucker Bayou to Old Battleground Road, Carpenter's Bayou to Sheldon Road, and Goose Creek to Highway 146. Proceed south and include Barbours Cut, Bayport Channel, Clear Lake to .063 miles upstream of FM 528 in Galveston/Harris County, Dickinson Bay, Dickinson Bayou 2.5 miles downstream of FM 517 in Galveston County, Moses Lake, Dollar Bay, Texas City Channel (including turning basin), Swan Lake, Jones Bay, and continuing at the junction of West Bay and the GIWW in Galveston County. Continue westerly along the GIWW to the Port of Freeport, including Greens Lake, Chocolate Bay, Chocolate Bayou to 2.6 miles downstream of SH 35, the Old Brazos River and the New Brazos River up to the Missouri-Pacific Railroad bridge in Brazoria County, and the Dow Barge Canal. Then southerly along the GIWW through and including Jones Lake and Creek, the San Bernard River to 2.0 miles upstream of SH 35, Cowtrap Lake, Matagorda Bay, the Colorado River to 1.3 miles downstream of the Missouri-Pacific Railroad in Matagorda County, to the Port of Bay City, Culver Cut (West Branch Colorado River to 28 degrees 42'N and the entire middle branch), Crab Lake, Oyster Lake, Tres Palacios Bay, Turtle Bay, Caranchua Bay, Keller Bay, Cox Bay, Lavaca Bay, Lavaca River to 5.3 miles downstream of U.S. 59 in Jackson County, Chocolate Bay/Bayou, Powderhorn Lake, Robinsons Lake, Blind Bayou, La Salle Bayou, Broad Bayou, and Boggy Bayou. Continuing southerly on GIWW from Port O'Connor through San Antonio Bay including: Guadalupe Bay, Mission Lake, Green Lake, Victoria Barge Canal, Guadalupe River to the Guadalupe-Blanco River Authority Salt Water Barrier 0.4 miles downstream of the confluence of the San Antonio River, Goff Bayou, Hog Bayou, Corey Bay, Buffalo Lake, Alligator Slide Lake, Twin Lake, Mustang Lake, and Jones Lake. Then continuing through Mesquite Bay including: Dunham Bay, Long Lake, Sundown Bay, and the Aransas Wildlife Refuge.

Continuing southerly through St. Charles Bay including: Burgentine Bay/Burgentine Creek to 28 degrees 17'N, Salt Creek to 28 degrees 16'N, and Cavaso Creek to 97 degrees 01'W. Then through Copano Bay, including Copano Creek, Mission Bay, Mission River to 4.6 miles downstream of U.S. 77, Chiltipin Creek, Aransas River to 3.3 miles upstream of Chiltipin Creek in Refugio/San Patricio County, Swan Lake, Port Bay, and Salt Lake. Then southerly including: Little Bay, Aransas Bay, Conn Brown Harbor, Redfish Cove, Redfish Bay, La Quinta Channel, Nueces River to Calallen Dam 1.1 miles upstream of U.S. 77/IH 37 in Nueces/San Patricio County, Rincon Industrial Channel, Rincon Bayou, Nueces Bay, Tule Lake, Corpus Christi Inner Harbor, Oso Creek, Oso Bay, Cayo Del Oso, and Corpus Christi Bay. Continuing south, through and including Packery Channel, Laguna Madre, Baffin Bay, Alazan Bay, Cayo del Hinoso, Petrolino Creek from the confluence of Chiltipin Creek in Kleberg County to 0.6 miles upstream of private road crossing near Laurless Ranch, Cayo Del Infiernillo, Cayo del Grullo, Laguna Salada, Laguna de los Olmos, and Comitas Lake. Continuing through the Laguna Madre to Redfish Bay, Port Mansfield Harbor, Four Mile Slough, Cayo Atascosa, Laguna Atascosa, Arroyo Colorado Cutoff, El Realito Bay, Laguna Vista Cove, Port Isabel Harbor, Brownsville Ship Channel, Bahia Grande, Vadia Ancha, San Martin Lake, South Bay, and the Arroyo Colorado River to .063 miles downstream of Cemetery Road south of Port Harlingen in Cameron County. Then southerly to the Rio Grande River to 6.7 miles downstream of the International Bridge in Cameron County. Where the coastal area is defined by a body of water such as a bay or lake, it includes any small bays or lakes encompassed therein.

(2) Commissioner--The commissioner of the General Land Office.

(3) Discharge cleanup organization--A corporation, partnership, proprietorship, organization, or association that intends to make itself available to engage in response actions to abate, contain, or remove an unauthorized discharge or pollution or damage from an unauthorized discharge.

(4) Environmentally sensitive areas--Streams and water bodies, aquifer recharge zones, springs, wetlands, bird rookeries, endangered and threatened species (flora and fauna) habitat, wildlife preserves or conservation areas, parks, beaches, dunes, or any other area protected or managed for its natural resource value.

(5) Facility--[~~Mobile or portable units, other than vessels, generally are considered facilities only when they are fixed in location and operating in coastal waters.~~]Any waterfront or offshore pipeline, structure, equipment, or device used for the purposes of drilling for, pumping, storing, handling, or transferring oil and operating where a discharge of oil from the facility could threaten coastal waters, including but not limited to any such facility owned or operated by a public utility or a governmental or quasi-governmental body, but does not include any temporary storage facilities used only in connection with the containment and cleanup of unauthorized discharges of oil.

~~[(A) Any pipeline, structure, equipment, or device used for handling oil, including, but not limited to, underground and aboveground tanks, impoundments, mobile or portable drilling or workover rigs and barge-mounted drilling or workover rigs operating in coastal waters, and portable fueling facilities located offshore or adjacent to coastal waters as defined in paragraph (1) of this subsection or any place where a discharge of oil from the facility could enter or pose an imminent threat to coastal waters.~~]

~~[(B) A combination of interrelated or adjacent tanks, impoundments, pipelines, gathering lines, flow lines, separator or treatment facilities, and other structures, equipment, or devices under common ownership or operation generally will be considered a single facility under OSPRA. Interrelated means that the devices are all an integral part of one commercial or industrial operation or are managed and controlled by a single entity. The term includes facilities owned by units of federal, state, or local government, as well as privately owned facilities.~~]

(6) Fund--The coastal protection fund established under OSPRA.

(7) Federal fund--The oil spill liability trust fund established under OPA.

(8) Handle--To transfer, transport, pump, treat, process, store, dispose of, drill for, or produce.

(9) Harmful quantity of oil--The presence of oil from an unauthorized discharge in a quantity sufficient either to create a visible film or sheen upon or discoloration of the surface of the water or a shoreline, tidal flat, beach, or marsh, or to cause a sludge or emulsion to be deposited beneath the surface of the water or on a shoreline, tidal flat, beach, or marsh.

(10) National contingency plan--The plan prepared under the Federal Water Pollution Control Act (33 United States Code §1321 et seq.) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 United States Code §9601 et seq.), as revised from time to time.

(11) Oil--Means oil of any kind or in any form, including but not limited to crude oil, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), §101(14), Subparagraphs (A)-(F) (42 United States Code §9601 et seq.), and which is subject to the provisions of that Act, and which is so designated by the Texas Natural Resource Conservation Commission.

(12) OPA--The Oil Pollution Act of 1990, Public Law 101-380.

(13) OSPRA--The Oil Spill Prevention and Response Act of 1991, Natural Resources Code, Chapter 40.

(14) Owner or operator--Any person, individual, partnership, corporation, association, governmental unit, or public or private organization of any character:

(A) owning, operating or responsible for operating, or chartering by demise a vessel;

(B) owning, operating, or responsible for operating a facility; or

(C) operating a facility by lease, contract, or other form of agreement. The term does not include a person who owns only the land underlying a facility or a person who owns only a security interest in a vessel or facility if the person does not participate in the operation of the vessel or facility, does not own a controlling interest in the owner or operator of the vessel or facility, and is not controlled by or under common ownership with the owner or operator of the vessel or facility.

(15) Regulated vessel--A vessel with a capacity to carry 10,000 U.S. gallons or more of oil as fuel or cargo.

(16) Unauthorized discharge--Discharges excluding those authorized by and in compliance with a government permit, seepage from the earth solely from natural causes, and unavoidable, minute discharges of oil from a properly functioning engine, of a harmful quantity of oil from a vessel or facility either:

(A) into coastal waters; or

(B) on any waters or land adjacent to coastal waters where harmful quantities of oil may enter coastal waters or threaten to enter coastal waters if the discharge is not abated nor contained and the oil is not removed.

(17) Underground storage tank--Any tank or container used for storing oil which is located completely under the surface of the earth. Tanks which are partially buried or which are contained in aboveground vaults or other aboveground containment structures are not considered underground tanks for the purpose of certification requirements under these sections.

(18) Underwriter--An insurer, a surety company, a guarantor, or any other person, other than an owner or operator of a vessel or facility, that undertakes to pay all or part of the liability of an owner or operator.

(19) Waste--Oil or contaminated soil, debris, and other substances removed from coastal waters and adjacent waters, shorelines, estuaries, tidal flats, beaches, or marshes in response to an unauthorized discharge. Waste means any solid, liquid, or other material intended to be disposed of or discarded and generated as a result of an unauthorized discharge of oil. Waste does not include substances intended to be recycled if they are in fact recycled within 90 days of their generation or if they are brought to a recycling facility within that time.

(20) Worst case unauthorized discharge--The largest foreseeable unauthorized discharge under adverse weather conditions. For facilities located above the high water line of coastal waters, a worst case discharge includes those occurring in weather conditions most likely to cause oil discharged from the facility to enter coastal waters.

(21) Coastal Facility Designation Line--The Coastal Facility Designation Line delineates the area within which a facility may be subject to the certification requirements of §19.12 of this title (relating to Facility Certification). The line does not delineate OSPRA's response or notification requirements; rather, it gives notice to facilities located coastward of the line that they may be subject to facility certification requirements. [~~These facilities should contact the General Land Office (GLO). The GLO will then, based on the precise location of the facility and based on the quantity of oil handled, determine whether facility certification is required.~~] A description of the coastal facility designation line and a map can be found in Appendix 1.
Figure 1: 31 TAC §19.2(a)(21) (no change)
Figure 2: 31 TAC §19.2(a)(21) (no change)
Figure 3: 31 TAC §19.2(a)(21) (no change)

(22) Offshore--Located on submerged lands below mean high tide in coastal waters.

(23) Waterfront--Located within 100 yards of coastal waters.

(b) All other terms used in this chapter and defined in OSPRA have the meaning assigned to them by OSPRA.

§19.4. Waiver.

(a) Upon written request, the commissioner may waive a provision of this chapter if the commissioner determines that the application of the provision would be inconsistent with the fundamental intent and purpose of OSPRA. The commissioner may also waive any requirement of this chapter if the commissioner determines that other existing federal or state statutory or regulatory provisions provide requirements necessary to implement OSPRA.

(1) Waiver from requirements of this chapter. Any person may request a waiver from a requirement of this chapter by submitting the following information to the commissioner:

(A) the name, address, and telephone number of the person submitting the requested waiver, and if that person is the agent of the person requesting the waiver, then the agent must also state the name, address, and telephone number of the person for whom the waiver is requested;

(B) a specific reference to the requirement from which the person is requesting a waiver;

(C) a detailed statement of the reasons which warrant a waiver;

(D) an analysis of the waiver's impact on the person's ability to prevent, abate, clean up, and remove an unauthorized discharge of oil.

(2) Waiver from facility certification requirements. Any person may request a waiver from the facility certification requirement of this chapter by submitting the following information to the commissioner:

(A) the name, address, and telephone number of the person submitting the requested waiver, and if that person is the agent of the person requesting the waiver, then the agent must also state the name, address, and telephone number of the person for whom the waiver is requested;

(B) the address and location, including directions from the nearest highway, of the facility subject to the requirements of this chapter;

(C) a vicinity map [~~and United States Geological Survey (USGS) Quad map (1:24,000) showing the location of the facility for which waiver is requested~~];

(D) a brief description of the business conducted at the facility, including the quantity and types of oil handled;

(E) a summary of the prevention and response practices utilized at the facility supporting the contention that an unauthorized discharge of oil therefrom will not pose an imminent threat to coastal waters;

(F) a summary of any other reasons that this chapter should not apply to the facility.

(3) Receipt of a request for waiver from any facility subject to certification requirements will be deemed to constitute compliance with all timelines for facility certification. Any person whose request for waiver is denied will be given a reasonable time to comply with all the requirements for certification.

(4) Requests for waivers from facility certification requirements will be evaluated by considering the following factors:

(A) the physical location of the facility, including:

(i) proximity to coastal waters;

(ii) proximity to environmentally sensitive areas;

(iii) topography;

(iv) site drainage;

(v) flood tide impacts;

(vi) the condition of oil storage areas, including age and condition of oil storage containers, evidence of past spills, leak detection abilities, and secondary or passive containment systems;

(B) the type and quantity of oil handled;

(C) the factors listed in this paragraph will be weighted so that subparagraph (A)(vi) of this paragraph will be considered only in the event that a determination cannot be made based solely on the other listed factors.

(D) The commissioner will conduct a field investigation, if necessary, to determine whether to grant the request for waiver.

(b) Where adequate precautions are taken to avoid environmental and property damage and other necessary governmental agencies have consented, the commissioner may allow the discharge of limited amounts of oil into or upon coastal waters or adjacent waters, shorelines, estuaries, tidal flats, beaches, or marshes, as part of a drill, demonstration of response capability or technology, or other study or project to further discharge prevention or response capability.

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205243
Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 305-9129

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SUBCHAPTER B. SPILL PREVENTION AND PREPAREDNESS

The General Land Office (GLO) proposes the repeal of §19.11 relating to Categories of Coastal Facilities, §19.12 relating to Facility Certification, §19.13 relating to Applications for Small Commercial Facilities, Underground Storage Facilities, and Small Facilities, §19.14 relating to Applications for Major Facilities, and §19.15 relating to Issuance; Modification and Suspension of Facility Certificates. Simultaneously, the GLO proposes new §19.11 relating to Classification of Waterfront and Offshore Facilities, §19.12 relating to Facility Certification Requirements, §19.13 relating to Requirements for Discharge Prevention and Response Plans, and §19.14 relating to Annual Updating of Application Information; Renewal and Suspension of Certificates. The GLO is also proposing amendments to §19.18, relating to Audits, Drills, and Inspections To Determine Prevention and Response Capability. The purpose of the new sections is to clarify for facility operators what types of facilities will require discharge prevention and response certificates and to provide clearer standards for preparation of oil spill prevention and response plans. The new sections will also simplify the process for and, in general, decrease the cost of obtaining a certificate. The GLO's costs of overseeing the spill prevention and response program will also be decreased. The proposed amendments to §19.18 inform the regulated community of the circumstances under which the GLO may pay all or part of the cost of an oil spill response drill and delete references to the National Preparedness for Response Exercise Program.

Section 40.109(a) of the Oil Spill Prevention and Response Act of 1991 (OSPRA), Tex. Nat. Res. Code, Chapter 40, requires an operator of a terminal facility to obtain a discharge prevention and response certificate from the GLO. (In this preamble, the term "facility" will be used instead of "terminal facility," since the terms are synonymous as defined in OSPRA §40.003(23)). OSPRA §40.109(b)(1) requires the GLO to determine, as a condition precedent to issuance of a certificate, that a facility has implemented an adequate discharge prevention and response plan. The GLO proposes the new sections to simplify and streamline the process for a facility operator to obtain and renew a certificate and for the GLO to determine a facility has an adequate plan. Under the current Subchapter B regulations, facility operators must submit detailed application information to the GLO to obtain a certificate. To satisfy the current application requirements, operators typically submit their entire discharge prevention and response plans to the GLO. Operators will no longer need to submit their plans to the GLO, resulting in paperwork reduction for the regulated community and the GLO. The proposed amendments still require facility operators to develop, maintain, and implement discharge prevention and response plans, but operators will not need to submit the plans to the GLO before obtaining a certificate.

Proposed new §19.11 establishes three classifications of facilities based on their capacity to transfer or store oil. The GLO's experience in reviewing facility operations shows that the actual amounts of oil transferred or stored at the facility can vary widely during the period of facility certification, so actual amounts of oil transferred or stored are not used in the classification scheme. Using transfer or storage capacity to determine the facility's classification reduces the administrative burden on facility operators and the GLO, because changes in actual storage or transfer amounts will not need to be reported to the GLO. A facility that transfers oil through a line will be classified according to its largest diameter line, without regard for the actual amount of oil transferred. A facility that stores oil will be classified according to the amount of oil storage capacity, without regard for the actual amount of oil stored. If a facility both transfers and stores oil, the facility classification will be determined based on the higher classification level considering the line diameter and the storage capacity individually. Thus, if a facility transfers oil through a three-inch line and has the capacity to store 10,000 gallons of oil, the facility would be classified as intermediate based on its storage capacity.

Proposed new §19.12 concerns the requirements for obtaining a discharge prevention and response certificate. Proposed new §19.12(a) states the section applies to any person who operates a waterfront or offshore facility. The terms "waterfront" and "offshore" are concurrently being proposed for addition to §19.2, relating to Definitions, in Subchapter A. To determine whether a facility will need a certificate to operate under proposed new §19.12(a), an operator need only determine whether the facility is waterfront or offshore. Proposed new §19.12(a) also specifies that interrelated equipment under common ownership or control is considered to be a single facility. This language is currently in §19.2(5)(B), so moving it to §19.12(a) is not a substantive change in the regulations. If a facility operates any equipment that handles oil within 100 yards of coastal waters, the facility's discharge prevention and response plan must address all interrelated oil-handling equipment at the facility.

Proposed new §19.12(b) specifies no facility can be operated without a current discharge prevention and response certificate unless a waiver has been obtained. An operator of a new facility

will be required to apply for and receive a certificate from the GLO before the facility begins handling oil. Operators are encouraged to apply for their certificates sufficiently in advance of the planned date on which their facilities will begin handling oil to give the GLO adequate time to review the applications and conduct an on-site facility review.

Proposed new §19.12(c) states that a discharge prevention and response certificate is void when the operator of a facility changes or when the facility classification level increases. The section notes that a certificate is not issued to the facility, but to the entity that operates the facility. When a new entity is planning to take over the operation of a facility, it will need to apply for a certificate sufficiently in advance of taking over operations to ensure that a certificate is issued before the new entity actually operates the facility. Certificates will also be void if the facility changes its oil-handling operations to the point where its classification level increases. The GLO believes it is imperative that both the facility and the GLO conduct a comprehensive review of the facility's discharge prevention and response preparedness when a facility's oil-handling capacity increases sufficiently to cause it to be classified at a higher level. This review will be triggered by the operator preparing a new application for a certificate at the appropriate classification level.

Proposed new §19.12(d) gives information on how to obtain certificate application forms. Operators can obtain application forms from any office of the GLO, or they can download them from the agency's website. A facility operator with a current discharge prevention and response certificate will not need to apply for a new certificate under the proposed amended regulations until the current certificate expires. The certificate application form is available on the GLO's website at www.glo.state.tx.us.

Proposed new §19.12(e) states the application must be signed by someone who has approved the facility's discharge prevention and response plan and has the authority to commit the resources necessary to implement it.

Proposed new §19.12(f) specifies that the GLO will inspect the facility and review its discharge prevention and response plan after the GLO receives a completed application form.

Proposed new §19.12(g) explains that the GLO may request additional information from the operator or require the operator to implement additional spill prevention and response measures to obtain a certificate.

Proposed new §19.12(h) requires the GLO to send a copy of the certificate application to the Railroad Commission of Texas for review and comment at least 30 days prior to issuance or renewal of a certificate for an oil or gas pipeline or facility used in the exploration, development, or production of oil or gas. The requirement to send the application to the Railroad Commission is mandated by OSPRA §40.110(f) and is currently in §19.15(d), which is proposed for repeal.

Issuance of the discharge prevention and response certificate is covered by proposed new §19.12(i) and §19.12(j). The GLO will issue certificates to facilities that have adequately addressed their discharge prevention and response requirements and submitted sufficient information in their applications. The facility classification level will be officially determined by the GLO during the application review process. A fee of $25 will be assessed for every certificate to be issued and will apply to all classifications of facilities. This fee is significantly less than the current certification fees, which range from $100 to $2,500. The collection of a certification fee is required by OSPRA §40.110(e) to cover the administrative costs of verifying information and the costs of inspections. The GLO believes the proposed new reduced fee will cover the agency's costs of processing applications and inspections, because the application process will be streamlined under the proposed new regulations. Operators will be notified that they are to submit the $25 certificate fee after the GLO determines a certificate will be issued; operators should not submit the fee with their applications. The proposed new $25 certification fee will generally decrease the economic burden on facilities needing certificates; however, some small oil-handling facilities, which are currently exempted from paying a fee for a discharge prevention and response certificate, will now be required to pay the nominal certification fee. This minor economic burden will be mitigated by not requiring a new certificate under the proposed new fee structure until the current certificate expires.

Proposed new §19.12(k) specifies that certificates will be issued for five-year terms, which is the term mandated by OSPRA and current §19.15(e), which is proposed for repeal. Each certificate will be assigned a unique identification number, which will allow the certificate holder to update application information on file with the GLO over the Internet.

Proposed new §19.12(l) allows the GLO to require a facility operator to submit the facility's entire discharge prevention and response plan to the GLO, if the GLO determines the operator is not adequately implementing its plan. Operators are encouraged to review their plans regularly and ensure their facilities are adequately addressing their responsibilities related to spill prevention and response preparedness.

Under proposed new §19.12(m) certain oil-handling facilities would be exempt from the requirement to obtain a discharge prevention and response certificate. Under the current definition of facility in §19.2(a)(5), mobile or portable equipment would be considered a facility if it is fixed in place at an offshore location for any length of time. Proposed new §19.12(m)(1) exempts mobile and portable equipment at both offshore and waterfront locations from facility certification requirements, if the equipment is fixed in place for 90 days or less. The 90-day exemption period will provide regulatory relief to the oil and gas industry, which operates mobile exploration and production equipment in Texas coastal waters. The GLO believes requiring owners or operators to obtain discharge prevention and response certificates for mobile or portable equipment fixed in place for short periods of time provides minimal benefits in oil spill prevention and response preparedness. Operators of portable or mobile oil-handling equipment who anticipate their oil-handling equipment may be fixed in place for more than 90 days are encouraged to apply for a certificate sufficiently in advance of the 90-day limit to ensure a certificate will be issued by the 90th day. If the equipment is operating beyond the 90-day limit without a certificate, the operator may be assessed a penalty for operating without a certificate. The exemption in proposed new §19.12(m)(2) for farms, ranches, or residential properties is the same basic exemption as in current §19.11(b)(1), with the addition of ranches as another property category that can qualify for the exemption. The exemption in proposed new §19.12(m)(3) applies only to facilities that store oil exclusively in underground storage tanks, provided they do not transfer oil to vessels in the water. The exemption is meant to cover some waterfront service stations that provide fuel to vessels on trailers. The exemption does not apply to waterfront service stations that provide fuel to vessels while the vessels are in the water. Proposed new §19.12(m)(4) provides an exemption for facilities that store or transfer oil only in containers with a volume

of 55 gallons or less. This exemption will apply no matter how much oil in the aggregate is stored or transferred at the facility, provided the container limitation of 55 gallons or less is met.

Proposed new §19.12(n) specifies issuance of a certificate would not estop the state from bringing an action under OSPRA or other law, other than an action under OSPRA for operating without a certificate. This is the same language used in current in §19.15(h), which is proposed for repeal.

Proposed new §19.13 concerns requirements for facilities to develop and implement discharge prevention and response plans. Section 19.13(a) is the general applicability statement. The section applies to any person who operates a waterfront or offshore facility.

Proposed new §19.13(b) requires all facility operators to develop and implement discharge prevention and response plans. The GLO will review the plan at the facility before issuing a certificate to ensure the plan contains the required information and has been implemented.

Proposed new §19.13(c) contains the requirements for discharge prevention and response plans for all facilities. For facilities classified as small, these will be the only requirements. Proposed new §19.13(c)(7) requires all facilities to conduct a small-scale oil spill drill that entails notification of the GLO and National Response Center. This drill can be a "table-top" exercise and does not need to include equipment deployment. Facility operators will be required to document the drills in a log kept at the facility. Proposed new §19.13(c)(10) specifies all plans must include a statement that facility personnel have been informed that using detergents or other surfactants to disperse an oil spill is prohibited. The GLO has responded to several oil spills where the responsible party has illegally used a detergent to disperse an oil spill. The use of detergents or surfactants may adversely affect the containment and cleanup of oil by dispersing oil into the water column where it cannot be cleaned up. Additionally, the detergents or surfactants themselves may be toxic to aquatic organisms. Proposed new §19.13(c)(11) requires all facility operators to describe in their plans any secondary containment or diversionary systems to prevent discharged oil from reaching coastal waters. The plans must also describe the methodology used by the facility to determine the secondary containment or diversionary system is adequate to prevent discharged oil from reaching coastal waters.

Proposed new §19.13(d) contains requirements, in addition to those listed in proposed new §19.13(c), for discharge prevention and response plans for facilities classified as intermediate. Proposed new paragraphs (1)-(3) concern the worst case unauthorized discharge likely to occur at the facility. Operators must describe in their plans the worst case unauthorized discharge likely to occur at the facility and the rationale used to determine this discharge. The plan must also include a description of the environmentally sensitive areas likely to be impacted by this discharge and the anticipated response strategies that would be used to contain and clean it up. Intermediate facilities will be required by proposed new §19.13(d)(5) to conduct an annual oil spill drill which will have a broader scope than the notification drill required by §19.13(c)(7) for all facilities. An oil spill drill which satisfies the requirements of §19.13(d)(5) will also satisfy the §19.13(c)(7) requirement for an annual notification drill.

Proposed new §19.13(e) lists requirements, in addition to those listed in proposed new subsection (c), for discharge prevention and response plans for facilities classified as large. Large facilities will be required by proposed new §19.13(e)(3) to conduct an annual oil spill drill. This larger scale drill will count as one of the notification drills required by §19.13(c)(7) for all facilities. Proposed new §19.13(e)(4) requires plans for large facilities to include a detailed description of the facility's discharge prevention and response capability. If the facility owns and maintains oil spill response equipment, proposed new subparagraph (G) requires that the plan describe the maintenance procedures to ensure the equipment will always be ready for deployment. Subparagraphs (I)-(K) concern the worst case unauthorized discharge likely to occur at the facility. Operators must describe in their plans the worst case unauthorized discharge likely to occur at the facility and the rationale used to determine this discharge. The plan must also include a description of the environmentally sensitive areas likely to be impacted and the response strategies that would be used to contain and clean it up.

Proposed new §19.14 concerns updating application information and renewal and suspension of certificates. Proposed new §19.14(a) addresses the requirement in OSPRA §40.110(a) mandating all certificate-holders to report annually on the status of their discharge prevention and response plan and response capability. The completed certificate application on file with the GLO provides key information on discharge prevention and response preparedness at a facility. Operators will need to review this information at least annually and report any changes to the GLO. Proposed new §19.14(a)(1) specifies how the application information can be updated over the Internet. Updating application information over the Internet lessens the administrative burden for both the regulated community and the GLO, so the GLO encourages all facility operators to use the Internet to update their application information. Proposed new §19.14(a)(2) states that updated information can also be sent to the GLO by either facsimile or mail.

Proposed new §19.14(b) concerns renewing certificates. Proposed new §19.14(b)(1) requires facility operators to submit a new application to the GLO to renew a certificate. The GLO will not send notice to operators that a certificate is about to expire, so operators will need to initiate the renewal process independently. To ensure the facility continues to operate under a valid certificate, facility operators will need to submit a new application to the GLO at least 15 days before the certificate expires. Proposed new §19.14(b)(2) states the GLO may conduct an on-site review of the facility's discharge prevention and response plan as part of the renewal process. As a result of that review, the GLO may require the applicant to amend its plan if the plan does not adequately address the elements required by §19.13. Under proposed new §19.14(b)(3), a fee of $25 will be assessed by the GLO when the agency determines the certificate will be renewed.

Proposed new §19.14(c) requires operators to inform the GLO when the facility closes or is shut-in and no longer handling oil.

Proposed new §19.14(d) concerns certificate suspension, which will require the facility operator to apply for a new certificate. The GLO may suspend a certificate if the facility operator has violated a provision of OSPRA or a rule or order adopted under its authority. A certificate may also be suspended if the GLO determines an operator has not adequately implemented its discharge prevention and response plan. If the GLO proposes to suspend a certificate, the facility operator will be informed in writing and given an opportunity to address the problems which led to the

proposed suspension. If the GLO ultimately determines suspension of a certificate is appropriate, the facility operator may request and is entitled to an administrative hearing.

Amendments are proposed to §19.18 to remove references to the National Preparedness for Response Exercise Program in current §19.18(a) and §19.18(d). The GLO will no longer audit an operator's records of participation in this program, and participation in the program will not have any bearing on an operator's requirements for conducting drills. An operator's participation in this program will no longer be considered a standard for spill prevention and response preparedness, because the GLO's proposed new requirements for discharge prevention and response plans in proposed new §19.13 establish uniform standards that are more definitive and less burdensome to the regulated community. The proposed amendment to §19.18(e) will allow the GLO to pay for all or part of the cost of conducting a drill at a facility. If a facility is located in an environmentally sensitive area and has been involved in more drills because of this, the GLO may pay for a drill at the facility. The drill will be used for training purposes for other facility operators in the area, who will be invited to observe or participate.

Greg Pollock, Deputy Commissioner of the GLO's Oil Spill Prevention and Response Division, has determined that for each year of the first five years the sections as proposed are in effect there will be no fiscal implications for units of local governments as a result of enforcing or administering the sections. The streamlined facility certification requirements and the reduced volume of paperwork which the regulated community will need to submit to the GLO to obtain a certificate will decrease the GLO's costs of administering the facility certification program. There will be no fiscal impacts on other state agencies.

Mr. Pollock has determined the proposed new regulations may result in a minimal additional cost to some small businesses that handle oil in waterfront or offshore locations, because they will be required to pay a nominal fee to obtain a discharge prevention and response certificate. Small commercial facilities as currently defined in §19.11(c) are exempt from paying a fee for certification in accordance with current §19.12(d)(4). If these small facilities cannot claim another exemption, such as the proposed new exemption in §19.12(m)(4) concerning storage or transfer in containers with a volume of 55 gallons or less, they will be required to pay the $25 certification fee. Considering certificates will be valid for a five-year period, the annual cost of the certificate will be negligible not only for these small facility operators, but also for all other operators required to pay the certification fee. The GLO is obligated to collect a certificate application fee by OSPRA §40.110, which states the GLO shall collect a reasonable fee for the administrative costs of verifying data submitted pursuant to obtaining a certificate and for inspections.

The public benefit of the proposed amendments will be to clarify for facility operators the requirements for obtaining a discharge prevention and response certificate and enhance compliance with the certification regulations. This will promote prevention of and adequate response to unauthorized discharges of oil.

The GLO has determined a local employment impact statement on these proposed new sections and amendments is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

In accordance with the Coastal Coordination Act, Tex. Nat. Res. Code, §§33.201 et seq., the GLO has determined this proposed rulemaking concerns an action subject to the Texas Coastal Management Program (CMP). Because the proposed rule governs aspects of the prevention of, response to, or remediation of a coastal oil spill, 31 TAC §505.11(b)(1) requires the rule to be consistent with the goals and policies of the CMP. Mr. Pollock has determined the proposed new rule is consistent with the goals and policies of the CMP because it will facilitate compliance with the GLO's regulations on oil spill prevention and response. The proposed rule will further the policy promulgated at 31 TAC §501.14(e)(1), which states "[t]he GLO regulations for certification of vessels and facilities that handle oil shall be designed to ensure that vessels and facilities are capable of prompt response and adequate removal of unauthorized discharges of oil." The GLO invites the public to submit comments on the consistency of the proposed rules with the CMP during the public comment period.

The GLO has evaluated the proposed rule to determine whether Texas Government Code, Chapter 2007, is applicable and a detailed takings impact assessment required. The GLO has determined the proposed rule does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined the proposed rule changes would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments.

Comments may be submitted to Ms. Melinda Tracy, Texas Register Liaison, Texas General Land Office, Legal Services Division, P.O. Box 12873, Austin, Texas 78711-2873.

31 TAC §§19.11 - 19.15

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

The repeal of §§19.11 - 19.15 is proposed under OSPRA, Natural Resources Code, Title 2, Chapter 40, Subchapter A, §40.007(a), which gives the commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA and §40.117 in Subchapter C, which authorizes the commissioner of the GLO to adopt, amend, repeal, and enforce regulations relating to standards for discharge prevention and response capabilities of terminal facilities and vessels.

OSPRA, Natural Resources Code, Title 2, Chapter 40, Subchapter C, §§ 40.109-40.113 are affected by the proposed repeals.

§19.11. Categories of Coastal Facilities.

§19.12. Facility Certification.

§19.13. Applications for Small Commercial Facilities, Underground Storage Facilities, and Small Facilities.

§19.14. Applications for Major Facilities.

§19.15. Issuance; Modification and Suspension of Facility Certificates.

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205103
Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 305-9129

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31 TAC §§19.11 - 19.14, 19.18

The sections are proposed under OSPRA, Tex. Nat. Res. Code, Title 2, Chapter 40, Subchapter A, §40.007(a), which gives the commissioner of the GLO the authority to promulgate rules necessary and convenient to the administration of OSPRA, §40.110 in Subchapter C, which authorizes the GLO to require payment of a reasonable fee for processing applications for discharge prevention and response certificates, and §40.117 in Subchapter C, which authorizes the commissioner of the GLO to adopt regulations relating to standards for discharge prevention and response capabilities of terminal facilities.

OSPRA, Tex. Nat. Res. Code, Title 2, Chapter 40, Subchapter C, §§40.109-40.113 are affected by the proposed sections.

§19.11. Classification of Waterfront and Offshore Facilities.

Waterfront and offshore facilities are classified based on their capacity to transfer or store oil. Oil that is integral to equipment, such as oil in transformers or lubricating oil in machinery, is not included in determining storage or transfer capacity.

(1) Small--A facility that transfers oil through pipelines, flow lines, gathering lines, or trunk lines with a line diameter of four inches or less or that has the capacity to store 1,320 gallons or less of oil.

(2) Intermediate--A facility that transfers oil through pipelines, flow lines, gathering lines, or trunk lines with a line diameter of greater than four inches up to and including twelve inches or that has the capacity to store more than 1,320 gallons up to and including 250,000 gallons of oil.

(3) Large--A facility that transfers oil through pipelines, flow lines, gathering lines, or trunk lines with a line diameter greater than 12 inches or that has the capacity to store more than 250,000 gallons of oil.

§19.12. Facility Certification Requirements.

(a) Applicability. This section applies to any person who operates a waterfront or offshore facility. If an operator controls part of a facility which is waterfront or offshore, the entire facility in which oil is handled under the control of that operator must be covered by the discharge prevention and response certificate. Pipelines, flowlines, gathering lines, or transmission lines that transfer oil across an area of coastal waters are considered facilities. A combination of interrelated or adjacent tanks, impoundments, pipelines, gathering lines, flow lines, separator or treatment facilities, and other structures, equipment, or devices under common ownership or operation will be considered a single facility under OSPRA. Interrelated means the devices are all an integral part of one commercial or industrial operation or are managed and controlled by a single entity. The term includes facilities owned by units of federal, state, or local government, as well as privately owned facilities.

(b) Current certificate required to operate. No entity may operate a waterfront or offshore facility without a current discharge prevention and response certificate issued by the GLO. This requirement does not apply, however, to an entity that operates a facility and has obtained a waiver from the facility certification requirement pursuant to §19.4 of this title (relating to Waiver) or if an exemption applies to the facility.

(c) Certificate void when operator changes or facility classification level increases. A discharge prevention and response certificate is issued to a specific operator and for a particular facility classification level. When the operator of a facility changes, the discharge prevention and response certificate is void. The new operator of the facility will need to submit an application for a certificate to the GLO before beginning to operate the facility. A certificate is also void when the facility changes its operations in a manner that increases its facility classification level. If an operator increases storage capacity or installs new oil transfer lines at a facility, causing the facility classification to change from small to intermediate or large or from intermediate to large, the operator will need to apply for a new certificate.

(d) Obtaining certificate application forms. The operator of a facility must apply for a discharge prevention and response certificate by submitting a completed application form to the GLO. Application forms are available from the General Land Office, Oil Spill Prevention and Response Program, 1700 North Congress Avenue, Austin, Texas 78701-1495 or from any regional office of the GLO. The application form can also be downloaded from the GLO's Oil Spill Prevention and Response Program website, www.glo.state.tx.us/oilspill.

(e) Signature requirements. The certificate application must be signed by a representative of the facility operator who has approved the facility's discharge prevention and response plan and has the authority to commit the necessary resources to implement the plan.

(f) Facility inspections. After the GLO determines the application is administratively complete, the GLO will contact the facility operator to schedule an on-site inspection and review of the facility's discharge prevention and response plan. The inspection and plan review will cover the following elements:

(1) the facility's compliance with applicable regulations;

(2) whether the discharge prevention and response plan adequately addresses all the elements required by §19.13;

(3) whether the discharge prevention and response plan specifically addresses the worst case unauthorized discharge and demonstrates the facility can adequately respond to the worst case unauthorized discharge from the facility; and

(4) whether the discharge prevention and response plan has been implemented.

(g) Additional information. After the on-site inspection, the GLO may require an applicant to submit additional information to resolve any issues related to the applicant's discharge prevention and response preparedness. The GLO may also require an applicant to develop and implement additional measures to prevent and respond to unauthorized discharges of oil.

(h) Railroad Commission review. At least 30 days prior to issuance or renewal of a certificate for an oil or gas pipeline or facility used in the exploration, development, or production of oil or gas, the GLO will send the Railroad Commission of Texas a copy of the application for review and comment.

(i) Notification that certification requirements have been met. When the GLO determines the facility has adequately addressed its discharge prevention and response requirements and has submitted sufficient information in its application, the GLO will notify the facility operator that the certification requirements have been met. The operator will then be informed of the facility classification level (small, intermediate, or large).

(j) Certification fee. A fee of $25 will be assessed for every facility to be certified, but the fee should not be submitted with the completed application form. The facility operator will be instructed to submit the fee to the GLO after the GLO determines a certificate will be issued to the operator.

(k) Term for certificates. The GLO will issue certificates with a term of five years from the date of issuance. Each certificate will be assigned an identification number, which will allow the facility operator to review and amend the facility information on the GLO's Oil Spill Prevention and Response Program interactive website. The identification number will be sent to the person who signed the application form, along with instructions on how to update and renew the certificate.

(l) Discretionary submittal of discharge prevention and response plan. After a certificate is issued to a facility, the GLO may require the facility operator to submit to the GLO a complete copy of its discharge prevention and response plan for review. Submittal of the plan for review may be required if the GLO determines the facility may not be adequately implementing its plan to prevent and respond to unauthorized discharges of oil.

(m) Exemptions. The following facilities that handle oil do not need to apply to the GLO for a discharge prevention and response certificate:

(1) Mobile or portable oil-handling equipment, such as a mobile offshore drilling unit, when it is fixed in place for less than 90 days.

(2) A farm, ranch, or residential property that stores up to and including 1,320 gallons of oil for farming, ranching, or residential purposes.

(3) A facility that stores oil exclusively in underground tanks and does not transfer oil to vessels in the water.

(4) A facility that stores or transfers oil only in containers with a volume of 55 gallons or less.

(n) Effect of certificate on other violations. Issuance of a certificate does not estop the state in an action brought under OSPRA, or any other law, from alleging a violation of any such law, other than failure to have a certificate.

§19.13. Requirements for Discharge Prevention and Response Plans.

(a) Applicability. This section applies to any person who operates a waterfront or offshore facility and must obtain a discharge prevention and response certificate.

(b) Implementation of plans. An operator of any facility that requires certification must develop and implement a written discharge prevention and response plan. Before issuing a certificate, the GLO will conduct an on-site review of the plan. The GLO will determine whether the facility's plan contains all the information required by this section and has been fully implemented.

(c) Required elements of discharge prevention and response plans for all facility classifications. Operators of all facilities that require certification must prepare discharge prevention and response plans which include the following information:

(1) the owner and operator of the facility;

(2) the person or persons in charge of the facility, as required by §19.16 of this title (relating to Person in Charge);

(3) the name and address (both physical and mailing) of the facility;

(4) a description of the facility, including:

(A) the location of the facility by latitude and longitude;

(B) the facility's primary activity;

(C) the types of oil handled, whether material safety data sheets (MSDS) have been prepared for them, and the location where the MSDS are maintained;

(D) the storage capacity of each tank used for storing oil;

(E) the diameter of all lines through which oil is transferred;

(F) the average daily throughput of oil at the facility; and

(G) the dimensions and capacity in barrels of the largest oil-handling vessel which docks at the facility.

(5) for a facility which normally does not have personnel on-site, a commitment to maintain in a prominent location a sign or placard which states that the GLO and National Response Center are to be notified of an oil spill and gives the 24-hour phone numbers for notifying the GLO and National Response Center;

(6) a general description of measures taken by the facility to prevent unauthorized discharges of oil;

(7) a plan to conduct an annual oil spill drill that entails notifying the GLO and National Response Center and keeping a log at the facility which documents when the notification drill was conducted and facility personnel who participated in it;

(8) if oil is transferred at the facility, emergency transfer procedures to be implemented if an actual or threatened unauthorized discharge of oil occurs at the facility;

(9) strategic plans to contain and clean up unauthorized discharges of oil from the facility;

(10) a statement that all facility personnel who might be involved in an oil spill response have been informed that detergents or other surfactants are prohibited from being used on an oil spill in the water, and that dispersants can only be used with the approval of the Regional Response Team, the interagency group composed of federal and state agency representatives that coordinates oil spill responses; and

(11) a description of any secondary containment or diversionary structures or equipment at the facility to prevent discharged oil from reaching coastal waters, including the methodology for determining that the structures or equipment are adequate to prevent oil from reaching coastal waters.

(d) Additional requirements for facilities classified as intermediate. In addition to the requirements in §19.13(c), operators of intermediate facilities must prepare written discharge prevention and response plans which include the following information:

(1) a description of the worst case unauthorized discharge of oil reasonably likely to occur at the facility and the rationale used to determine the worst case unauthorized discharge;

(2) a description and map of environmentally sensitive areas that would be impacted by the worst case unauthorized discharge and plans for protecting these areas if an oil spill occurs at the facility;

(3) a description of the facility's response strategies to contain and clean up the worst case unauthorized discharge;

(4) a description of discharge prevention procedures implemented at the facility, including procedures to prevent discharges from transfers of oil;

(5) a plan to conduct an annual oil spill drill that includes the following elements:

(A) notifying the GLO and National Response Center;

(B) notifying any third parties, such as discharge cleanup organizations, which have agreed to respond to an oil spill and confirming they would be able to respond to an oil spill at the facility on the day of the drill;

(C) if the facility has spill response equipment stored on-site, deployment of a representative portion of the equipment which would be used to respond to the type of discharge most likely to occur at the facility; and

(D) a log documenting when the annual drill was conducted and the facility personnel who participated in it; and

(6) if the operator has entered into any oil spill response or cleanup contracts or basic ordering agreements with a discharge cleanup organization, copies of the contracts or agreements or a narrative description of their terms.

(e) Additional requirements for facilities classified as large. In addition to the requirements in §19.13(c), operators of large facilities must prepare written discharge prevention and response plans which include the following information:

(1) maps showing vehicular access to the facility, pipelines to and from the facility, and nearby residential or other populous areas;

(2) a site plan of the facility showing:

(A) the location of all structures in which oil is stored;

(B) the location of all areas where oil is transferred at the facility; and

(C) drainage and diversion systems at the facility, such as sewers, outfalls, catchment or containment systems or basins, sumps, and all watercourses into which surface runoff from the facility drains (all of which may be shown on the site plan or maps);

(3) a plan to conduct an annual oil spill drill that includes the following elements:

(A) notifying the GLO and National Response Center;

(B) notifying any third parties, such as discharge cleanup organizations, which have agreed to respond to an oil spill and confirming they would be able to respond to an oil spill at the facility on the day of the drill;

(C) if the facility has spill response equipment stored on-site, deployment of a representative portion of the equipment which would be used to respond to the type of discharge most likely to occur at the facility; and

(D) a log documenting when the annual drill was conducted and the facility personnel who participated in it;

(4) a detailed description of the facility's discharge prevention and response capability, including:

(A) leak detection and safety systems to prevent accidental discharges of oil, including a description of equipment and procedures;

(B) schedules, methods, and procedures for testing, maintaining, and inspecting storage tanks, pipelines, and other equipment used for handling oil;

(C) schedules, methods, and procedures for conducting accidental discharge response drills;

(D) whether the facility's oil spill response capability will primarily be based on contracts or agreements with third parties or on the facility's own personnel and equipment;

(E) planned response actions, the chain of command, lines of communication, and procedures for notifying the GLO, emergency response and public safety entities, other agencies, and neighboring facilities in the event of an unauthorized discharge of oil;

(F) oil spill response equipment and supplies located at the facility, their ownership and location, and the time required to deploy them;

(G) if the facility owns and maintains oil spill response equipment, the schedules, methods, and procedures for maintaining the equipment in a state of constant readiness for deployment;

(H) if the operator has entered into any oil spill response or cleanup contracts or basic ordering agreements with a discharge cleanup organization, copies of the contracts or agreements or a narrative description of their terms;

(I) the worst case unauthorized discharge of oil reasonably likely to occur at the facility and the rationale used to determine the worst case unauthorized discharge;

(J) a description and map of environmentally sensitive areas that would be impacted by the worst case unauthorized discharge and plans for protecting these areas if an oil spill occurs at the facility;

(K) a description of response strategies that would be implemented to contain and clean up the worst case unauthorized discharge;

(L) information on the facility's program for training facility personnel on accidental discharge prevention and response;

(M) information on facility personnel who have been specifically designated to respond to an oil spill, including any training they have received and where the training records are maintained;

(N) plans for transferring oil during an emergency; plans for recovering, storing, separating, transporting, and disposing of oily waste materials generated during an oil spill response; and

(O) plans for providing emergency medical treatment, site safety, and security during an oil spill.

§19.14. Annual Updating of Application Information; Renewal and Suspension of Certificates.

(a) Annual review of application information. Facility operators are required to report annually any changes in the information submitted to the GLO in their applications for certificates. Changes must be reported by the anniversary of the date the certificate was issued, but operators are encouraged to update the information more frequently. Facility operators can update information on file with the GLO in the following ways:

(1) Internet. The GLO has established a link on its website (www.glo.state.tx.us) to allow facility operators to review and amend application information on file with the GLO. Facility operators can use the identification number, which is issued with the certificate, to access this interactive link. To minimize the GLO's administrative expense of updating information, the GLO encourages certificate holders to use the Internet to revise facility information on file with the GLO.

(2) Mail or facsimile. If a facility operator cannot update application information over the Internet, updated information can be sent by mail or facsimile to the appropriate GLO regional office. Addresses and facsimile numbers for the regional office covering a particular facility can be obtained by calling the main oil spill program office in Austin at (512) 475-1575.

(b) Renewing certificates. Operators are responsible for ensuring that certificates are renewed by their expiration dates. The GLO will not send expiration notices to operators.

(1) All certificates, which will be issued for a period of five years, will specify the date of expiration. To renew a certificate, certificate holders must complete and submit to the GLO a new application form. To give the GLO sufficient time to review the application, it must be submitted to the GLO at least 15 days before the expiration date.

(2) In reviewing the application to renew a certificate, the GLO may conduct an on-site review of the facility's discharge prevention and response plan. The GLO may require the applicant to amend its plan if the GLO determines the plan does not adequately address the elements required by §19.13.

(3) A fee of $25 will be assessed for renewal of a certificate. The GLO will inform the certificate holder that the fee is being assessed after the application is reviewed and a determination has been made that the certificate will be renewed.

(c) Notification to GLO when facility closes or is shut-in. A facility operator is required to notify the GLO when the facility closes or when the facility is shut-in and no longer handling oil.

(d) Certificate suspension. Suspension of a certificate requires the facility owner or operator to apply for a new certificate. The GLO may suspend a certificate if the facility operator violates a provision of OSPRA or rules or orders adopted under authority of OSPRA. A certificate may also be suspended if the GLO determines the facility has not adequately implemented its discharge prevention and response plan or the facility's response to an unauthorized discharge of oil was inadequate. Before suspending a certificate, the GLO will inform the certificate holder in writing that suspension is being considered. The reasons for the proposed suspension will be specified, and the certificate holder will be afforded an opportunity to address the problems. If the GLO ultimately determines the certificate holder has not adequately addressed the facility's problems and suspension of the certificate is appropriate, the facility operator may request and is entitled to a hearing on the suspension in the same manner provided under Chapter 2 of this Title, relating to Rules of Practice and Procedure for contested case hearings before the GLO.

§19.18. Audits, Drills, and Inspections To Determine Prevention and Response Capability.

(a) An audit is a full review of a facility's or vessel's compliance with the requirements of OSPRA and regulations adopted pursuant thereto. An audit may be announced or unannounced. Audits will be commenced between the hours of 7:00 a.m. and 6:00 p.m. The owner and/or operator of the facility or vessel subject to audit must produce records related to unauthorized discharges of oil into coastal waters, discharge prevention and response plans, equipment inventory, maintenance and repair, material safety data sheets for oil handled, oil storage and throughput, financial responsibility, personnel certification and training, and daily records and other documents and records containing information relevant to compliance with OSPRA [~~and, if applicable, in the voluntary National Preparedness for Response Exercise Program~~]. The representative of the General Land Office (GLO) is authorized to view all equipment at the facility that is available for responding to unauthorized discharges of oil. The GLO representative is authorized to enter any portion of the facility and vessel where oil is handled, where discharge prevention and response equipment and supplies are stored and maintained or where oil transfer operations are being performed. Although the audit may be unannounced, prior to entering the facility, the GLO representative will make a reasonable effort, as defined in §19.3(a) of this title (relating to Inspections and Access to Property), to obtain the consent of the owner or operator or his representative.

(b) An inspection is a review of a specified area or areas of a facility or vessel for a specified purpose. An inspection may be announced or unannounced. Inspections between the hours of 7:00 a.m. and 6:00 p.m. may be unannounced. Inspections after 6:00 p.m. and before 7:00 a.m. will be announced. The GLO will make a reasonable effort to obtain the consent of the owner or operator or a representative of either prior to entering property to conduct the inspection. At the commencement of the inspection, the GLO representative will inform the owner or operator of the area or areas to be inspected and the purpose of the inspection. The areas and purposes of an inspection are limited to those set forth in subsection (a) of this section.

(c) A drill is a test of equipment and personnel in operation. A drill is in response to a mock discharge which is conducted by GLO representatives who determine the extent and parameters of the exercise. A drill may be announced or unannounced. Prior to entering property in order to conduct the drill, the GLO will make a reasonable effort to obtain consent of the owner or operator or representative of either to enter the property. Drills will be commenced between the hours of 7:00 a.m. and 6:00 p.m. and all drills involving vessels will be conducted in cooperation with the United States Coast Guard. A drill involving a facility will be conducted in cooperation with any other governmental agencies whom the GLO intends to involve in the mock operation.

(d) A vessel or facility will not be subjected to more than a total of two audits and/or drills in one 12-month period. This limitation[~~A vessel or facility that is participating in the National Preparedness for Response Exercise Program will not be drilled separately under OSPRA or these rules. These limitations~~] will not apply to any vessel or facility that has violated OSPRA, any regulation promulgated thereunder, or any order of the commissioner.

(e) The owner or operator of the vessel or facility must bear its own costs of the audit, drill, or inspection and may not be reimbursed its costs from the fund. The GLO may, however, pay all or part of the cost of an oil spill drill under limited circumstances. The GLO's decision to pay for a drill will be based on a determination that the facility is located in an environmentally sensitive area and has been involved in a greater number of drills or more complex audits or drills because of its location. If the GLO pays for any part of the cost of the drill, the GLO will invite other facility operators in the vicinity to observe or participate in the drill for training purposes.

(f) Performance of an audit, drill, or inspection does not estop the state in an action brought under OSPRA or any other law from alleging a violation of OSPRA or any such law.

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205091
Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 305-9129

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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 §3.302

The Comptroller of Public Accounts proposes an amendment to §3.302, concerning accounting methods, credit sales, bad debt deductions, repossessions, interest on sales tax, and trade-ins. Subsection (h)(1) is amended to provide that tax paid on an account that later becomes a bad debt is not considered to be tax paid in error and does not accrue interest under Texas Tax Code §111.064. Subsection (d)(4) is amended for clarity.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§151.005, 151.007, 151.008, and 151.426.

§3.302. Accounting Methods, Credit Sales, Bad Debt Deductions, Repossessions, Interest on Sales Tax, and Trade-Ins.

(a) Accounting methods.

(1) For sales and use tax purposes, retailers may use a cash basis, an accrual basis, or any generally recognized accounting basis that correctly reflects the operation of their business. Retailers who wish to use an accounting system to report tax that is not on a pure cash or accrual basis or that is not a commonly recognized accounting system should obtain prior written approval from the comptroller.

(2) Paragraph (1) of this subsection does not apply to the reporting of sales tax on rentals and leases of tangible personal property. See §3.294 of this title (relating to Rentals and Leases of Taxable Items) for the accounting of rentals and leases.

(b) Credit sales.

(1) Credit sales include all sales in which the terms of the sale provide for deferred payments of the purchase price. Credit sales include installment sales, sales under conditional sales contracts and revolving credit accounts, and sales by a retailer for which another person extends credit to the purchaser under a retailer's private label credit agreement.

(2) Sales tax is due on insurance, interest, finance charges, and all other service charges incurred as a part of a credit sale unless these charges are stated separately to the customer by such means as an invoice, billing, sales slip, ticket, or contract.

(3) Tax is to be reported on a credit sale based upon the accounting method that the retailer uses.

(A) If the retailer is on an accrual basis, the entire amount of tax is due and must be reported at the time the sale is made.

(B) If the retailer is on a cash basis of accounting, the payment received from the customer includes a proportionate amount of tax, sales receipts, and may also include finance charges. Tax must be reported based upon the actual cash collected during the reporting period, excluding separately stated finance charges.

(C) If the retailer uses an accounting basis that is not a pure cash or accrual basis, tax must be reported in a consistent manner that accurately reflects the realization of income from the credit sales on the retailer's books and records.

(c) Transfer or sale of sales contracts and accounts receivable. A retailer may sell, factor, or assign to a third party the retailer's right to receive all payments due under a credit sale. At the time the contract or receivable is sold, factored, or assigned, the tax becomes due on all remaining payments. The retailer is responsible for reporting all remaining tax due under the credit sale to the comptroller in the reporting period in which the contract or receivable is sold, factored, or assigned. No reduction in the amount of tax to be reported and paid by the retailer is allowed if the transfer to the third party is for a discounted amount. This section does not apply to a seller's assignment or pledge of contracts or accounts receivable to a third party as loan collateral.

(d) Bad debts.

(1) Any portion of the sales price of a taxable item that the retailer or private label credit provider cannot collect is considered to be a bad debt.

(A) A retailer is not required to report tax on any amount that has been entered in the retailer's books as a bad debt during the reporting period in which the sale was made, and that will be taken as a deduction on the federal income tax return during the same or subsequent reporting period.

(B) A retailer is entitled to a credit for tax reported and paid on an account later determined to be a bad debt. A retailer may take a deduction on the retailer's report form, or obtain a refund from the comptroller, in the reporting period in which the retailer's books reflect the bad debt. Deductions and refunds due to bad debts are limited to four years from the date the account is entered in the retailer's books as a bad debt.

(C) A retailer who extends credit to a purchaser on an account that is later determined to be a bad debt, a person who extends credit to a purchaser under a retailer's private label credit agreement on an account that is later determined to be a bad debt, or an assignee or affiliate of either who extends credit on an account that is later determined to be a bad debt, is entitled to a credit or refund for the tax paid to the comptroller on the bad debt.

(2) The amount of the bad debt may include both the sales price of the taxable item and nontaxable charges, such as finance charges, late charges, or interest that were separately billed to the customer. A deduction may only be claimed on that portion of the

bad debt that represents the amount reported as subject to tax. In determining that amount, all payments and credits to the account may be applied ratably against the various charges that comprise the bad debt, except as provided by paragraph (3) of this subsection.

(3) A retailer, private label credit provider, or assignee or affiliate may not deduct from the amount subject to tax to be reported the expense of collecting a bad debt, or the amount that a third party has retained or which has been paid to a third party for the service of collecting a bad debt.

(4) To claim bad debt deductions, the records of the person who claims the bad debt deduction must show:

(A) date of original sale and name and Texas sales tax permit number of the retailer;

(B) name and address of purchaser;

(C) amount that the purchaser contracted to pay;

(D) taxable and nontaxable charges;

(E) amount on which the retailer reported and paid Texas tax;

(F) all payments or other credits applied to the account of the purchaser;

(G) evidence that the uncollected amount has been designated as a bad debt in the books and records of the person who claims the bad debt deduction, and that the amount has been or will be claimed as a bad debt deduction for income tax purposes;

(H) city, county, transit authority, or special purpose district to which local taxes were reported; and

(I) the unpaid portion of the assigned sales price.

(5) A person who is otherwise qualified to claim a bad debt deduction, and whose volume and character of uncollectible accounts warrants an alternative method of substantiating the reimbursement or credit, may:

(A) maintain records other than the records specified in paragraph (4) of this subsection if:

(i) the records fairly and equitably apportion taxable and nontaxable elements of a bad debt, and substantiate the amount of Texas sales tax imposed and remitted to the comptroller with respect to the taxable charges that remain unpaid on the debt; and

(ii) the comptroller approves the procedures used; or

(B) implement a system to report its future tax responsibilities based on a historical percentage calculated from a sample of transactions if:

(i) the system utilizes records provided by the person claiming the credit or reimbursement and the person who reported and remitted such tax to the comptroller; and

(ii) the comptroller approves the procedures used.

(6) The comptroller may revoke the authorization to report under paragraph (5)(B) of this subsection if the comptroller determines that the percentage being used is no longer representative because of:

(A) a change in law, including a change in the interpretation of an existing law or rule; or

(B) a change in the taxpayer's business operations.

(7) A person who is not a retailer may claim a credit or reimbursement authorized by paragraph (1)(C) of this subsection only for taxes imposed by Tax Code, §151.051 or §151.101.

(8) For purposes of this section, "affiliate" means any entity or entities that would be classified as a member of an affiliated group under 26 U.S.C. §1504.

(9) If a retailer or other person later collects all or part of an account for which a bad debt deduction or write-off was claimed, the amount collected must be reported as a taxable sale in the reporting period in which such collection was made.

(10) Credit or installment sales may not be labeled as bad debts merely for the purpose of delaying the payment of the tax.

(e) Repossessions.

(1) When taxable items upon which the retailer or other person has paid tax are repossessed, the retailer or other person is allowed a credit or deduction for that portion of the actual purchase price that remains unpaid. The deduction must not include any nontaxable charges that were a part of the original sales contract. Any payments that the purchaser made prior to repossession must be applied ratably against the various charges in the original sales contract.

(2) A retailer or other person may not deduct from the tax to be reported the expense of collecting an account receivable, or the amount that a third party has retained or that has been paid to a third party for the service of collecting an account or repossessing or selling a repossessed item.

(3) To claim a deduction or credit the person who claims the deduction or credit must be able to provide detailed records that show:

(A) date of original sale and name and Texas sales tax permit number of retailer;

(B) name and address of purchaser;

(C) amount that the purchaser contracted to pay;

(D) taxable and nontaxable charges;

(E) amount on which retailer reported and paid Texas tax;

(F) all payments or other credits applied to the account of the purchaser;

(G) city, county, transit authority or special purpose district to which local taxes were reported; and

(H) the unpaid portion of the sale price assigned.

(4) Sales tax is due on the sale of a repossessed item, irrespective of whether a vendor, mortgagee, secured party, assignee, trustee, sheriff, or an officer of the court has sold the item, unless the sale is otherwise exempt. If the vendor, mortgagee, secured party, assignee, trustee, sheriff, or officer of the court does not collect the tax, the purchaser must remit the tax directly to the comptroller.

(f) Interest on sales tax. This section will refer to the terms "interest" and "time price differential" as interest. The term "credit" includes all deferred payment agreements.

(1) Sellers on a cash basis of accounting who sell taxable items on credit and charge interest on the amount of credit extended, including sales tax, are required to remit to the comptroller a portion of the interest that has been collected on the state, city, and metropolitan transit authority taxes.

(2) If the amount of interest charged on the tax is 18% or less, the seller must remit to the comptroller one-half of the interest charged on the tax.

(3) If the amount of interest charged on the tax is greater than 18%, the seller must remit the amount of interest charged less 9%. For example, 21% charged less 9% deduction equals 12% interest remitted. A seller will not be allowed the 9% deduction if the interest rate charged on sales tax differs from the interest rate charged on the sales price of the taxable item.

(4) In determining the amount of interest to be remitted to the comptroller, a seller does not need to calculate the interest on each individual account. A formula for the calculation may be used if the formula correctly reflects the amount of interest collected. The formula will be subject to verification upon audit of the taxpayer's records.

(5) Except for the provisions of Texas Tax Code, §151.423 and §151.424, all reporting, collection, refund, and penalty provisions of Texas Tax Code, Chapter 151, including assessment of penalty and interest, apply to interest due.

(g) Trade-ins. In this subsection, a trade-in is considered as a taxable item that is being used to reduce the purchase price of another taxable item.

(1) The sales price of a taxable item does not include the value of a trade-in that a seller takes as all or part of the consideration for a sale of a taxable item of the same type that is normally sold in the regular course of business. For example, sales tax will be due only on the difference between the amount allowed on an old piano taken in trade and the sales price of a new piano.

(2) The sales price of a taxable item does include the value of a trade-in that a seller takes as all or part of the consideration for the sale of a taxable item, if the trade-in is a different type from the type normally sold in the regular course of business. For example, a seller of pianos who takes a desk in trade as part of the sales price of a piano would collect sales tax on the retail sales price of the piano without any deduction for the value of the desk. In this situation, the seller and buyer are considered to be bartering. However, if a seller of pianos is also a seller of desks, the value of the desk would be allowed as a trade-in.

(3) Persons who remove items from a tax-free inventory for use as a trade-in owe sales tax on the cost price of the items. If both parties to a transaction remove items from a tax-free inventory to trade for other items that each party will use, the transaction will be regarded as barters by both parties. Each party to the barter will be required to collect sales tax on the retail sales price of the item being transferred. For example, a retailer of drill pipe trades pipe to a retailer of aircraft in exchange for an aircraft. Both retailers are trading the respective items for use, not resale. The pipe retailer must collect sales tax on the retail sales price of the pipe. The aircraft retailer must collect sales tax on the retail sales price of the aircraft.

(4) See §3.336 of this title (relating to Sales of Gold, Silver, Coins, and Currency) for information on persons who barter for taxable items with gold, silver, diamonds, or precious metals.

(h) Tax Code, §111.064, provides that interest will be paid on tax amounts found to be erroneously paid and claimed on a request for refund or in an audit. See also §3.325 of this title (relating to Refunds, Interest, and Payments Under Protest).

(1) Tax[~~A refund of tax~~] paid on an account that islater determined to be uncollectible and written off for federal tax purposes is not tax paid in error and does not[~~will~~] accrue interest [~~60 days after the account is determined to be uncollectible and entered into the books as a bad debt~~].

(2) A request for refund, or an overpayment of tax in an audit, for a report period due before January 1, 2000, does not accrue interest.

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205054
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-0387

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34 TAC §3.322

The Comptroller of Public Accounts proposes an amendment to §3.322, concerning exempt organizations. The amendment implements clarifications to subsection (b)(5), and (e)(1). The revocation information currently under (b)(5)(A), (B), and (C) has been deleted from this subsection and moved to subsection (f). Because the Legislature repealed Chapter 57 of the Texas Agriculture Code concerning Agricultural Development Corporations, subsection (c)(7) deletes reference to the Agricultural Development Act of 1983. The new language in subsection (f) provides the guidelines for revocation of exemptions from sales tax. Other subsections of the proposed rule are amended for the purpose of clarity.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code §151.310.

§3.322. Exempt Organizations.

(a) General policy. This section is [~~will be~~] administered using the following guiding principles: [~~these guidelines.~~]

(1) Because exemptions are[~~Since exempt status is~~] not favored under the laws of the State of Texas, the provisions of this section shall be strictly interpreted.

(2) An organization must show by clear and convincing evidence[, without doubt,] that it meets the requirements of this section and the statutes. Any unresolved question about the qualifications of an organization will result in denial of exempt status.

(b) Entities that must prove exempt status. Entities or organizations that may qualify for exempt status include:

(1) a nonprofit charitable or eleemosynary organization that devotes[devoting] all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If the organization engages in any substantial activity other than the activities described in this section, it [will not be considered as having been organized for purely public charity, and therefore, will not]cannot qualify for exemption under this provision because it is not organized for purely public charity. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the definition of charitable organization, [requirements for exemption under this definition]even if the nonprofit organizations perform services that are often charitable in nature, are as follows: fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. [Even though not organized for profit and performing services that are often charitable in nature, these types of organizations do not meet the requirements for exemption under this provision.] Although these organizations do not qualify for exemption [under this category of exemption] as charitable organizations, they may qualify for the exemption under the Tax Code, §151.310(a)(2), if they obtain an exemption from the Internal Revenue Service (IRS) under the Internal Revenue Code (IRC), §501(c). Chambers of Commerce may qualify under paragraph (6) of this subsection;

(2) a nonprofit educational organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and has a regularly scheduled curriculum that uses[, using] the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities that solely consist of presentation of [consisting solely of presenting] discussion groups, forums, panels, lectures, or other similar programs, may qualify for the exemption under this provision, if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. An [The] organization [will not be considered] cannot qualify for exemption under this provision if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Although these organizations do not qualify for exemption [under this category of exemption] as educational organizations, they may qualify for the exemption under the Tax Code, §151.310(a)(2), if they obtain an exemption from the IRS under the IRC[Internal Revenue Code], §501(c);

(3) a nonprofit religious organization that is an organized group of people who regularly meet[meeting] for the primary purpose of holding, conducting, and sponsoring religious worship services according to the rites of their sect. The organization must be able to provide evidence of an established congregation that shows[showing that there is an organized group of people regularly attending] regular attendance of these services by an organized group of people. An organization that supports or encourages religion as an incidental part of its overall purpose, or one whose general purpose is to further[furthering] religious work or instill[instilling] its membership with a religious understanding, cannot [will not] qualify for exemption under this provision. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic associations, churches with membership consisting of family members only, missionary organizations, and groups that organize[who meet] for the purpose of holding prayer meetings, Bible [bible] study, or revivals. Although these organizations do not qualify for exemption [under this category of exemption] as religious organizations, they may qualify for an[the] exemption under the Tax Code, §151.310(a)(2), if they obtain an exemption from the IRS under the IRC[Internal Revenue Code], §501(c);

(4) a youth athletic organization that is a nonprofit corporation or association that[engaged] exclusively provides [in providing] athletic competition among persons under 19 years of age;

(5) a nonprofit organization that applies for and obtains a determination letter or a group exemption ruling letter from the IRS that states that the organizationqualifies for exemption from federal income tax under the IRC[Internal Revenue Code], §501(c)(3), (4), (8), (10), or (19);

[(A) Under a federal/state exchange agreement, the Internal Revenue Service notifies the comptroller when an organization no longer qualifies for federal exemption. Upon notification, an organization's exempt status will be immediately revoked, and all subsequent purchases by the organization will be subject to tax.]

[(B) The organization must immediately notify its suppliers of the loss of exempt status. Failure to so notify a supplier is a violation of the sales tax law.]

[(C) After revocation, the organization may re-apply for exempt status under other provisions of this section.]

(6) a nonprofit chamber of commerce that represents [representing] at least one Texas city, county, or geographic locality. For the purpose of this section, a chamber of commerce is a perpetual organization devoted exclusively to promoting the general economic interest of all commercial enterprises in the city, county, or areas it represents. The term does not include chamber-like organizations such as trade associations or business leagues that [which] serve a single line or closely related lines of business within a single industry;

(7) a nonprofit convention and tourist promotional agency organized or sponsored by at least one Texas city or county;

(8) an electric cooperative formed under the Electric Cooperative Corporation Act (Utilities Code, Chapter 161) and nonprofit electric cooperatives located outside the state;

(9) a telephone cooperative formed under the Telephone Cooperative Act (Utilities Code, Chapter 162) and nonprofit telephone cooperatives located outside the state; and

(10) a local organizing committee that is exempt from federal income tax under the IRC[~~Internal Revenue Code~~], §501(c). The local organizing committee must be authorized by an endorsing municipality to pursue an application and submit a bid on the municipality's behalf to a site selection organization for selection as the host site of the 2007 Pan American Games or the 2012 Olympic Games.

(c) Entities always exempt. The following entities and organizations are exempt under the law and are not required to request and prove exempt status except to send information as requested by the comptroller to verify its exempt status under this subsection:

(1) the United States, its unincorporated agencies and instrumentalities;

(A) The United States includes all parts of the executive, legislative, and judicial branches and all independent boards, commissions, and agencies of the United States government.

(B) Instrumentalities and agencies of the United States include:

(i) various military entities under the supervision of a base commander;

(ii) organizations that contract [~~contracting~~] with the United States and whose contracts explicitly and unequivocally state that they are agents of the United States;

(iii) organizations wholly owned by the United States or wholly owned by an organization that[~~which~~] is itself wholly owned by the United States; and

(iv) organizations specifically named as agents of the United States or exempted as instrumentalities of the United States by federal statutes.

(C) Instrumentalities and agencies of the United States also include organizations having substantially all of the following characteristics:

(i) they are funded by the United States;

(ii) they carry out a specific program of the United States;

(iii) they are managed or controlled by officers of the United States;

(iv) their officers are appointed by the United States;

(v) they perform commitments of the United States under an international treaty; and

(vi) they are not organized for private profit.

(2) any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States. "Wholly owned" means total or 100% ownership;

(3) federal credit unions organized under 12 United States Code, §1768;

(4) the State of Texas, its unincorporated agencies and instrumentalities;

(5) any county, city, special district or other political subdivision of the State of Texas, and any college or university created or authorized by the State of Texas;

(6) any company, department, or association organized for the purpose of answering fire alarms and extinguishing fires or for the purpose of answering fire alarms, extinguishing fires, and providing emergency medical services, the members of which receive nominal or no compensation for their services;

(7) nonprofit corporations formed under the Development Corporation Act of 1979 [~~,~~] or the Health Facilities Development Act of 1981[~~, or the Agricultural Development Act of 1983~~] when they purchase [~~purchasing~~] items for their exclusive use and benefit. The exemption does not apply to items purchased by the corporation to be lent, sold, leased, or rented. See §3.291 of this title (relating to Contractors); and

(8) nonprofit corporations established by the Texas National Research Laboratory Commission under [~~the~~] Government Code, §465.008(g). Taxable items purchased or leased from these corporations are also exempt from tax if the items are used in or for carrying out an eligible undertaking as defined by [~~the~~] Government Code, §465.021.

(d) Qualification requirements. To qualify for exempt status under subsection (b) of this section, an organization must satisfy all of the following requirements.

(1) An organization must be organized or formed solely to conduct one or more exempt activities. The Comptroller will consider all[~~All~~] documents necessary to prove the purpose for which an organization is formed [~~will be considered when exempt status is sought~~].

(2) An organization must devote its operations exclusively to one or more exempt activities.

(3) An organization must dedicate its assets in perpetuity to one or more exempt activities.

(4) No profit or gain may pass directly or indirectly to any private shareholder or individual. All salaries or other benefits furnished officers and employees must be commensurate with the services actually rendered.

(e) How to obtain exempt status.

(1) To apply for and obtain [~~receive~~] a letter of exemption from the comptroller, an organization must submit to the comptroller a written statement that details[~~setting out in detail~~] the nature of the activities conducted or to be conducted [~~,~~] and the following documentation: [~~a copy of the articles of incorporation if the organization is a corporation, a copy of the bylaws, a copy of any applicable trust agreement or a copy of its constitution, and a copy of any letter granting exemption from the Internal Revenue Service.~~]

(A) a copy of the bylaws, a copy of its constitution, and a copy of any applicable trust agreement, and if the organization is a corporation, a copy of the articles of incorporation and any related amendments;

(B) if the claimed exemption is under §501(c)(3), (4), (8), (10), or (19) of the IRC, a copy of all pages of a determination letter or a group exemption ruling letter from the IRS. If the original determination letter is more than four years old, then the organization must send a copy of a recent letter from the IRS. A nonprofit organization that claims exemption under a parent's exemption must provide a copy of the parent organization's group exemption ruling letter from the IRS and a letter from the parent organization that states that the applicant nonprofit organization is a subordinate covered under the parent organization's group exemption.

(2) The comptroller may require an organization to furnish additional information to establish the claimed exemption. For example, the comptroller may request financial information and[~~including, but not limited to,~~] documentation that shows [~~showing~~] all services

that[~~performed by~~] the organization performs[~~and all income, assets and liabilities of the organization~~].

(3) After a review of the material, the comptroller will inform an organization in writing if it qualifies for exemption.

(4) The comptroller or an authorized representative of the comptroller may audit the records of an organization at any time during regular business hours to verify the validity of the organization's exemption status.

(f) Revocations, withdrawals, or loss of exemptions.

(1) Except as provided in paragraph (2) of this subsection, if at any time the comptroller has reason to believe that an exempt organization no longer qualifies for exemption, a comptroller's representative will notify the organization that its exempt status is under review. A comptroller's representative may request additional information that is necessary to ascertain the continued validity of the organization's exempt status. An organization must immediately notify the comptroller in writing of a revocation, withdrawal, or loss of exemption when the organization no longer qualifies for exemption. If the comptroller determines that an organization is no longer entitled to its exemption, then the comptroller will notify the organization. The date of the notification letter is the effective date of the revocation. All subsequent purchases are subject to tax.

(2) For nonprofit organizations that are granted an exemption under Tax Code, §151.310(2), the revocation, withdrawal, or loss of the federal income tax exemption automatically terminates the sales tax exemption effective the earlier of the date on which the IRS serves formal written notice of the revocation on the nonprofit organization or the date on which the IRS notifies the comptroller.

(A) The effective date of a revocation for a nonprofit organization that was granted an exemption as a recognized subordinate is the date on which the organization ceased to be recognized as a subordinate under the federal group exemption. All subsequent purchases by the organization are subject to tax.

(B) The organization must notify the comptroller in writing of the revocation, withdrawal, or loss of exemption immediately upon receiving notice from the IRS of such revocation, withdrawal, or loss.

(C) Under a federal/state exchange agreement, the IRS may notify the comptroller when an organization no longer qualifies for federal exemption.

(3) An organization that loses its exempt status must immediately notify its suppliers that its purchases are subject to tax. Failure to so notify a supplier is a violation of the sales tax law.

(4) After revocation, the organization may re-apply for exempt status under other provisions of this section.

(g) [~~(f)~~] Purchases by an exempt organization.

(1) The purchase, lease, or rental of a taxable item that[~~which~~] relates to the purpose of an exempt organization listed in subsection (b)(1), (2), (3), or (5) of this section is exempt from tax when the organization or an authorized agent of the organization pays for the item and provides the vendor an exemption certificate in the form prescribed by the comptroller. See §3.287 of this title (relating to Exemption Certificates).

(2) The purchase, lease, or rental of a taxable item to an exempt organization listed in subsections (c) and (b)(4), (6), (7), (8), or (9) of this section is exempt from tax when the organization or an authorized agent pays for the taxable item and provides the vendor an exemption certificate in lieu of tax.

(3) A purchase voucher issued by any one of the entities identified in subsection (c) of this section is sufficient proof of the entity's exempt status.

(4) An exemption certificate must be given to a[~~the~~] vendor when an authorized agent makes a cash purchase of merchandise for an exempt organization.

(5) An employee of an exempt organization cannot claim an exemption from tax when the employee purchases[~~purchasing~~] taxable items of a personal nature even though the employee receives an allowance or reimbursement from the organization.

(6) A person who travels [~~traveling~~] on official business for an exempt organization must pay sales tax on taxable purchases whether reimbursed on a per diem basis or reimbursed for actual expenses incurred.

(h) [~~(g)~~] Sales by an exempt organization.

(1) An exempt organization that[~~which~~] sells taxable items must obtain a sales tax permit and is responsible for collection [~~collecting~~] and remittance of [~~remitting~~] tax on all sales of taxable items that[~~made by~~] the organization makes, unless such sales are otherwise exempt from the tax. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service), §3.299 of this title (relating to Newspapers, Magazines, Publishers, Exempt Writings), and §3.298 of this title (relating to Amusement Services).

(2) A religious, educational, charitable, eleemosynary organization, or an organization exempt under IRC[~~Internal Revenue Code~~], §501(c)(3), (4), (8), (10), or (19) and each of its bona fide chapters, may have two one-day tax-free[~~tax free~~] sales or auctions each calendar year. During a tax-free sale or auction lasting only one day, the organization is not required to collect sales tax on the sales price of taxable items sold for $5,000 or less. Additionally, a taxable item may be sold tax-free during a one-day tax-free[~~one day tax free~~] sale or auction regardless of price if the item is manufactured by the organization or is donated to the organization and is not sold to the donor.

(A) One day is a consecutive 24-hour period. If a designated tax-free sale or auction exceeds a consecutive 24-hour period, the organization or chapter may not hold another tax-free sale or auction that calendar year. An organization or chapter may hold the two tax-free sales or auctions consecutively, but the two tax-free sales or auctions by that organization or chapter cannot exceed a maximum of 48 consecutive hours in a calendar year.

(B) The organization may employ an auctioneer to conduct the sale or auction and pay the auctioneer a reasonable fee not to exceed 20% of the gross receipts.

(C) If two or more exempt organizations or chapters jointly hold a tax-free sale or auction, each is considered to have held a tax-free sale or auction during that calendar year. Each exempt organization that participates in a joint tax-free sale or auction may hold one additional tax-free sale or auction during that calendar year.

(3) Sales by agencies and instrumentalities of the federal government are subject to tax, and the agencies and instrumentalities must collect and remit tax unless [~~except where~~] the collection of tax is specifically prohibited by federal law [~~, the tax shall be collected and remitted by the agency or instrumentality~~]. If the collection is prohibited by specific federal law, the purchaser of the taxable item [~~property~~] shall be liable for reporting the tax directly to the state.

(i) [~~(h)~~] Organizations that do not qualify for exempt status. Examples of [~~Some~~] organizations that [~~which~~] cannot qualify for exempt status include professional groups, certain mutual benefit or social

groups, political, trade, business, bar, or medical associations. For information on exempt sales by senior citizens' organizations or exempt sales by student organizations affiliated with a college or university, see §3.316 of this title (relating to Occasional Sales and Other Tax-Free Sales).

(j) [~~(i)~~] Consular officers, administrative, and technical employees.

(1) Foreign diplomatic personnel stationed in the United States are exempt from the payment of sales or use tax if they hold a photo-identification card issued by the United States Department of State. Cards are not transferable and may not be used by others, including spouses.

(2) Procedure for retailers.

(A) A[~~The~~] retailer should retain a copy of the sales invoice or contract signed by the consular official that bears [~~bearing~~] the consular exemption certificate number appearing on the back of the card.

(B) Certain cards are limited in what and how much may be purchased tax free. This information is contained on the card itself. Retailers who make [~~making~~] sales to persons with [~~holding~~] cards that [~~which~~] require purchases to exceed a certain dollar limit should include only those taxable items that are purchased in the same transaction to determine[~~when determining~~] if the appropriate level has been reached. Purchases made in separate transactions may not be added together to reach minimum exemption levels.

(k) [~~(j)~~] The Alabama-Coushatta, Kickapoo, and the Tigua Native American tribes[~~Indian tribe~~].

(1) The purchase, lease, or rental of a taxable item to a tribal council or a business owned by a tribal council of these Native American[~~Indian~~] tribes is exempt from sales tax. An exemption certificate or purchase order from the tribal council is sufficient proof of the exempt sale.

(2) Sales made by a tribal council or a business owned by a tribal council of these Native American[~~Indian~~] tribes within the boundaries of the reservation are exempt from sales tax if:

(A) the taxable item being sold is made by a member of the tribe; and

(B) the taxable item is a cultural artifact of the tribe.

(3) Sales made off the reservation or sales made on the reservation of items that are not cultural artifacts are taxable.

(l) [~~(k)~~] Bordering states and governmental units of states that border Texas.

(1) The State of Arkansas, State of Louisiana, State of New Mexico, State of Oklahoma, or a governmental unit of a state that borders Texas may qualify for exemption on the purchase, lease, or rental of taxable items, but only to the extent that the bordering state or governmental unit of a state that borders Texas exempts or does not impose a tax on similar sales of items to the State of Texas or a political subdivision of the State of Texas.

(2) A bordering state or a governmental unit of a state that borders Texas may enter into a reciprocal agreement with the comptroller for the exemption of taxable items purchased, leased or rented to the State of Texas or a political subdivision of the State of Texas.

(3) The purchase, lease, or rental of a taxable item to a bordering state or a governmental unit of a bordering state is exempt from sales tax to the extent allowed under the terms of the reciprocal agreement. An exemption certificate from a qualifying bordering state or a governmental unit of a bordering state is sufficient proof of the exempt sale.

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

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205055
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 429. MINIMUM STANDARDS FOR FIRE INSPECTORS

37 TAC §§429.1, 429.3, 429.5, 429.7

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§429.1, 429.3, 429.5, and 429.7 concerning minimum standards for fire inspectors. The proposed changes make grammatical corrections, incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*), and add procedures for basic fire inspection training programs to become approved by the TCFP.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the requirements associated with the appointment of a fire inspector.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.022, which provides the TCFP with the authority to establish minimum training standards for fire protection personnel in advanced or specialized fire protection personnel positions; and Texas Government Code, §419.032, which provides the TCFP with the authority to establish standards for employment as fire protection personnel.

Texas Government Code, §419.022 is affected by the proposed changes.

§429.1. Minimum Standards for Fire Inspection Personnel.

(a) [~~All full-time personnel, as employed by a government entity who are assigned fire code enforcement activities, must be certified by the commission as fire inspectors.~~]

[~~(b)~~] Fire protection personnel[~~All full-time employees~~] of a governmental entity who are appointed to[~~assigned~~] fire code enforcement duties must be certified, as a minimum, as a basic fire inspector as specified in §429.3 of this title (relating to Minimum Standards for Basic Fire Inspector Certification) within one year of initial appointment to such position.

(b) [~~(c)~~] Prior to being appointed[~~assigned~~] to fire code enforcement duties [~~as a full-time employee~~], [~~all~~] personnel must complete a commission approved basic fire inspection training program and successfully pass the commission examination pertaining to that curriculum.

(c) [~~(d)~~] Individuals[~~All individuals~~] holding any level of fire inspector certification shall be required to comply with the continuing education requirements in §441.13 of this title (relating to Continuing Education Requirements for Fire Inspection Personnel).

(d) [~~(e)~~] Code enforcement is defined as the enforcement of laws, codes, and ordinances of the authority having jurisdiction pertaining to fire prevention.

§429.3. Minimum Standards for Basic Fire Inspector Certification.

(a) (No change.)

(b) In order to be certified by the commission as a Basic Fire Inspector an individual must complete a commission approved fire inspection training program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved basic fire inspection training program shall consist of one or any combination of the following:

(1) completion of the commission approved Basic Fire Inspector Curriculum, as specified in Chapter 4 of the commission's [~~document titled "Commission~~]Certification Curriculum Manual,["] as approved by the commission in accordance with Chapter 443 of this title (relating to Certification Curriculum Manual); or

(2) successful completion of an out-of-state training program which has been submitted to the commission for evaluation and found to meet the minimum requirements as listed in the commission approved Basic Fire Inspector Curriculum as specified in Chapter 4 of the commission's [~~document titled "Commission~~] Certification Curriculum Manual["]; or

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

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

§429.5. Minimum Standards for Intermediate Fire Inspector Certification.

(a) Applicants for Intermediate Fire Inspector Certification must complete the following requirements:

(1) hold as a prerequisite a Basic Fire Inspector Certification as defined in §429.3 of this title (relating to Minimum Standards for Basic Fire Inspector Certification);

(2) acquire a minimum of four years of fire protection experience and complete the courses contained in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission[~~Commission~~] that the courses comply with subsections (c) and (d) of this section; or

(B)-(D) (No change.)

(b) (No change.)

(c) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's [~~document titled "Commission~~] Certification Curriculum Manual["] or for experience in the fire service, may not be counted toward higher levels of certification.

(d) (No change.)

§429.7. Minimum Standards for Advanced Fire Inspector Certification.

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

(c) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's [~~document titled "Commission~~] Certification Curriculum Manual["] or for experience in the fire service, may not be counted toward higher levels of certification.

(d) (No change.)

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205105
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 431. FIRE INVESTIGATION

The Texas Commission on Fire Protection (TCFP) proposes changes to §§431.1, 431.3, 431.5, and 431.7 concerning minimum standards for arson investigator certification, and changes to §431.201, concerning fire investigator certification. The proposed changes incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*), remove redundant language, and make other grammatical corrections.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect there will be no significant fiscal impact on state and local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the requirements for appointment of fire protection personnel.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §§431.1, 431.3, 431.5, 431.7

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022, which provides the TCFP with the authority to establish minimum training standards for fire protection personnel in advanced or specialized fire protection personnel positions.

Texas Government Code, §419.022, is affected by the proposed changes.

§431.1. Minimum Standards for Arson Investigation Personnel.

(a) [~~All full-time personnel employed by any local government entity in Texas who are assigned arson investigation duties must be certified by the commission.~~]

[~~(b)~~] Fire protection personnel[~~All full-time employees of a local government entity in Texas~~] who are appointed[~~assigned~~] arson investigation duties must be certified, as a minimum, as a basic arson investigator as specified in §431.3 of this title (relating to Minimum Standards for Basic Arson Investigator Certification) within one year from the date of initial appointment to such position.

(b) [~~(c)~~] Prior to being appointed[~~assigned~~] to arson investigation duties [~~as a full-time employee~~], fire protection[~~all~~] personnel must complete a commission approved basic fire investigator training program and successfully pass the commission examination pertaining to that curriculum.

(c) [~~(d)~~] Personnel[~~All individuals~~] holding any level of arson investigation certification shall be required to comply with the continuing education requirements in §441.15 of this title (relating to Continuing Education Requirements for Arson Investigator or Fire Investigator).

§431.3. Minimum Standards for Basic Arson Investigator Certification.

(a) (No change.)

(b) In order to be certified by the commission as a Basic Arson Investigator an individual must:

(1) possess a current basic peace officer's license from the Texas Commission on Law Enforcement Officer Standards and Education or documentation that the individual is a federal law enforcement officer;

(2) hold a current commission as a peace officer with the employing entity for which the arson investigations will be done;

(3) complete a commission approved basic fire investigation training program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved basic fire investigation training program shall consist of one of the following:

(A) completion of the commission approved Fire Investigator Curriculum, as specified in Chapter 5 of the commission's [~~document titled "Commission~~] Certification Curriculum Manual [~~," as approved by the commission in accordance with Chapter 443 of this title (relating to Certification Curriculum Manual)~~];

(B) successful completion of a minimum of 128 hours of instruction in a National Fire Academy program for fire investigation. The program must include the basic course, Fire Arson Investigation, and any combination of the following courses or their predecessor:

(i) Arson Detection; or

(ii) Fire Cause Determination for Company Officers; or

(iii) Initial Fire Investigation; or

(iv) Management of Arson Prevention and Control.

(C) successful completion of an out-of-state or military training program which has been submitted to the commission for evaluation and found to meet the minimum requirements as listed in the commission approved Fire Investigator Curriculum as specified in Chapter 5 of the commission's [~~document titled "Commission~~] Certification Curriculum Manual [~~"~~]; or

(D) (No change.)

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

§431.5. Minimum Standards for Intermediate Arson Investigator Certification.

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

(c) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's [~~document titled "Commission~~] Certification Curriculum Manual [~~"~~] or for experience in the fire service, may not be counted toward higher levels of certification.

(d) (No change.)

§431.7. Minimum Standards for Advanced Arson Investigator Certification.

(a) Applicants for Advanced Arson Investigator certification must complete the following requirements:

(1) hold as a prerequisite an Intermediate Arson Investigator Certification as defined in §431.5 of this title (relating to Minimum Standards for Intermediate Arson Investigator Certification);

(2) acquire a minimum of eight years of fire protection experience and complete the courses listed in one of the following options:

(A) Option 1--Successfully complete six semester hours of fire science or fire technology from an approved Fire Protection Degree Program and submit documentation as required by the commission[~~Commission~~] that the courses comply with subsections (c) and (d) of this section;

(B) Option 2--Complete a minimum of 96 hours of instruction in any National Fire Academy courses;

(C) Option 3--Successfully complete three semester hours of college courses listed in Option 1 and a minimum of 48 hours in any National Fire Academy courses; or

(D) Option 4--Advanced Arson for Profit (Bureau of Alcohol, Tobacco, and Firearms resident or field course, 80 hours)

(E) Option 5--Successfully complete any combination of courses that lead to International Fire Service Accreditation Congress (IFSAC) certification that total 96 recommended hours or more in the commission[~~Commission~~] curricula. Evidence of completion of the appropriate courses shall be a certification from the commission[~~Commission~~] or a valid documentation from another jurisdiction of accreditation from IFSAC. Option 5 may not be combined with any

of the above options to obtain this certification. See exception outlined in subsection (d) of this section.

(b) (No change.)

(c) Non-traditional credit awarded at the college level, such as credit for experience or credit by examination obtained from attending any school in the commission's [~~document titled "Commission~~] Certification Curriculum Manual [~~"~~] or for experience in the fire service, may not be counted toward higher levels of certification.

(d) (No change.)

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205107
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INVESTIGATOR CERTIFICATION

37 TAC §431.201

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022, which provides the TCFP with the authority to establish minimum training standards for fire protection personnel in advanced or specialized fire protection personnel positions.

Texas Government Code, §419.022, is affected by the proposed changes.

§431.201. Minimum Standards for Fire Investigation Personnel.

(a) Fire protection[~~All full-time~~] personnel [~~employed by any local government entity in Texas~~] who are appointed[~~assigned~~] fire investigation duties must be, as a minimum, certified as a structure fire protection personnel or fire investigator by the commission.

(b) Prior to being appointed[~~assigned~~] to fire investigation duties [~~as a full-time employee~~], [~~all~~] personnel who are not certified as structure fire protection personnel must complete a commission approved basic fire investigator training program and successfully pass the commission examination pertaining to that curriculum.

(c) Individuals[~~All individuals~~] holding a Fire Investigator certification shall be required to comply with the continuing education requirements in §441.15 of this title (relating to Continuing Education Requirements for Arson Investigator or Fire Investigator).

(d) Individuals[~~An individual~~] certified under this subchapter shall limit their[~~his or her~~] investigation to determining fire cause and origin. If evidence of a crime is discovered, [~~the investigator shall immediately transfer~~] custody and control of the investigation shall be immediately transferred [~~of the investigation~~] to a certified arson investigator or licensed peace officer.

(e) Individuals[~~A person~~] who previously held [~~an~~] arson investigator certification, who no longer hold[~~holds~~] a current commission as a peace officer, may apply for certification as a fire investigator in accordance with this subchapter.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205108
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 437. FEES

37 TAC §§437.1, 437.3, 437.5, 437.7, 437.11, 437.13, 437.15, 437.17

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§437.1, 437.3, 437.5, 437.7, 437.11, 437.13, 437.15, and 437.17 concerning fees. The proposed changes incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*), reduce the fee for the compact disk containing the TCFP's standards manual, rename the sections, and make grammatical corrections.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a fee for the TCFP's standards manual which reflects lower production costs achieved by switching from paper manuals to manuals on compact disks and a clearer understanding of the fees charged for the issuance and renewal of certificates, TCFP manuals, and copies of TCFP records or documents.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties; Texas Government Code, §419.025, which provides the TCFP with the authority to set and collect a fee for a manual that states rules and standards for fire protection personnel, and Texas Government Code, §419.026, which provides the TCFP with authority to set and collect a fee for each certificate it issues or renews.

Texas Government Code, §419.025 and §419.026, are affected by the proposed changes.

§437.1. [~~Fees.~~]Purpose and Scope.

(a) The purpose of these sections is to set forth requirements governing the fees charged for the issuance of certificates to fire protection personnel, to establish the procedures for the collection of annual renewal fees, [~~manual~~] fees for commission manuals,[~~Commission Certification Curriculum Manual fees,~~] and copying fees as prescribed by the Government Code, [~~Executive Branch, Chapter 419,~~] §419.025 and §419.026, and commission rule.

(b) These sections shall govern all proceedings before and dealing with the commission [~~Texas Commission on Fire Protection,~~] concerning certification fees, renewal fees, fees for commission manuals[~~manual fees, Commission Certification Curriculum Manual fees~~], and copying fees. Hearings and appellate proceedings regarding these fees shall be governed by these sections where applicable and by the rules of the practice and procedure of the commission [~~Texas Commission on Fire Protection~~] and the Administrative Procedure Act and Texas Register Act, Chapter 2001 of the[~~,~~] Texas Government Code.

§437.3. [~~Fees--~~]Certification Fees.

(a) (No change.)

(b) Certification fees shall not be combined with other fees such as renewal fees, fees for commission manuals, [~~fees for Commission Certification Curriculum Manuals,~~] or copying fees.

(c) The regulated employing entity shall be responsible for all certification fees required as a condition of appointment[~~employment~~].

(d) Nothing in this section shall prohibit an individual from paying a certification fee for any certificate which he or she is qualified to hold, providing the certificate is not required as a condition of appointment[~~employment~~] (see subsection (c) of this section concerning certification fees).

(e) [~~If a person re-enters the fire service whose certificate(s) has been expired for one year or longer, the employing entity must:~~]

[~~(1) within 14 days of employment, notify the commission that the individual has been employed;~~]

[~~(2) prior to appointment assignment to any fire protection duties, obtain documented proof that the individual has passed the proficiency test as required by §439.13 of this title (relating to Testing for Proof of Proficiency) within one calendar year prior to the date of employment; and~~]

[~~(3) within one year from the date of employment, make application for certification of the individual and pay the certification fee as required by subsection (a) and (b) of this section (concerning certification fees). Upon payment of the required fees, the certificates previously held by the individual for which he or she continues to qualify, will be re-issued. The employing entity has the option of making the application and paying the fee at any time within the one-year period.~~]

[~~(f)~~] Any person who holds a certificate, and is no longer employed by an entity that is regulated by the commission may submit in writing a request together with the required fee to receive a one-time certificate stating the level of certification in each discipline held by the person on the date that person left employment, pursuant to the Texas Government Code, §419.033(b). Multiple certifications may be listed on the one-time certificate. The one-time fee for the one-time certificate shall be the same as the current certification fee provided in subsection (a) of this section.

(f) [~~(g)~~] A facility that provides basic level training for any discipline for which the commission has established a Basic Curriculum must be certified by the commission. The training facility will be charged a separate certification fee for each discipline.

§437.5. [~~Fees--~~]Renewal Fees.

(a) (No change.)

(b) Renewal fees shall not be combined with other fees, such as certification fees, fees for commission manuals, [~~fees for Commission Certification Curriculum Manuals,~~]and copying fees.

(c) (No change.)

(d) If a person re-enters the fire service whose certificate(s) has been expired for less than one year, the regulated [~~employing~~] entity must[~~:~~] pay all applicable renewal fee(s) and any applicable additional fee(s). Upon payment of the required fees, the certificates previously held by the individual, for which he or she continues to qualify, will be renewed.

[~~(1) within 14 days of employment notify the commission that the individual has been employed, and~~]

[~~(2) pay all applicable renewal fee(s) and any applicable additional fee(s). Upon payment of the required fees, the certificates previously held by the individual, for which he or she continues to qualify, will be renewed.~~]

(e)-(j) (No change.)

(k) Individual certificate holders that possess a certification that expires on October 31 will receive a renewal statement during the regulated entity's[~~employing entities~~] renewal cycle for a six month renewal period to align that individual to the individual holding certification renewal cycle as defined in subsection (j) of this section.

(l) A regulated [~~employing~~] entity that hires an individual holding certification that is current and has a renewal expiration date of April 30 will receive a renewal statement during the individual holding certification renewal cycle to align the renewal period as defined in subsection (j) of this section.

(m)-(p) (No change.)

§437.7. [~~Fees--~~]Standards Manual and Certification Curriculum Manual Fees.

(a) A fee of $12 [~~$25~~]will be charged for the compact disk containing the commission's Standards Manual for Fire Protection Personnel and the Certification Curriculum Manual.

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

§437.11. [~~Fees--~~]Copying Fees.

(a) All photographic reproduction of records or documents in the files of the commission[~~Commission~~] and prepared on standard office machines will be furnished for a fee.

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

(d) Copying[~~Copy~~] fees shall not be combined with renewal fees or certification fees. Copying[~~Copy~~] fees may be combined with commission standards manual fees and commission certification curriculum manual fees.

§437.13. [~~Fees--~~]Basic Certification Examination Fees.

(a) A non-refundable fee of $15 shall be charged for each written examination administered by the commission.

(b) Examination fees will not be combined with any other fees, such as renewal fees, fees for commission manuals, and copying fees.

(c) A non-refundable fee of $15 shall be charged for each performance skills examination administered at a training facility providing field examiners. If the skills examination is administered at Austin, or other place designated by the commission, a non-refundable fee of $50 shall be charged.

§437.15. [~~Fees--~~]International Fire Service Accreditation Congress (IFSAC) Seal Fees.

A $5.00 fee shall be charged for each IFSAC seal issued by the commission.

§437.17. [~~Fees--~~]Records Review Fees.

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

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205110
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §§439.3, 439.7, 439.13, 439.15

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§439.3, 439.7, 439.13, and 439.15, concerning examinations for on-site delivery training. The proposed changes incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*) and make grammatical corrections.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect there will be no significant fiscal impact on state and local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of examination procedures and the eligibility requirements for challenging certification examinations.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, Texas Government Code, §419.026, which provides the TCFP with the authority to give examinations to fire protection personnel for basic certification; and Texas Government Code, §419.032, which provides the TCFP with the authority to establish standards for basic certification tests for fire protection personnel and qualifications relating to basic certification tests.

Texas Government Code, §419.026 and §419.032, are affected by the proposed changes.

§439.3. Definitions.

The following words and terms used in this chapter have the following definitions unless the context clearly indicates otherwise.

(1) Certificate of Completion--A signed statement certifying that an individual has successfully completed a commission approved basic certification curriculum or phase program for a particular discipline, including having been evaluated by field examiners on performance skills identified by the commission. The Certificate of Completion will be on a form provided by the commission and is to be completed and signed by the provider of training and issued to the individual upon successful completion of the training. The Certificate of Completion [~~certificate of completion~~] must, as a minimum, identify the provider of training, the course I.D. number, the course approval number, hours of instruction, date issued, curriculum name, training officer or course coordinator, and the name of the person completing the course. The Certificate of Completion[~~certificate of completion~~] qualifies an individual to take an original certification examination.

(2) Commission--The Texas Commission on Fire Protection

(3) Curriculum--The competencies established by the commission as a minimum requirement for certification in a particular discipline.

(4) Eligibility--A determination of whether or not an individual has met the requirements set by the commission and would therefore be allowed to take a commission examination.

(5) Endorsement of eligibility--A signed statement testifying to the fact that an individual has met all requirements specified by the commission and is qualified to take a commission examination. An endorsement of eligibility will be issued, when appropriate, by a member of the commission staff. An endorsement of eligibility qualifies an individual to take a proficiency examination or an examination for certification status.

(6) Examination--A state test administered by the commission which an examinee must pass as one of the requirements for certification. Exams will be based on curricula as currently adopted in the commission's[~~Commission~~] Certification Curriculum Manual. The state test can consist of only a written test or it can consist of a test that contains both a written portion and a performance skills portion. If the training program is conducted in the phase format, the examination will be based on the curriculum in place at the time of the examination.

(7) Examinee--An individual who has met the commission requirements and therefore qualifies to take the commission examination.

(8) Field examiner--An individual that has successfully completed the commission administered field examiner orientation and has received a Certificate of Completion [~~certificate of completion~~] from the commission. An approved field examiner must sign an agreement to comply with the commission's testing procedures. The field examiner must as a minimum, possess a Fire Instructor Certification. The field examiner must be approved by the commission to instruct all subject areas identified in the curriculum that they will be evaluating. The field examiner must work under the supervision of a staff examiner to administer commission examinations, except when evaluating performance skills during an approved basic certification school. The field examiner must receive an examiner orientation course every three years administered by a certified instructor authorized by the commission or evaluate at least 50 individual state-administered performance skill examinations every three years.

Prior to renewal, the field examiner must obtain, sign and return to the commission a new Letter of Intent.

(9) Staff examiner--A member of the commission staff or an approved designee who has been assigned by the commission the responsibility to administer a commission examination. A designee is an entity or individual approved by the executive director to administer commission certification examinations and/or performance skills in accordance with Chapter 439. A staff examiner who conducts or supervises performance skill evaluations must meet the same requirements as field examiners.

§439.7. Eligibility.

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

(d) No person shall be permitted to:

(1) violate any of the fraud provisions of this section;

(2) disrupt the examination;

(3) bring into the examination site any books, notes, or other written materials related to the content of the examination;

(4) refer to, use, or possess any such written material at the examination site;

(5) give or receive answers or communicate in any manner with another examinee during the examination;

(6) communicate at any time or in any way, the contents of an examination to another person for the purpose of assisting or preparing a person to take the examination;

(7) steal, copy, or reproduce [~~in~~] any [~~way~~] part of the examination;

(8) engage in any deceptive or fraudulent act either during an examination or to gain admission to it; or

(9) solicit, encourage, direct, assist, or aid another person to violate any provision of this section.

§439.13. Testing for Proof of Proficiency.

(a) (No change.)

(b) The individual may obtain a new certificate in the discipline which was previously held by passing a commission proficiency examination pertaining to the discipline held and becoming certified within the time specified for that discipline. The proficiency examination must be passed prior to appointment[~~assignment~~] to fire protection duties. If performance skills are part of the proficiency examination, the individual may be exempted from that portion of the examination by documenting twenty hours of continuing education for each year since the expiration of the certificate for a maximum of five years. The continuing education training must be done within the most recent five years and must be in subjects contained in the basic curriculum for the discipline. At least one-half of the continuing education must be hands-on performance skills. The training must be conducted as specified in Chapter 441 of this title (relating to Continuing Education).

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

§439.15. Testing for Certification Status.

(a) If an individual who has never held certification in a discipline defined in §421.5, (relating to the definitions of fire protection personnel and volunteer fire protection personnel), seeks certification in that discipline two years or longer after passing a commission examination pertaining to that discipline, the individual shall:

(1) complete all requirements and become certified by the commission within the time specified for that discipline; and

(2) successfully complete the current commission requirements for certification in that discipline; or

(3) pass a commission certification examination pertaining to that discipline. The certification examination for some disciplines consists of a written examination only, while the certification examination for other disciplines consists of both a written portion and a performance skills portion. In any case, all portions of an examination must be passed before the individual is considered to have passed the examination. The certification examination must be passed prior to appointment[~~assignment~~] to fire protection duties. If it has been less than four years since an individual passed the performance skills portion of an examination pertaining to a discipline, the individual may be exempted from that portion of the examination if the individual can document twenty hours of continuing education for each year since the individual last passed the performance skills portion of an examination pertaining to the discipline. The continuing education must be in subjects contained in the basic curriculum for the discipline. At least one-half of the continuing education must be hands-on performance skills. The training must be conducted as specified in Chapter 441 of this title (relating to Continuing Education).

(b) (No change.)

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205111
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 441. CONTINUING EDUCATION

37 TAC §§441.3, 441.5, 441.9, 441.17

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§441.3, 441.5, 441.9, and 441.17 concerning continuing education. The proposed changes to §441.3 and §441.5 incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*) and make grammatical corrections. The proposed changes to §441.9 and §441.17 clarify the minimum continuing education training requirements for aircraft rescue fire fighting personnel and hazardous materials technicians.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the continuing education training requirements for fire protection personnel.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.032, which provides the TCFP with the authority to propose rules relating to continuing education requirements for fire protection personnel.

Texas Government Code, §419.032 is affected by the proposed amendments.

§441.3. Definitions.

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

(1) Certification period--That period from the time a certificate is obtained or renewed until it is time for the certificate to be renewed again. See §437.5 of this title (relating to renewal fees [~~Fees--Renewal~~]) for the definition of certification period.

(2) Qualified instructor--An individual who may or may not be certified, but has, in either case, met as a minimum the requirements for basic instructor certification.

(3) Track A--Training intended to maintain previously learned skills as stated in the commission certification curriculum manual for the appointed [~~assigned~~] discipline.

(4) Track B--Training intended to develop new skills in an appointed [~~assigned~~] discipline.

§441.5. Requirements.

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

(e) No more than four hours per year in any one subject of the appropriate chapter of the commission's [~~Commission~~] Certification Curriculum Manual may be counted toward the 20-hour continuing education requirement for Track A.

(f) (No change.)

(g) The [~~administrative~~] head of a fire [~~the~~] department may select subject matter for continuing education appropriate for a particular discipline.

(h) The [~~administrative~~] head of a fire [~~the~~] department must certify whether or not the individuals whose certificates are being renewed have complied with the continuing education requirements of this chapter on the certification renewal application. Unless exempted from the continuing education requirements, an individual who fails to comply with the continuing education requirements in this chapter shall be notified by the commission of the failure to comply.

(i) After notification from the commission of a failure to comply with continuing education requirements, an individual who holds a certificate is prohibited from performing any duties authorized by a required certificate until such time as the deficiency has been resolved and written documentation is furnished by the department head for approval by the commission, through its Fire Service Standards and Certification Division director. [~~No person may assign duties or accept an assignment of duties in violation of this rule.~~] Continuing education hours obtained to resolve a deficiency may not be applied to the continuing education requirements for the current certification period.

(j) Any person who is a member of a paid or volunteer fire department who is on extended leave for a cumulative period of six months or longer because of illness or injury may be exempted from the continuing education requirement for the current renewal period. Such exemptions shall be reported by the head of the fire department to the commission at renewal time.

(k) Any individual who is not a member of a paid or volunteer fire department who is unable to perform work, substantially similar in nature as would be performed by fire protection personnel appointed [~~assigned~~] to that discipline, may be exempted from the continuing education requirement for the current renewal period. Commission staff shall determine the exemption using documentation of the illness or injury that cumulatively lasts six months or longer, from documentation provided by the individual and the individual's treating physician.

(l)-(m) (No change.)

§441.9 Continuing Education for Aircraft Rescue Fire Fighting [~~Protection~~] Personnel.

(a) Continuing education will be required for personnel assigned as aircraft rescue fire fighting [~~protection~~] personnel.

(b) Continuing education must, at a minimum, meet the specific training requirements of FAR 139.319(j)(2) and (3) [~~FAR 139.319, j, 2 and 3~~] (pertaining to Aircraft Rescue and Fire Fighting Operational Requirements). Continuing education required by this subsection may exceed 20 hours, if necessary, to complete all required subjects.

§441.17. Continuing Education for Hazardous Materials Technician.

(a) Ten hours of continuing education in hazardous materials (technician level) will be required for individuals certified as a hazardous materials technician. This will be in addition to continuing education required by other sections of this chapter.

(b) (No change.)

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205112
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 447. PART-TIME FIRE PROTECTION EMPLOYEE

37 TAC §447.1

The Texas Commission on Fire Protection (TCFP) proposes amendments to §447.1, concerning minimum standards for part-time fire protection employees, to incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*) and to remove redundant language.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer

understanding that part-time fire protection employees are subject to the same TCFP rules that apply to fire protection personnel.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.0321, which provides that the TCFP shall create a separate certification class for part-time fire protection employees.

Texas Government Code, §419.0321 is affected by the proposed amendments.

§447.1. Minimum Standards for Part-Time Fire Protection Employees.

(a) [~~All part-time employees of a fire department or a local government who perform the duties of fire protection personnel must be certified by the commission. In order to be certified, part-time fire protection employees must be employed by a fire department or a local government and complete the requirements for fire protection personnel certification in the assigned discipline.~~]

[~~(b) A certified part-time fire protection employee may be certified in any discipline that has a commission approved curriculum.~~]

[~~(c) Certified part-time fire protection employees are subject to the same commission rules that apply to certified fire protection personnel.~~]

[~~(d)~~] Regulated entities[~~Fire departments or local governments~~] that appoint[~~employ certified~~] part- time fire protection employees are subject to the same commission rules that apply to fire departments as defined in §421.5 [~~and local governmental entities that employ fire protection personnel~~].

(b) Part-time fire protection employees are subject to the same commission rules that apply to fire protection personnel.

[~~(e) Prior to being assigned to fire suppression duties, an individual must have completed a commission-approved curriculum and successfully passed the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification).~~]

[~~(f) A person who holds or is eligible to hold a certificate upon employment as fire protection personnel may be certified in the same discipline as a part-time fire protection employee as set forth in subsection (b) of this section without meeting the applicable examination requirements.~~]

[~~(g) If a person holds a current certification as a full- time structural fire fighter, the Texas Department of Health ECA certification requirement may be satisfied by documentation of equivalent training or certification in lieu of certification by the Texas Department of Health.~~]

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205115
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 449. HEAD OF A FIRE DEPARTMENT

37 TAC §§449.1, 449.3, 449.5

The Texas Commission on Fire Protection (TCFP) proposes amendments to §§449.1, 449.3, and 449.5, concerning minimum standards for head of a fire department, to incorporate the term "appointment" which is proposed to be added and defined in 37 TAC §421.5 of the TCFP's rules (see the August 16, 2002, issue of the *Texas Register*), provide for fire fighters with out-of-state experience to apply for head of a fire department certification, and clarify that volunteer fire fighters can count volunteer service at multiple volunteer fire service organizations toward the "years of experience" requirement.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be increased opportunities for individuals with out-of-state experience to apply for head of a fire department certification and a clearer understanding of the differences in the minimum requirements for appointment as head of a suppression fire department versus appointment as head of a prevention only fire department.

There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to *info@tcfp.state.tx.us*.

The amendments are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.032(f), which provides that for the purpose of subsection (f), the TCFP shall adopt rules relating to the appointment of a person to the position of head of a fire department.

Texas Government Code, §419.032(f) is affected by the proposed amendments.

§449.1. Minimum Standards for the Head of a Fire Department.

(a) An individual who becomes appointed [~~employed and is assigned~~] as the head of a fire department, on or after March 1, 1999, must not be assigned the duties of a head of a fire department unless the individual is eligible or will become eligible to be certified by the commission as head of a fire department, within one year of appointment.

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

§449.3. Minimum Standards for Certification as Head of a Suppression Fire Department.

(a) In order to be certified as a head of a fire department which provides [~~providing~~] fire suppression, an individual must:

(1) be appointed [~~assigned~~] as head of a fire department; and

(2) hold a certification as [~~a~~] fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire protection personnel certification and five years experience in a full-time fire suppression position; or

(3) an individual from a jurisdiction other than Texas who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic fire suppression curriculum and documentation in the form of a non self-serving sworn affidavit of five years experience in a full-time fire suppression position and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or

(4) [~~(3)~~] provide documentation in the form of a non self-serving sworn affidavit of ten years experience as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; and

(A) if there is a break in service, document completion of continuing education, that meets the requirements of Chapter 441, for each full year the individual has been out of the fire service up to a maximum of five years; and

(B) successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or

(5) [~~(4)~~] provide documentation in the form of a non self-serving sworn affidavit of ten years of experience as a certified structural part-time fire protection employee; or

(6) [~~(5)~~] provide documentation in the form of a non self-serving sworn affidavit of ten years experience as an active volunteer fire fighter [~~in one or more volunteer fire departments~~] that meets [~~meet~~] the requirements of subsection (b) of this section and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title.

(b) The ten years of volunteer service must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department, volunteer fire service organization, or departments with 10 or more active members that conducts a minimum of 48 hours of drills in a calendar year.

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

§449.5. Minimum Standards for Certification as Head of a Prevention Only Department.

In order to be certified as the head of a fire department performing[~~providing~~] fire prevention activities only, an individual must:

(1) be appointed[~~assigned~~] as head of a fire department; and

(2) hold a certification as a fire inspector, fire investigator, or arson investigator and have five years of full-time experience in fire prevention activities; or

(3) an individual from a jurisdiction other than Texas who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved fire investigator or fire inspector curriculum and documentation in the form of a non self-serving sworn affidavit of five years experience in a full-time fire prevention position and successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or

(4) [~~(3)~~] provide documentation in the form of a non self-serving sworn affidavit of ten years experience as an employee of [~~with~~] a local governmental entity in a full-time[~~, part-time or volunteer~~] fire inspector, fire investigator, or arson investigator position in a jurisdiction other than Texas[~~with ten years of experience in fire prevention activities~~]; and

(A) if there is a break in service, document completion of continuing education, that meets the requirements of Chapter 441, for each full year the individual has been out of the fire service up to a maximum of five years; and

(B) successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or[~~.~~]

(5) provide documentation in the form of a non self- serving sworn affidavit of ten years experience as a certified fire investigator, fire inspector or arson investigator as a part-time fire prevention employee; or

(6) provide documentation in the form of a non self- serving sworn affidavit of ten years experience as an active volunteer fire inspector, fire investigator, or arson investigator with ten years experience in fire prevention and successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification).

(7) [~~(4)~~] Individuals certified as the head of a fire department under this section must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205117
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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CHAPTER 495. REGULATION OF NONGOVERNMENTAL DEPARTMENTS

The Texas Commission on Fire Protection (TCFP) proposes amendments to §495.1 and §495.207, concerning regulation of nongovernmental departments, organizations, and personnel. The proposed changes to §495.1 remove the reference to the "key rate" which is no longer in use in Texas. The proposed

changes to §495.207 remove references to the effective date of the section. The TCFP also proposes to shorten the title of Chapter 495, Subchapter B, to "Regulation of Nongovernmental Organizations and Personnel."

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed changes are in effect there will be no fiscal implications for state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect the public benefit anticipated as a result of enforcing the proposed rule actions will be a clearer understanding of the TCFP's rules by the removal of obsolete terminology and effective dates.

There are no additional costs of compliance for small or large businesses or individuals required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mailed to *info@tcfp.state.tx.us*.

SUBCHAPTER A. VOLUNTARY REGULATION OF NONGOVERNMENTAL DEPARTMENTS

37 TAC §495.1

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, Texas Government Code, §419.085, which provides the TCFP with the authority to prescribe procedures under which a nongovernmental entity may apply for regulation, and Texas Government Code, §419.087, which provides the TCFP with the authority to regulate certain nongovernmental organizations and personnel.

Texas Government Code, §419.085 and §419.087, are affected by this proposed amendment.

§495.1 Application Procedures.

A nongovernmental entity may apply to the commission for voluntary regulation pursuant to the Texas Government Code, §419.085. A nongovernmental entity seeking voluntary regulation shall inform the commission in writing of its request and must provide the following documentation:

(1) a letter from the Texas Department of Insurance verifying that the area protected constitutes a rating [~~territory with a protected key rate assigned by the Texas Department of Insurance or a public protection classification~~] of one through eight assigned by Insurance Services Organization;

(2) documentation from the United States Census Bureau verifying the population of the protected area;

(3) written verification from the administrative head of the department that the entity provides fire protection to an unincorporated area; and

(4) written documentation of the duties, responsibilities, and work schedules of the fire protection personnel employed by the entity.

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205118
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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SUBCHAPTER B. REGULATION OF NONGOVERNMENTAL ORGANIZATIONS AND PERSONNEL

37 TAC §495.207

The amendment is proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, Texas Government Code, §419.085, which provides the TCFP with the authority to prescribe procedures under which a nongovernmental entity may apply for regulation, and Texas Government Code, §419.087, which provides the TCFP with the authority to regulate certain nongovernmental organizations and personnel.

Texas Government Code, §419.085 and §419.087, are affected by this proposed amendment.

§495.207. Regulation and Certification.

[~~(a)~~] A nongovernmental organization that is subject to regulation under this chapter on September 1, 1993, is subject to all rules and regulations of the commission effective immediately.

[~~(b) An individual that is subject to regulation under this chapter on September 1, 1993, and who does not meet the requirements for certification must meet the requirements and become certified by August 31, 1994.~~]

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

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205119
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 239-4921

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

SUBCHAPTER KK. SUPPORT DOCUMENTS

40 TAC §3.3703

The Texas Department of Human Services (DHS) proposes to amend §3.3703, concerning food stamp basis of issuance tables, in its Texas Works chapter. The purpose of the amendment is to allow issuance of food stamp allotments of $1, $3, and $5. Currently, if a household is eligible for an allotment of $1, $3, or $5, DHS adjusts that allotment to $2, $4, or $6. DHS will continue to round benefits up to $2, $4, or $6 when coupons are issued because an individual notifies DHS that he is moving out of Texas.

James R. Hine, Commissioner, has determined that, for the first five-year period the proposed section will be in effect, there will be fiscal implications for state government as a result of enforcing or administering the section. There will be no fiscal implications for local government as a result of enforcing or administering the section.

The effect on state government for the first five-year period the section will be in effect is an estimated additional cost of $11,660 in fiscal year (FY) 2002; $0 in FY 2003; $0 in FY 2004; $0 in FY 2005; and $0 in FY 2006.

Mr. Hine also has determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be that DHS can administer the Food Stamp program more efficiently. In addition, the amendment will simplify program requirements and remove barriers for participation. There will be no adverse economic effect on small or micro businesses as a result of enforcing or administering the section, because the amendment concerns income deductions and issuance tables and does not affect the operation of businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Questions about the content of this proposal may be directed to Eric McDaniel at (512) 438- 2909 in DHS's Texas Works section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-299, 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, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

The amendment is proposed under the Human Resources Code, Title 2, Chapter 33, which authorizes DHS to administer nutritional assistance programs.

The amendment implements the Human Resources Code, §§33.001-33.027.

§3.3703. Food Stamp Basis of Issuance Tables.

The Texas Department of Human Services (DHS) amends the basis of issuance tables, standard deductions, and allotment levels on an annual basis each October, as required by Sections [~~Section~~] 3(o) and 5(e) of the Food Stamp Act of 1977, 7 United States Code §§2012(o) and 2014(e), as amended [~~by Title VIII, Sections 804 and 809 of Public law 104-193, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and as amended by Public Law 106-387, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001~~]. Texas received a waiver of the provision in 7 Code of Federal Regulations §273.10(e)(2)(ii)(C) to issue allotments of $1, $3, and $5 that are not rounded up.

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

Filed with the Office of the Secretary of State on August 9, 2002, 2002.

TRD-200205211
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER TT. WORKFORCE ORIENTATION

40 TAC §§3.7301 - 3.7303

The Texas Department of Human Services (DHS) proposes to amend §3.7301, concerning workforce orientation requirements--temporary assistance for needy families (TANF), §3.7302, concerning exceptions to the workforce orientation requirements-- temporary assistance for needy families (TANF), and §3.7303, concerning failure to comply, in its Texas Works chapter. The purpose of the amendments is to require all individuals initially applying in person at a local office for TANF/TANF-SP, and individuals who have reached the 60th month of TANF/TANF-SP assistance, to attend a regularly scheduled Workforce Orientation offered by a local workforce development board as a condition of eligibility. If extraordinary circumstances prevent the individual from attending a regularly scheduled orientation within the DHS timeframe for processing the TANF/TANF-SP application, the individual is required to contact the local workforce development board to request an alternative Workforce Orientation. Extraordinary circumstances may include issues such as domestic violence, lack of transportation, or childcare. If the local workforce development board fails to provide the individual with an alternative orientation during the application processing timeframe, the applicant's attempt to cooperate with the requirement satisfies the requirement.

James R. Hine, Commissioner, has determined that, for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Hine also has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be that more individuals will be exposed to the information provided at the orientation about TANF time limits and the services available from the local workforce board. DHS and the Texas Workforce Commission hope to encourage more applicants to take advantage of the services available to help them move from welfare to work. There will be no adverse economic effect on small or micro businesses as a result of enforcing or administering the sections, because the proposed amendments concerning workforce orientation rules do not affect the operation of businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Eric McDaniel at (512) 438- 2909 in DHS's Texas Works section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-293, 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, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

The amendments are proposed under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001-31.053.

§3.7301. Workforce Orientation Requirements for [–]Temporary Assistance for Needy Families (TANF).

TANF caretakers and second parents [~~adults and minor parents, age 16 through 59,~~] living in a full service Choices [~~Job Opportunities and Basic Skills (JOBS)~~] county[~~, with TANF children,~~] must comply with the requirement to attend a Workforce Orientation presented by the Texas Workforce Commission as detailed in §3.7302 of this title (relating to Exceptions to the Workforce Orientation Requirements for Temporary Assistance for Needy Families (TANF)).

§3.7302. Exceptions to the Workforce Orientation Requirements for [–]Temporary Assistance for Needy Families (TANF).

(a) An individual initially applying in person for [~~or receiving~~] TANF or who has reached the 60th month of TANF assistance and is applying for an extension of TANF benefits on the basis of hardship is [~~not~~] required to attend a Workforce Orientation presented by a local workforce development board as a condition of eligibility. [~~the Texas Workforce Commission if the individual:~~]

~~[(1) is too remote from the orientation site. "Too remote" is defined as the distance from the applicant's home to the orientation if it:]~~

~~[(A) requires commuting time of more than one hour one way (not including taking a child to and from a child care facility); or]~~

~~[(B) prohibits walking and transportation is not available;]~~

~~[(2) claims to be incapacitated;]~~

~~[(3) is a child age 16, 17, or 18, and enrolled in school;]~~

~~[(4) is age 60 or older;]~~

~~[(5) is needed in the home to care for an incapacitated child or adult;]~~

~~[(6) is caring for a child under four months of age;]~~

~~[(7) is employed and working 30 hours or more a week at minimum wage or earning the equivalent of 30 hours a week at minimum wage;]~~

~~[(8) has an open Job Opportunities and Basic Skills (JOBS) case;]~~

~~[(9) claims to be a victim of domestic violence and will be in danger if required to comply; or]~~

~~[(10) is attending school or training and their schedule conflicts with all available orientation sessions.]~~

(b) If extraordinary circumstances prevent the individual from attending a regularly scheduled orientation within the timeframe the Texas Department of Human Services (DHS) has established for processing TANF applications, the individual is required to attend an alternative Workforce Orientation provided by local workforce development boards, including but not limited to individual scheduled appointments and telephone orientations.

(c) If an alternative Workforce Orientation is not provided within the timeframe DHS has established for processing the application, the applicant's attempt to cooperate satisfies the Workforce Orientation requirement.

§3.7303. Failure to Comply.

If a caretaker or second parent who is required to attend a Workforce Orientation as specified in §3.7301[~~(a)~~] of this title (relating to Workforce Orientation Requirements for Temporary Assistance for Needy Families (TANF)) refuses or fails to comply, then the Texas Department of Human Services (DHS) denies the application [~~or case will be denied. If a client age 16, 17, or 18, certified as a child, and required to attend the Workforce Orientation refuses or fails to comply, then the child will be disqualified from Temporary Assistance for Needy Families (TANF)~~].

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

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205212
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 438-3734

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CHAPTER 8. MEDICAL ASSISTANCE FOR BREAST AND CERVICAL CANCER

SUBCHAPTER A. PROGRAM REQUIREMENTS

40 TAC §8.1, §8.5

The Texas Department of Human Services (DHS) proposes new §8.1, concerning client eligibility requirements, and §8.5, concerning right to appeal, in its new Medical Assistance for Breast and Cervical Cancer chapter. The purpose of the new sections is to provide Medicaid coverage to women who are screened by the Texas Department of Health's Breast and Cervical Cancer Control Program and found in need of treatment for breast and cervical cancer, and who meet other eligibility criteria.

James R. Hine, Commissioner, has determined that, for the first five-year period the proposed sections will be in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

The effect on state government for the first five-year period the sections will be in effect is an estimated additional cost of $46,110 in fiscal year (FY) 2002; $0 in FY 2003; $0 in FY 2004; $0 in FY 2004; and $0 in FY 2005.

Mr. Hine 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 full coverage for eligible women for the prevention and treatment of breast and cervical cancer. Low-income women are currently screened through the Breast and Cervical Cancer Control Program, administered by the Texas Department of Health, and usually turn to local and county resources for treatment. Medicaid coverage for eligible women would begin no earlier than the day after screening and diagnosis and continue as long as the women are in active treatment. There will be no adverse economic effect on small or micro businesses as a result of enforcing or administering the sections, because only a small population of women will be eligible for this Medicaid. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Eric McDaniel at (512) 438- 2909 in DHS's Texas Works section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-256, 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, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

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

The sections implement the Human Resources Code, §§22.001-22.038 and §§32.001-32.053.

§8.1. Client Eligibility Requirements.

(a) Eligible group. The eligible group consists of women screened and found to need treatment through the Centers for Disease Control and Prevention's National Breast and Cervical Cancer Early Detection Program, created by Public Law 101-354 and administered by the Texas Department of Health (TDH) as the Breast and Cervical Cancer Control Program. Medicaid coverage for women who meet the requirements for application is authorized by the Breast and Cervical Cancer Prevention and Treatment Act of 2000, Public Law 106-354, 42 United States Code §1396r-1b.

(b) Presumptive eligibility. Applicants for Medicaid assistance for breast and cervical cancer are identified through TDH's Breast and Cervical Cancer Control Program. Medical providers of the Breast and Cervical Cancer Control Program screen and diagnose qualifying medical conditions and will either make a determination of presumptive eligibility, or, if not enrolled as a Medicaid provider, will make a referral to a qualified entity for determination of presumptive eligibility. Medicaid providers of the Breast and Cervical Cancer Control Program of TDH have been designated as qualified entities for presumptive determinations. The period of presumptive Medicaid eligibility is specified in the Social Security Act, 42 United States Code, Sec 1396r-1b (b)(1) as beginning with the date a qualified entity determines eligibility under the State Plan, based upon preliminary information, and ends with (and includes) the earlier of the date an eligibility determination is made by the Texas Department of Human Services (DHS) or by the last day of the month following the month the presumptive eligibility was determined. Providers are required to notify DHS of the determination of presumptive eligibility within five working days after the date the determination was made.

(c) Eligibility requirements. To be eligible for Medicaid assistance for breast and cervical cancer, women must meet the following requirements:

(1) Age. Women must be under age 65.

(2) Citizenship. Citizenship requirements are the same as those requirements specified for Temporary Assistance for Needy Families applicants specified in 45 Code of Federal Regulations, §233.50.

(3) Residency. Clients must meet residence requirements as stipulated in 45 Code of Federal Regulations §233.40(a). If the client leaves Texas, but returns within 90 days and declares his stay was not permanent, the client may be eligible for retroactive benefits.

(4) Other eligibility. Women must not be otherwise eligible for Medicaid.

(5) Third-party resources. Women must not have any other health insurance that covers the services covered by this program.

(d) Application procedures. Applicants for Medicaid assistance for breast and cervical cancer are identified through the Breast and Cervical Cancer Control Program of TDH. Breast and Cervical Cancer Control Program Medicaid providers, or a qualified Medicaid provider to whom a woman is referred, will submit an application packet containing determination of presumptive eligibility and an application for assistance to a central site of DHS. This application packet must be sent within five working days of the date the determination of presumptive eligibility is made but no later than the end of the month following the month the presumptive determination is made.

(e) Medicaid eligibility. The period of coverage begins no earlier than the day after screening and diagnosis of the qualifying medical condition, and lasts for the duration of the cancer treatment.

§8.5. Right to Appeal.

Applicants and recipients have the right to appeal Texas Department of Human Services decisions about their cases. Notice of the right to appeal and information about free legal representation is included in the Medicaid Action Notice. Decisions may be appealed according to procedures found in Chapter 79, Subchapter M, of this title (relating to Appeals Process).

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

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205236
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Texas Department of Human Services (DHS) proposes to amend §97.249, concerning reportable conduct, and §97.501,

concerning survey procedures, in its Licensing Standards for Home and Community Support Services Agencies chapter. The purpose of the amendments is to align rule language with statutory requirements regarding accreditation statutes and to correct a reference to statute.

James R. Hine, Commissioner, has determined that, for the first five-year period the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Hine 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 proper compliance with statute. There will be no effect on small or micro businesses as a result of enforcing or administering the sections, because the proposal clarifies procedure. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by these sections.

Questions about the content of this proposal may be directed to Linda Kotek at (512) 438- 3158 in DHS's Long Term Care-Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-275, 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, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES
DIVISION 3. AGENCY ADMINISTRATION

40 TAC §97.249

The amendment is proposed under the Health and Safety Code, Title 2, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, §§142.001-142.030.

§97.249. Reportable Conduct.

An agency must adopt and enforce a written policy relating toreporting acts of abuse, neglect, or exploitation of clients and reportable conduct by an employee(s) of the agency.

(1) (No change.)

(2) In this section, "reportable conduct" has the meanings assigned by Human Resources Code, §48.401 [~~Health and Safety Code, §253.001~~].

(3) An agency that has cause to believe that an employee has abused, exploited, or neglected a client of the agency[~~, the agency~~] must report the information upon discovery to:

(A) (No change.)

(B) the Texas Department of Protective and Regulatory Services (PRS) [~~(TDPRS)~~] at 1-800-252-5400.

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

Filed with the Office of the Secretary of State on August 8, 2002

TRD-200205163
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 438-3734

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SUBCHAPTER E. SURVEYS

40 TAC §97.501

The amendment is proposed under the Health and Safety Code, Title 2, Chapter 142, which provides DHS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements the Health and Safety Code, §§142.001-142.030.

§97.501. Survey Procedures.

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

(c) Except for the investigation of complaints, an agency licensed by DHS is not subject to additional surveys relating to home health, hospice, or personal assistance services while the agency maintains [~~deemed~~] accreditation status for the applicable services from the Joint Commission on Accreditation of Healthcare Organizations, [~~or~~] the Community Health Accreditation Program, or other accreditation organizations that meet or exceed the regulations adopted under this chapter. An initial survey after issuance of an initial license will be done by DHS:

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

(d) - (n) (No change.)

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

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205164
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 22, 2002
For further information, please call: (512) 438-3734

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.94

The Railroad Commission of Texas has withdrawn from consideration the proposed amendment to §3.94 which appeared in the February 8, 2002, issue of the *Texas Register* (27 TexReg 844).

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205165
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: August 8, 2002
For further information, please call: (512) 475-1295

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 291. UTILITY REGULATIONS
SUBCHAPTER B. RATES, RATE MAKING, AND RATES/TARIFF CHANGES

30 TAC §§291.24, 291.26, 291.32, 291.34

The Texas Natural Resource Conservation Commission has withdrawn from consideration the proposed amendments to §§291.24, 291.26, 291.32, 291.34 which appeared in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2969).

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205215
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 9, 2002
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS
SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH

34 TAC §§41.33 — 41.35

The Teacher Retirement System of Texas has withdrawn from consideration adopted new §§41.33 — 41.35 which appeared in the issues of the *Texas Register* on March 15, 2002 (27 TexReg 5325), June 21, 2002 (27 TexReg5325), and July 5, 2002 (27 TexReg 5907).

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205053
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective date: August 25, 2002
For further information, please call: (512) 542–6115

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PART 12. STATE EMPLOYEE CHARITABLE CAMPAIGN

CHAPTER 329. ELIGIBILITY CRITERIA FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §329.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the State Employee Charitable Campaign has been automatically withdrawn. The new section as proposed appeared in the February 8, 2002 issue of the *Texas Register* (27 TexReg 873).

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205191

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CHAPTER 330. ELIGIBILITY CRITERIA FOR LOCAL FEDERATIONS/FUNDS, AFFILIATED ORGANIZATIONS, AND LOCAL CHARITABLE ORGANIZATIONS

34 TAC §330.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the State Employee Charitable Campaign has been automatically withdrawn. The new section as proposed appeared in the February 8, 2002 issue of the *Texas Register* (27 TexReg 875).

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205192

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CHAPTER 331. REVIEW AND APPEAL PROCEDURES FOR STATEWIDE FEDERATIONS/FUNDS AND AFFILIATED ORGANIZATIONS

34 TAC §331.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed new section, submitted by the State Employee Charitable Campaign has been automatically withdrawn. The new section as proposed appeared in the February 8, 2002 issue of the *Texas Register* (27 TexReg 876).

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205193

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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 daysafter the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federalstatute or regula tion requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 87. NOTARY PUBLIC
SUBCHAPTER A. NOTARY PUBLIC QUALIFICATIONS

1 TAC §87.22, §87.25

The Office of the Secretary of State adopts amendments to Subchapter A, concerning notary public qualifications without changes to the proposed text as published in the June 28, 2002 issue of the *Texas Register* (27 TexReg 5643).

The amendments add a new §87.25 and amend §87.22 to provide a procedure for qualification by an applicant who is an officer or employee of a State agency. The purpose of the amendments is to conform Subchapter A to an amendment to Chapter 453 of the Government Code that was made by the 77th Texas Legislature in House Bill 1203, which will be effective on September 1, 2002.

No comments were received concerning the proposed amendments.

The amendments are adopted under the Texas Government Code, §2001.004 (1) and the Notary Public Act, Texas Government Code, §406.023(a) which provide the Secretary of State with the authority to prescribe and adopt rules. The amendments affect the Texas Government Code §406.006, §406.010 & §653.012. The effective date of the amendments is September 1, 2002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205066
Geoffrey S. Connor
Assistant Secretary of State
Office of the Secretary of State
Effective date: September 1, 2002
Proposal publication date: June 28, 2002
For further information, please call: (512) 475-0775

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.14

The Texas Department of Housing and Community Affairs (the Department) adopts new §1.14, without changes, as published in the July 5, 2002 issue of the *Texas Register* (27 TexReg 5934-5936), concerning Housing Sponsor: Tenant and Management Selection, and therefore, will not be republished.

The purpose of this section is to set standards and restrictions concerning tenant and management selection by a housing sponsor in accordance with Section 2306.269 of the Government Code as added by SB 322, 77th Session of the Texas Legislature.

No Comments were received concerning this new rule.

The new section is adopted pursuant to the authority of the Texas Government Code, Chapter 2306; and in accordance with the Texas Government Code §2001.039.

The new section affects no other code, article or statute.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205104
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Effective date: August 27, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 475-3726

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PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 176. ENTERPRISE ZONE PROGRAM

10 TAC §§176.1 - 176.12

The Texas Department of Economic Development (agency) adopts the repeal of Chapter 176, Enterprise Zone Program, §§176.1 - 176.12, relating to identifying severely distressed areas of the state and providing incentives by state and local government to induce investment in those areas. The repeal is adopted without changes to the proposal as published in the May 3, 2002, issue of the *Texas Register* (27 TexReg 3663) as authorized by Government Code, Chapter 2303, as amended, Enterprise Zones.

The repeal is necessary to adopt new rules that accurately reflect current law, as amended by House Bill 820 and House Bill 2686 (77th Legislature), and to reflect current program practices of the agency.

The department received no comments regarding the proposed repeal.

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

Texas Government Code, Chapter 2303, as amended, is affected by this repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205194
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: August 29, 2002
Proposal publication date: May 3, 2002
For further information, please call: (512) 936-0177

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10 TAC §§176.1 - 176.10

The Texas Department of Economic Development (agency) adopts new Chapter 176, Enterprise Zone Program, §§176.1 - 176.10, relating to identifying severely distressed areas of the state and providing incentives by state and local government to induce investment in those areas, as authorized by Government Code, Chapter 2303, as amended, Enterprise Zones. Sections 176.1 - 176.10 are adopted without changes to the proposed text as published in the May 3, 2002, issue of the *Texas Register* (27 TexReg 3663).

The new rules are necessary to accurately reflect current law, as amended by House Bill 820 and House Bill 2686 (77th Legislature), and to reflect current program practices of the agency. In addition:

Section 176.1 updates the rules to eliminate references to recycling market development zones, and to clarify the definition of qualified business.

Section 176.2 updates the rules to eliminate references to recycling market development zones and to accurately reflect current program practices regarding filing of applications and to accurately reflect current law regarding job certification, and allow for an increase in the application fees.

Section 176.3 updates the rules to eliminate references to recycling market development zones and clarify the statute regarding automatic designation as a state enterprise zone for areas designated under federal empowerment zone initiatives.

Section 176.4 updates the rules by eliminating references to recycling market development zones.

Section 176.5 replaces repealed §176.7 due to the renumbering of the chapter and clarifies that retained jobs that are vacated and refilled must meet the original hiring requirement standard.

Section 176.6 replaces repealed §176.8 due to the renumbering of the chapter and clarifies when a purchaser or lessee of a qualified business must apply to assume the enterprise project designation and when a designated project may apply for an adjustment of its job allocation.

In addition, §176.7 replaces repealed §176.9 due to the renumbering of the chapter.

Section 176.8 replaces repealed §176.10 due to the renumbering of the chapter and updates the rules to eliminate references to recycling market development zones and accurately reflect the current law regarding conditions under which the agency will designate a qualified business as an enterprise zone, and clarify the length of time of enterprise zone designations and to accurately reflect present program procedures regarding assumption of a project designation or name change by a qualified business.

Section 176.9 replaces repealed §176.11 due to the renumbering of the chapter.

Section 176.10 replaces repealed §176.12 due to the renumbering of the chapter.

The agency received seven comments regarding the proposed new rules from Ryan & Company. One comment suggested that the meaning of "an individual who receives public assistance" in the definition of "economically disadvantaged individual" in §176.1(c)(10) be expanded to include persons who have registered with the Texas Workforce Commission for job placement assistance. The rule in §176.1(c)(10)(B) presently defines an "economically disadvantaged individual" as, an individual who, among other things, "receives public assistance benefits, such as welfare payments and food stamp payments, based on need and intended to alleviate poverty." The agency disagrees with this comment because the definition in the rule is exactly the same as in the statute, Government Code §2303.402(c)(2). More importantly, the intent of the classification of "economically distressed individual" is to identify persons in actual economic need. A person who simply registers for job placement assistance is not necessarily a person in actual economic need.

A second comment suggested that in §176.1, the term "industrial area" be added to the definitions, and that such an area should be excluded from the requirement of official governmental action necessary to designate an "industrial park" as a part of a zone as stated in §176.3. The agency disagrees with this comment because the statute is clear on the subject of the requirement of governmental action in establishing and amending boundaries of a zone as prescribed in Government Code §2303.103 and §2303.110. Moreover, without a formal action by the governing

body to amend a boundary and review by the agency in accordance with Government Code §2303.105, the agency would not have an opportunity to verify that the entire zone after amending the boundary continued to meet the unemployment and economic distress requirements of the statute.

Another comment expressed objection to the increase in administrative fees for all agency actions that require a fee, except for the original application fee, which, the commenter suggested, should be raised to $1,000. The commenter also asserted that a fee increase was not necessary because electronic data transmission and manipulation actually would make administration of the program less costly. The agency disagrees with the comment because the use of electronic data is only a small part of the review process and recent cost analysis of the application review process (zones, projects, job certifications) shows that the actual cost is almost $1000 for each review. Electronic media are used whenever possible in the review process to aid efficiency and reduce costs; however, not all data and documentation can be handled electronically, because much of the documentation must be in hard copy form with original signatures and corporate seals. The commenter used the presumed mounting fees involved in multiple job re-certifications as a result of position turnover as an example of the onerous consequences of the fee increase. However, there is no re-certification process related to position turnover until a project submits a subsequent application for agency review. A project that does not submit a subsequent application simply reports its continuing qualifications on the annual re-certification form, for which there is no fee. Therefore, the increase in fees is appropriate considering the time-consuming and costly nature of the administration of the program. The new fee levels set by the agency are within the levels authorized by statute, Government Code §2303.110(e). However, the commenter's suggested original application fee of $1,000 exceeds the fee limit authorized by the statute.

A fourth comment proposed multiple concurrent enterprise project designations for the same business in a single or in multiple zones within a jurisdiction. The agency has requested an opinion on the matter by the Office of the Attorney General.

A further comment concerning bonus enterprise project designations in §176.8(b)(2)(B) apparently was based on the assumption that an earned bonus project must be designated in a specific enterprise zone within a governing body's jurisdiction. The agency disagrees with this comment because, as administered by the agency, a bonus project may be used in any zone under the jurisdiction of the governing body from which it was earned.

A sixth comment seeks to clarify the duration of a zone designation in §176.8(c)(1)(A). The agency disagrees with this comment because rather than clarify the duration, the suggested language would change the duration. The time period specifically described in the rule reflects the intended date of expiration of a zone designation and therefore does not need to be changed.

A final comment seeks to change the process prescribed in §176.10 for amending the boundary of a zone that would add only industrial areas with zero population to the zone, by resolution or order of a governing body of the enterprise zone without re-qualifying the entire zone. The agency disagrees with this comment on the basis that the suggested change would be inconsistent with the statute, which provides at Government Code §2303.110 that amendment must be by ordinance or order adopted after a public hearing on the issue and that the amended boundary must continue to meet the unemployment and economic distress requirements of Government Code §2303.101. Consequently, qualification data must be updated by the governing body and reviewed by the agency to verify compliance with the statutory requirements for continued designation.

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

Texas Government Code, Chapter 2303, as amended, is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205195
Tracye McDaniel
Deputy Executive Director
Texas Department of Economic Development
Effective date: August 29, 2002
Proposal publication date: May 3, 2002
For further information, please call: (512) 936-0177

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 26. PRACTICE AND PROCEDURE

The Texas Historical Commission (THC) adopts the repeal of §§26.1 - 26.13, 26.17, 26.18, 26.20 - 26.22, 26.24, and 26.25 of Chapter 26, concerning the Rules of Practice and Procedures. The repeal of §26.27 is being withdrawn and will be submitted at a later time. New §§26.1 - 26.13, 26.16 - 26.22, 26.24 and 26.25 will replace the repealed sections and they are contemporaneously adopted in this issue of the *Texas Register*. Section 26.15 is being amended to delete language concerning Parks and Wildlife's MOU, because it is being adopted under new §26.16.

New §§26.2, 26.3, 26.5, 26.11, 26.12, 26.17, 26.22 and 26.25 are adopted with changes to the text as published in the May 24th issue of the *Texas Register* (27 TexReg 4479). New §§26.1, 26.4, 26.6 - 26.10, 26.13, 26.16, 26.18 - 26.21, 26.24; amended §26.15; and the repeals are adopted without changes and will not be republished.

The amendment and the new sections are necessary to delete obsolete language and to replace references to the "committee" with references to the "commission." These changes will make the rules more current and efficient.

Two sets of comments were received via email regarding the proposed adoption of these replacements and amendments and those comments primarily identified clerical errors and involved questions about definitions used in the text. The Commission agreed that many of the suggested changes were warranted and those appropriate changes were made.

A commenter questioned whether architectural artifacts recovered from publicly owned historic buildings shouldn't be curated in certified repositories. The Commission does not believe that this is necessary because it has never been the Commission's intention to imply that an extant historic structure's features and materials are archeological artifacts. Historic features and materials are primarily important for their contribution to the historical and architectural integrity of a specific or related structure. Retaining such features and materials with the structure is often important to the preservation of its integrity.

A commenter also questioned whether the definition of "eligibility" in Section 26.5 should reference the criteria for eligibility set forth in Section 26.7 - 26.10. The Commission concurs that the criteria for eligibility should be referenced and therefore, that change was made.

13 TAC §§26.1 - 26.13, 26.17, 26.18, 26.20 - 26.22, 26.24, 26.25

The repeals are adopted under Section 442.005(q), Title 13, Part 2 of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably affect 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.

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205161
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 463-5711

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13 TAC §§26.1 - 26.13, 26.15 - 26.22, 26.24, 26.25

The new and amended rules are adopted under Section 442.005(q), Title 13, Part 2 of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules to reasonably affect the purposes of this chapter.

§26.2. Scope.

State Archeological Landmarks include sites, objects, buildings, structures and historic shipwrecks, and locations of historical, archeological, educational, or scientific interest including, but not limited to, prehistoric American Indian or aboriginal campsites, dwellings, and habitation sites, aboriginal paintings, petroglyphs, and other marks or carvings on rock or elsewhere which pertain to early American Indian or other archeological sites of every character, treasure imbedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of their contents, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants, prehistory, history, government, or culture in, on, or under any of the lands of the State of Texas, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas. Sections 191.091 and 191.092 of the Antiquities Code provide that archeological sites and historic structures on lands belonging to state agencies or political subdivisions of the State of Texas are State Archeological Landmarks or may be eligible to be designated as landmarks. Also protected under the Antiquities Code of Texas (Section 191.094) are specially designated landmarks on private property. The commission is further empowered to provide for a system of permits and contracts for the study of archeological sites, historical structures and objects. Sections 191.002, 191.021, 191.051, 191.0525, 191.053, 191.054, 191.091, 191.092, 191.095, and 191.098 of the Antiquities Code of Texas specifically discuss the interests of the State of Texas in the recordation, protection, preservation, and study of archeological sites and historic structures in and on public lands, and under the public seas and waterways in the State of Texas. The State of Texas considers that all publicly owned archeological sites and historic structures have some intrinsic historic value, and the Antiquities Code provides some level of protection for those sites or structures regardless of their size, character, or ability to currently yield data that will contribute important information on the history or prehistory of Texas. Additionally, these publicly owned archeological sites and historic structures are protected from vandalism, or other actions meant to take, alter, or destroy them, and information directly related to the specific location of archeological sites is restricted from open records requests. All cultural resources are not equally significant to the history and prehistory of Texas. Some archeological sites may not possess research value sufficient to warrant long-term preservation or investigations beyond survey level recordation. Some historic structures retain minimal integrity due to damage or deterioration. Therefore, the issue of whether cultural resources are significant and warrant preservation, and/or further research (such as archeological testing and data recovery level investigations), is addressed through official landmark designation, permit issuance and regulation. Official State Archeological Landmark designation is an administrative procedure that provides for public notice of sites and structures being considered for designation, and allows the land-owning or controlling public agency and the public the opportunity to have input into the designation process. The permit issuance and regulation procedures provide for an investigative and consultative process that allows the commission, land-owning agency, project sponsor, principal investigator, or project architect, and investigative firms or other professional firms, a system by which sites and structures can be documented and assessed to determine whether further investigations, or official landmark designation is necessary, and if appropriate work is proposed

§26.3. Compliance with Rules.

(a) If the permittee, project sponsor, principal investigator or other professional personnel and investigative firm or other professional firm fails to comply with any of the rules and regulations of the commission or any of the terms of the specific permit involved, or fails to properly conduct or complete the project, or fails to act in the best interest of the state, or fails to meet terms and conditions of defaulted permits, the commission may cancel the permit and notify the permittee of such cancellation by registered letter, mailed to the last address furnished to the commission by the permit applicant. When determined to be appropriate and upon notification of cancellation the permittee, project sponsor, principal investigator or other professional personnel, and investigative firm or other professional firm shall, in the case of ongoing projects, cease work immediately, remove all personnel and equipment, and vacate the area or site within 24 hours. A permit, which has been canceled, can be reinstated by the commission if good cause is shown within 30 days.

(b) A principal investigator, or project architect, and investigative firm or other professional firm shall not proceed with an investigation without applying for, and having been issued, an appropriate permit by the commission, or without having been officially authorized by the commission to proceed prior to issuance of an emergency permit. Failure to do so may result in the principal investigator, project architect, investigative firm, or professional firm being censured and denied issuance of permits for a six-month period. The commission will send

a letter of reprimand to the principal investigator and/or investigative firm for each application offense. More than one permit application offense in one calendar year could result in permit censuring for a period of six months for each offense. If the commission determines that more than one permit application offense has occurred in one calendar year, it may direct the staff to censure the principal investigator or other professional personnel, investigative firm or professional firm in question. The censured parties will then be ineligible to be issued a permit for a period of six months for each offense. Any decisions relative to permit censuring can be appealed to the State Office of Administrative Hearings (SOAH), and a formal evidentiary hearing on the matter will be set.

(c) Project sponsors and permittees shall not encourage principal investigators, project architects, or investigative firm or other professional firms to perform investigations on public lands in the State of Texas without a properly issued permit, and such investigations proceeding with the knowledge of the project sponsor and/or permittee would constitute a violation of the Antiquities Code of Texas. Such actions may result in the denial of a permit and compromise authorization for a development project to proceed relative to jurisdiction under the Antiquities Code of Texas. The commission may also require that the investigations performed without a permit be performed again under a properly issued permit.

(d) The rules and standards that must be followed in relationship to the curation of artifacts recovered under the jurisdiction of the Antiquities Code can be found under Title 13, Part 2, Chapter 29 of the Texas Administrative Code (print copies available from the commission or also online at www.thc.state.tx.us).

§26.5. Definitions.

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

(1) Accession--means the formal acceptance of a collection and its recording into the holdings of a curatorial facility.

(2) Antiquities and artifacts--the tangible objects of the past that relate to human life and culture. Examples include, but are not limited; projectile points, tools, documents, art forms, and technologies.

(3) Antiquities Advisory Board--a ten-member board that assists the Texas Historical Commission in reviewing matters related to the Antiquities Code of Texas.

(4) Applicant--the controlling agency, organization, or political subdivision having administrative control over a publicly owned landmark or the owner of a privately owned landmark. Only the applicant may be issued a historic structures permit.

(5) Appropriate historical or archeological authorities--for purposes of implementing the Antiquities Code of Texas, the commission is the statutorily created body responsible for protecting and preserving State Archeological Landmarks, Texas Natural Resources Code of 1977, Title 9, Chapter 191.

(6) Archeological site--any place containing evidence of human activity, including but not limited to the following:

(A) Habitation sites. Habitation sites are areas or structures where people live or have lived on a permanent or temporary basis. Standing structures may or may not be present. Habitation sites may also contain evidence of activities that are listed in the following as site types in the non-habitation category.

(i) Campsites.

(I) Native American open campsites were occupied on a temporary, seasonal, or intermittent basis. Evidence of structures may or may not be present. Native American campsites may have accumulations of shell or burned rock as well as hearths, hearth fields, bedrock mortars, burials, and/or scatters or accumulations of ceramics, stone debitage, flaked tools, and grinding stones. Campsites vary in size from a few square meters to several hectares. Additionally, Native American sites near missions, forts, and trading posts were of varying degrees of permanence with the site generally being continuously occupied; but not necessarily by the same group or tribe.

(II) Rock shelters, in general, are a special kind of campsite. These sites are located in caves or under rock overhangs and have been occupied either temporarily, seasonally, or intermittently. Many articles of perishable materials such as clothing, basketry, sandals, and matting may be preserved. Shelter sites include not only the shelter area itself, but also the area of debris accumulation located in the immediate vicinity that is the result of activity by those occupying the rock shelter. Associated hearths, burials, bedrock mortars, dumps, etc., may be present. Rock shelters vary in size from an area large enough to accommodate only one person to areas of several hundred meters in the largest dimension.

(III) Non-Native American campsites are the cultural remains of activities by people who are not Native American. Examples are sites that represent the activities of railroad workers, military units, settlers, slave quarters, wagon trains, shepherd shelters, line camps, buffalo hunter camps, cavalry campgrounds, trail drive camps, camps at river fords, candelilla wax camps, WPA and CCC camps and work sites.

(ii) Residence sites.

(I) Residence sites are those where routine daily activities were carried out and which were intended for year-round use. A greater degree of permanence is implied in a residence site than a campsite; therefore, structural evidence in the form of post molds, foundations, and so forth is more likely to be present. Examples include remains of cabins, dugouts, farmhouses, ranch headquarters, plantation residences, slave quarters, and urban homes, as well as teepee rings, pueblos, subterranean pithouses, and Caddoan houses constructed by Native Americans.

(II) Residence sites resulting from Native American activities may include additional features and structures, including hearths, retaining walls, enclosures, compounds, patios, burials, cemeteries, mounds, platforms, and borrow areas, as well as scatters and accumulations of stone debitage, ceramic sherds, burned rock, flaked tools, grinding tools, grinding stones, and bedrock mortars.

(III) Non-Native American sites may include, in addition to the main structure, outbuildings, water systems, trash dumps, garden areas, driveways, and other remains that were an integral part of the site when it was inhabited. Examples of structures or structural remains which might be present in addition to the residence include, but are not limited to, barns, silos, cisterns, corrals, wells, smokehouses, stables, gazebos, carriage houses, fences, walls, corn cribs, gins or mills, cellars, kitchens, and bunkhouses. Family cemeteries are often associated with early historic sites.

(B) Non-habitation sites. Non-habitation sites result from use during specialized activities and may include standing structures. Descriptions of each kind of site are given.

(i) Rock art and graffiti sites consist of symbols or representations that have been painted, ground, carved, sculpted, scratched, or pecked on or into the surface of rocks, wood, or metal. Names, dates, symbols, and representations or likenesses of people,

animals, plants, lines, shapes or objects are common elements in such sites.

(ii) Mines, quarry areas, and lithic procurement sites are those from which raw materials such as flint, clay, coal, minerals, or other materials were collected or mined for future use. Sites where flint was obtained can be identified by the abundance of flint flakes, broken tools, and flint cobbles. Historic mines often have associated structures such as head frames, support timbers, and transportation facilities.

(iii) Game procurement and processing sites are areas where game was killed or butchered for food or hides. Remnants of structures such as game runs, hunting blinds, and fish weirs, as well as stone, bone, and metal tools, may be present in association with animal remains. Often the animal remains form a bone bed with cultural material dispersed sparsely among the bones.

(iv) Engineering structures such as aqueducts, irrigation canals and ditches, earthen mounds, ramps, platforms, terraces, dams, bordered and leveled fields, constructed trails, bridges, tunnels, shafts, roads, rock fences, dams, lighthouses, and railroad, streetcar, and thoroughfare systems are the most common, but not the only kinds of engineering structures.

(v) Cemeteries and burials, marked and unmarked, are special locales set aside for burial purposes. Cemeteries contain the remains of one or more persons. Burials may contain the remains of one or more individuals located in a common grave in a locale not formerly or subsequently used as a cemetery. The site area encompasses the human remains present and also gravestones, markers, containers, coverings, garments, vessels, tools, and other goods, which may be present. Cemeteries and burials whether prehistoric or historic, that are publicly owned are protected under the Antiquities Code. Cemeteries are considered historic if interments within the cemetery occurred at least fifty (50) years ago. Individual burials within a cemetery are not considered historic unless the interments occurred at least fifty (50) years ago.

(vi) Fortifications, battlefields, training grounds and skirmish sites include fortifications of the historic period and the central areas of encounters between opposing forces, whether a major battleground or areas of small skirmishes. Trenches, mounds, walls, bastions, and other fortifications may be present. Trash dumps will also be considered a part of the site. Included here are battlefields of the Civil War, the Texas War for Independence, the Mexican War, and skirmish sites between non-Native American and Native American forces. Standing structures may or may not be present.

(vii) Public service and ceremonial sites include, but are not limited to, kivas, temple mounds, shrines, missions, churches, libraries, museums, educational institutions, courthouses, fire stations, and hospitals. Standing structures may or may not be present.

(viii) Commercial business structures and industrial structures and sites where products or services are produced, stored, distributed, or sold include, but are not limited to, markets, stores, shops, banks, hostels, stables, inns, stage stops, breweries, bakeries, factories, kilns, mills, storage facilities, and railroad, bus and tramway depots. Trash or dump deposits, outbuildings, wells, cisterns, and other features associated with the principal structures are considered to be parts of these sites.

(ix) Monuments and markers include structures erected to commemorate or designate the importance of an event, person, or place, and may or may not be located at the sites they commemorate. Included in this category are certain markers erected by the Texas Historical Commission and county historical commissions, and markers and statuary located on public grounds such as courthouse squares, parks and the Capitol grounds. Examples of such sites constructed by Native Americans are medicine wheels that will be included in this category upon identification.

(x) Shipwrecks by definition, Texas Natural Resource Code, Section 191.091, include the wrecks of naval vessels, Spanish treasure ships, coastal trading schooners, sailing ships, steamships, and river steamships, among others.

(7) Archeological Survey Standards for Texas--Minimum survey standards developed by the commission in consultation with the Council of Texas Archeologists.

(8) Board--the Antiquities Advisory Board.

(9) Building--A building is a structure created to shelter any form of human activity, such as a courthouse, city hall, church, hotel, house, barn, or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.

(10) commission--the Texas Historical Commission and its staff.

(11) Committee, or Antiquities Committee, or Texas Antiquities Committee--as redefined by the 74th Texas Legislature within Section 191.003 of the Antiquities Code means the Texas Historical Commission and/or staff members of the Texas Historical Commission.

(12) Contract archeologist--a professional archeologist who performs or directs archeological investigations under contract.

(13) Conservation--scientific laboratory processes for cleaning, stabilizing, restoring, preserving artifacts, and the preservation of buildings, sites, structures and objects.

(14) Council of Texas Archeologists--a non-profit voluntary organization that promotes the goals of professional archeology in the State of Texas.

(15) Council of Texas Archeologists Guidelines--professional and ethical standards which provide a code of self regulation for archeological professionals in Texas with regard to field methods, reporting, and curation.

(16) Cultural resource--any building, site, structure, object, artifact, historic shipwreck, landscape, location of historical, archeological, educational, or scientific interest, including, but not limited to, prehistoric and historic Native American or aboriginal campsites, dwellings, and habitation sites, archeological sites of every character, treasure embedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of the contents thereof, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants' prehistory, history, natural history, government, or culture. Examples of cultural resources include Native American mounds and campgrounds, aboriginal lithic resource areas, early industrial and engineering sites, rock art, early cottage and craft industry sites, bison kill sites, cemeteries, battlegrounds, all manner of historic buildings and structures, local historical records, cultural landscapes, etc.

(17) Curatorial facility--a museum, school of higher education, institution, or governmental agency that engages in the permanent curation, conservation, storage, and/or displays of archeological or other cultural artifacts.

(18) Data recovery--an excavation mode of archeology and a form of mitigation. The evidence from a skillfully accomplished archeological excavation provides a detailed picture of the human activities at the site; emphasis is placed on evidence rather than artifacts. In data recovery, the archeological deposits are removed by digging and so destroyed. The destruction can be justified only if:

(A) it is done with such care that antiquities and cultural and environmental data in the area excavated are discovered, and if possible, preserved, however faint the surviving trace may be;

(B) appropriate information has been accurately recorded, whether its importance is immediately recognized or not, to remain available after the site has disappeared; and

(C) the record and results of the investigation are made available through publication.

(19) Deaccession--means the permanent removal of an object or collection from the holdings of a curatorial facility.

(20) Default--failure to fulfill all conditions of a permit or contract, issued or granted to permittee(s), sponsors, and principal investigator or investigative firm.

(21) Defaulted permit--a permit that has expired without all permit terms and conditions having been met.

(22) Department of Antiquities Protection (DAP)--means the Archeology Division (AD) of the commission.

(23) Designated historic district-- areas of archeological, architectural, or historical significance indicated by: listing in, or determination of eligibility for listing in, the National Register of Historic Places; designation as State Archeological Landmarks, or determination of eligibility for designation as State Archeological Landmarks; or identified by State agencies or political subdivisions of the State as historically sensitive sites, districts, or areas. This includes historical designation by local landmark commissions, boards, or other public authorities, or through local preservation ordinances.

(24) Discovery-- the act of locating, recording, and reporting a cultural resource.

(25) Destructive analysis - means destroying all or a portion of an object or sample to gain specialized information. For purposes of these rules, it does not include analysis of objects or samples prior to their being accessioned by a curatorial facility.

(26) Disposal - means the discard of an object or sample after being recovered and prior to accession.

(27) Eligible-- archeological sites or other historic properties that meet the criteria set forth in Sections 26.7 - 26.10 of this title, are eligible for official landmark designation.

(28) Environmental data--presently available information as well as data derived as an adjunct to an archeological investigation, which includes, but is not limited to, area drainage, physiography, surface and subsurface geology, soils, flora, fauna, climate, the alteration of prehistoric and historic landforms, and so forth. The implications of present and/or hypothetical microenvironments should be presented when sufficient data allow for such inferences. The above elements of the environment through time must be considered during attempts to reconstruct past technological subsistence and settlement patterns.

(29) Emergency permit--a permit that authorizes investigations to be performed prior to the formal application for those investigations. This permit will only be issued under emergency conditions when cultural resources are discovered during development or other construction projects, or under conditions of natural or man-made disasters that necessitate immediate action to deal with the findings.

(30) Held-in-trust collection.--means those state-associated collections under the authority of the Texas Historical Commission that are placed in a curatorial facility for care and management; stewardship is transferred to that curatorial facility but not ownership.

(31) Historic landscape--a geographic area, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values.

(32) Historic property--a district, site, building, structure or object significant in American history, architecture, engineering, archeology or culture.

(33) Historic time period--for the purposes of State Archeological Landmark designation, this time period is defined as extending from A. D. 1500 to 50 years before the present.

(34) Integrity--the authenticity of a property's historic identity, evidenced by the survival of physical characteristics that existed during the property's historic or prehistoric period.

(35) Intensive survey--a field survey examination to determine the number and extent of the cultural resources present and their scientific importance. Shovel testing may be required to locate archeological sites when the ground surface is obscured or to determine the horizontal limit of buried archeological deposits.

(36) Investigation--archeological or architectural activity including, but not limited to: reconnaissance or intensive survey, testing, or data recovery; preservation of rock art; underwater archeological survey, test excavation, or data recovery excavations; monitoring; measured drawings; or photographic documentation.

(37) Investigative firm--a company or scientific institution that has full-time experienced research personnel capable of handling investigations and employs a principal investigator and/or project architect. The company or institution holds equal responsibilities with the principal investigator or project architect to complete requirements under an Antiquities Permit.

(38) Land owning or controlling agency--any state agency or political subdivision of the state that owns or controls the land(s) in question.

(39) Landmark--means state archeological landmark.

(40) Mitigation--the amelioration of the potential total or partial loss of significant cultural resources. For example, mitigation for removal of a deteriorated historic building feature might include photographs and drawings of the feature, and installing a replacement that matches the original in form, material, color, etc. Mitigation for the loss of an archeological site might be accomplished through preplanned data recovery actions, to preserve or recover an appropriate amount of data by application of current professional techniques and procedures, as defined in the permit's scope of work. Following archeological mitigation or data recovery investigation, a clearance letter may be issued by the commission that authorizes destruction of all or part of an archeological site without an Antiquities Permit.

(41) Monitoring--the on-site presence of a professional archeologist or architect to observe construction activities that could or will alter cultural resources, and to report findings and effects.

(42) National Register--the National Register of Historic Places is a register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture maintained by the Secretary of the Interior. Information concerning the National Register is available through the commission (print copies available from the commission or also online at www.thc.state.tx.us).

(43) Nonpublic interior spaces--are insignificant spaces exempt from the authority of the Antiquities Code. The interior spaces to be considered public and therefore not exempt are those spaces that are or were accessible to the public (lobbies, corridors, rotundas, meeting

halls, courtrooms, offices of public officials, public employees and services, etc.), and those that are important to the public because of any significant historical, architectural, cultural, or ceremonial value.

(44) Normal maintenance or repair--any work performed on the materials, features or landforms of cultural resources that does not have the potential to cause removal, damage or alteration to the integrity, form or appearance of the material, feature or landform, is considered to be normal maintenance and repair and therefore exempt from the notification requirement. For example, permanent masonry damage can result from use of inappropriate cleaning methods, such as sandblasting, high pressure water cleaning or the use of unsuitable chemicals, or from use of damaging repointing techniques and materials. Replacing historic windows damages the historical integrity of a building and painting previously unpainted surfaces constitutes alteration. Such work is not considered normal maintenance or repair. Cleaning surfaces with non-corrosive mild solutions and low-pressure water, repainting window frames or doorways with similar paints, or minor repairs such as replacing putty on windows are examples of normal maintenance and repair.

(45) Permit application offense--failure to properly apply for a permit and/or receive authorization for an emergency permit by the commission, prior to the actual performance of an archeological investigation or other project work.

(46) Permit censuring--a restriction in the ability of a principal investigator or other professional personnel and/or an investigative firm or other professional firm to be issued a permit under the auspices of the Antiquities Code of Texas.

(47) Permittee--the landowning or controlling individual or, public agency and/or a project sponsor that is issued an Antiquities Permit for an archeological investigation or other project work.

(48) Political subdivision--a local government entity created and operating under the laws of this state, including a city, county, school district, or special district created under the Texas Constitution, Article III, Section 52(b)(1) or (2), or Article XVI, Section 59.

(49) Prehistoric time period--for the purpose of State Archeological Landmark designation, a time period that encompasses a great length of time beginning when humans first entered the New World and ending with the arrival of the Spanish Europeans, which has been approximated for purposes of these guidelines at A. D. 1500.

(50) Preservation--the act or process of applying measures necessary to sustain and protect the existing form, integrity and materials of a cultural resource. Preservation consists of maintenance and repair of materials, features or landforms of cultural resources, rather than extensive replacement and new construction. Also, the conservation of buildings, sites, structures and objects.

(51) Professional firm--A company or scientific institution that has professional personnel who meet the required qualifications for specific types of work. The company or institution holds equal responsibilities with a project architect or other professional personnel to complete requirements under an Antiquities Permit.

(52) Professional personnel--appropriately trained specialists required to perform adequate archeological and architectural investigations and project work. These personnel include the following:

(A) Principal investigator. A professional archeologist with demonstrated competence in field archeology and laboratory analysis, as well as experience in administration, logistics, personnel deployment, report publication, and fiscal management. In addition to these criteria the principal investigator shall:

(i) hold a graduate degree in anthropology/archeology, or closely related field such as geography, geology, or history, if their degree program also included formal training in archeological field methods, research, and site interpretation from an accredited institution of higher education; and/or be registered as a professional archeologist by the Register of Professional Archeologists (RPA); and/or have successfully completed investigations under an Antiquities Permit; and/or hold an active permit not in default, prior to the date that these rules become effective;

(ii) have at least twelve months of full-time experience in a supervisory role involving complete responsibility for a major portion of a project of comparable complexity to that which is to be undertaken under permit;

(iii) have demonstrated the ability to disseminate the results of an archeological investigation in published form conforming to current professional standards;

(iv) remain on-site a minimum of 25% of the time required for the field investigation, and whose names must appear on the project report;

(v) provide a field archeologist to supervise the field investigation in his or her absence; and

(vi) testify concerning report findings in the interest of controversy or challenge.

(B) Professional archeologist. One who has a degree in anthropology, archeology or a closely related field if that degree also included formal training in archeological field methods, research, and site interpretation, conducts archeological investigations as a vocation, and whose primary source of income is from archeological work. Qualifications for specialized types of professional archeologists are listed below.

(i) Prehistoric archeologist. One who is a professional archeologist and, in addition, meets the following conditions:

(I) has been trained in the field of prehistoric archeology;

(II) has a minimum experience of two comprehensive archeological field seasons of three to six months in length on archeological site(s) that contain prehistoric (pre-16th century) archeological deposits; and

(III) has published the results of those prehistoric archeological investigations in scholarly journals or publications.

(ii) Historic archeologist. One who is a professional archeologist and, in addition, meets the following conditions:

(I) has been trained in the field of historical archeology;

(II) has a minimum experience of two comprehensive archeological field seasons of three to six months in length on archeological site(s) that contain historic (post-16th century) archeological deposits; and

(III) has published the results of those historical archeological investigations in scholarly journals or publications.

(iii) Underwater archeologist. One who is a professional archeologist and, in addition, is a competent diver with a minimum of two full seasons in underwater archeological testing or excavation projects. Training and experience sufficient for safe and proficient use of the specialized underwater remote sensing survey, excavation and mapping techniques, and equipment are required.

(iv) Underwater archeological surveyor. One who has training and experience sufficient for safe and proficient supervision of appropriate remote sensing survey equipment operation, as well as for interpretation of survey data for anomalies and geomorphic features that may have some probability of association with submerged aboriginal sites and sunken vessels. This individual may represent the archeological interests on board the survey vessel in the absence of an underwater archeologist, as defined in subparagraph (B)(iii) of this definition.

(C) Project architect. A professional who is a licensed architect and has had full-time experience in a supervisory role on at least one historic preservation project. The project architect must be involved, at a minimum, in 25% of the time required to develop plans and specifications and manage project work for an historic structures permit project and, when not involved with the project, must assign a qualified preservation specialist to supervise the preservation project.

(i) A preservation specialist may serve in the place of the project architect if: all responsibilities of a project architect under this title will be fulfilled by the project preservation specialist; and all education and experience criteria for a preservation specialist are met.

(ii) A project engineer may serve in the place of the project architect if: the scope of project work is limited to structural stabilization and repair; all responsibilities of a project architect under this title will be fulfilled by the project engineer; and all education and experience criteria for a project engineer are met.

(iii) A landscape architect may serve in the place of the project architect if: the project scope is limited to landscape architecture; all responsibilities of a project architect under this title will be fulfilled by the project landscape architect; and all education and experience criteria for a project landscape architect are met.

(iv) A project contractor may serve in the place of a project architect if: the project scope of work is limited to the demonstrated professional expertise of the contractor; all responsibilities of a project architect under this title will be fulfilled by the project contractor; and all the requirements for a project contractor are met.

(D) Preservation specialist. One who has a professional degree in architecture or a state license to practice architecture, plus one of the following:

(i) at least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field, or

(ii) at least one year of full-time professional experience on historic preservation projects to include experience on projects similar to the project to be permitted; detailed investigations of historic structures; preparation of historic structures research reports; and preparation of plans and specifications for preservation projects.

(E) Project contractor. A professional who has the appropriate training, certifications and/or licenses for the type of project work specified in the permit application and at least one year of demonstrable full-time experience in applying the methods and practices of the proposed work on historic preservation projects similar to the project to be permitted.

(F) Project engineer. A professional who is a licensed engineer and has had full-time experience in a supervisory role on at least one historic preservation project similar to the project to be permitted.

(G) Project landscape architect. A professional who is a licensed landscape architect and has had full-time experience in a supervisory role on at least one historic preservation project similar to the project to be permitted.

(H) Historian. The minimum professional qualifications are a graduate degree in history or closely related field; or a bachelor's degree in history or a closely related field plus one of the following:

(i) at least two years of full-time experience in research, writing, teaching, interpretation, or other demonstrable professional activity with an academic institution, historical organization or agency, museum, or other professional institution; or

(ii) substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

(I) Geomorphologist or geoarcheologist. A person who holds a graduate degree in geology, geomorphology, archeology, or other closely related field, and has had sufficient training to adequately evaluate the sedimentology, stratigraphy, and pedology of deposits in the field and be competent to describe and analyze the deposits using standard terminology and methods. This person should also have general archeological experience in the area in which the investigations are to occur.

(53) Project-- activity on a cultural resource including, but not limited to: investigation, survey, testing, excavation, restoration, demolition, scientific or educational study.

(54) Project sponsor--an individual, institution, public agency, or company paying costs of archeological investigation or other project work.

(55) Public agency or agencies--any state agency or political subdivision of the state.

(56) Public lands--non-federal, public lands that are owned or controlled by the State of Texas or any of its political subdivisions, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas.

(57) Reconnaissance--a literature search and record review plus an on-the-ground surface examination of selected portions of an area adequate to assess the general nature of the resource probably present. This level of investigation is appropriate to preliminary planning decisions and will be of assistance in determining viable project alternatives. A reconnaissance can be used to help determine whether an Intensive Survey is warranted.

(58) Recorded archeological site--sites that are recorded, listed, or registered with an institution, agency, or university, such as the Texas Archeological Research Laboratory of the University of Texas at Austin.

(59) Register of professional archeologists--a voluntary national professional organization of archeologists which registers qualified archeologists.

(60) Rehabilitation--the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values.

(61) Research design--a written theoretical approach and a plan for implementing fieldwork that also explains the goals and methods of the investigation. A research design is developed prior to the implementation of the field study and submitted with a completed Archeological Permit Application.

(62) Restoration--a treatment, defined in the Secretary of the Interior's Standards for the Treatment of Historic Properties, as the

act or process of accurately depicting the form, features, and character of a property and its setting as it appeared at a particular period of time by means of the removal of features from later periods in its history and reconstruction of missing features from the restoration period.

(63) Rock art--all manner of carvings, scratchings, and paintings on rock which relate to human life and culture, including, but not limited to, Native American pictographs and petroglyphs, historical graffiti and inscriptions, and religious and genealogical records.

(64) Ruins--a historic or prehistoric site, composed of both archeological and structural remains, in which the structure is in a state of collapse or deterioration to the point that the original roof and/or flooring and/or walls are either missing, partially missing, collapsed, partially collapsed, or seriously damaged through natural forces or structural collapse. Ruins are considered archeological sites, and historic structures recently damaged or destroyed are not classified as ruins.

(65) Scope of work--a summary of the methodological techniques used to perform the archeological investigation or outline of other project work under permit.

(66) Significance--a trait attributable to sites, buildings, structures and objects of historical, architectural, and archeological value which are state archeological landmarks and eligible for official designation and protection under the Antiquities Code of Texas. Historical significance is the importance of a property to the history, architecture, archeology, engineering or culture of a community, state or the nation, and is a trait attributable to properties listed or determined eligible for listing in the National Register of Historic Places or for state landmark designation.

(67) Site--any place or location containing physical evidence of human activity. Examples of sites include: the location of prehistoric or historic occupations or activities, a group or district of buildings or structures that share a common historical context or period of significance, and designed landscapes such as parks and gardens.

(68) Sponsor--an agency, individual, institution, investigative firm or other professional firm, organization, corporation, subcontractor, and/or company paying the costs of archeological investigation or other project work, or that sponsors, funds or otherwise functions as a party under a permit.

(69) State agency--a department, commission, board, office, or other agency that is a part of state government and that is created by the constitution or a statute of this state. The term includes an institution of higher education as defined by the Texas Education Code, Section 61.003.

(70) State Archeological Landmark--any cultural resource located in, on, or under the surface of any land belonging to the State of Texas or to any county, city, or other political subdivision of the state, or a site officially designated as a landmark at an open public hearing before the commission.

(71) State associated collections - means the collections owned by the State and under the authority of the commission.

(72) State Historic Preservation Officer--the official within each state authorized by the state, at the request of the Secretary of the Interior, to act as liaison for purposes of implementing the National Historic Preservation Act. In Texas, the Executive Director of the commission is designated as the State Historic Preservation Officer.

(73) Structure--A structure is a work made up of interdependent and interrelated parts in a definite pattern of organization. The term "structure" is used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter. Constructed by man, it is often an engineering project. Examples of structures include bridges, power plants, water towers, silos, windmills, grain elevators, etc.

(74) Testing--applying current scientific or archeological techniques to investigate and evaluate one or more cultural resources. Testing must be accomplished in such a way as to recover archeological, historical and scientific data through detailed examination of a representative sample of the site or sites, or building conditions. Testing must result in the recovery of data, specimens, and samples relating to the total cultural content of the archeological site or sites, or in the least damage possible to the building. Results of testing are utilized in making significance determinations relative to the potential need for additional investigations or the preservation of the remaining portions of the archeological site, or in making decisions regarding appropriate restoration or other treatment of the cultural resource.

§26.11. Location and Discovery of Cultural Resources and Landmarks.

The Texas Natural Resource Code of 1977, Title 9, Heritage, Chapter 191, Antiquities Code of Texas, Section 191.002 (concerning Declaration of Public Policy), declares that it is the public policy and in the interest of the State of Texas to locate archeological sites and other cultural resources, in, on, or under any land within the jurisdiction of the State of Texas. Section 191.051 of the Antiquities Code (concerning Powers and Duties In General) directs the commission to provide for the discovery and/or scientific investigation of publicly owned cultural resources. Section 191.174 of the Antiquities Code (concerning Assistance from State Agencies, Political Subdivisions, and Law Enforcement Officers), further directs the commission, state agencies, political subdivisions of the state, and law enforcement agencies to work together to locate and protect cultural resources when deemed prudent, necessary, and/or in the best interest of the state. To achieve these mandates, the commission reviews construction plans for projects on public lands prior to development to determine the project's potential impact to cultural resources, and invokes its power to issue and supervise Antiquities Permit investigations in accordance with Section 191.054 of the Antiquities Code (concerning Permit for Survey and Discovery, Excavation, Restoration, Demolition, or Study). These mandates and the review of construction plans that may adversely affect both archeological sites and historic structures are accomplished in the following manner.

(1) Project notification. As provided for in Sections 191.0525 and 191.054 of the Antiquities Code (concerning Notice Required and Permit for Survey and Discovery, Excavation, Restoration, Demolition, or Study), public agencies shall notify the commission before groundbreaking on public land or construction projects that could take, alter, damage, destroy, salvage, or excavate archeological sites, historic structures, designated historic districts, or other cultural resources or landmarks on non-federal public land in Texas. The notification must contain a brief written scope of work and a copy of the appropriate topographical quadrangle map with clearly marked project boundaries and photographs of the historic structure(s) involved in the project work.

(2) Project review. Once the commission receives a complete notification a response will be provided within 30 days (unless otherwise provided for within Section 191.0525) of receipt of the review request. The commission shall review submitted documentation and notify the public agency if historic structures involved in the work are landmarks eligible for designation and/or of the possible need for a survey to locate cultural resources situated in the proposed development tract. If the commission does not respond within 30 days, the public agency may proceed without further notice to the commission.

Expedited reviews (24 hours) will be accommodated on a case-by-case basis in emergency situations.

(3) Project coordination. If a survey investigation or review of project work is required, appropriate professional personnel will perform the investigations or work under an Antiquities Permit in accordance with Sections 26.17-18, 26.20-22, and 26.24-25 of this title.

(4) Construction discovery. Anyone working on public lands who discovers archeological sites or historic structures which may qualify for designation as a State Archeological Landmark according to the criteria listed in Sections 26.7-26.10 of this title (relating to Criteria for Evaluating Historic Structures; Criteria for Evaluating Archeological Sites; Criteria for Evaluating Caches and Collections; and Criteria for Evaluating Shipwrecks) shall report such discovery to the state agency or political subdivisions owning or controlling the property and to the commission. Upon notification, the commission staff may initiate designation proceedings if it determines the site to be a significant cultural or historical property and/or the commission staff may issue a permit for mitigative archeological investigations or any other investigations. The cost of a proper investigation, excavation, or preservation of such a landmark or potential landmark will be borne by the owner or developer of the property rather than by the commission.

§26.12. Designation Procedures for State Archeological Landmarks.

(a) Nomination. Any group or individual, public or private, and public agencies may submit a property in public ownership to the commission for official designation as a State Archeological Landmark. The nomination must be submitted to the commission on a form approved by the commission, and the commission will determine whether the nomination is in order and acceptable, and when the nomination will be placed on the agenda of one of the commission's public meetings.

(1) Any third-party private individual or a private group that desires to nominate a building or site owned by a political subdivision as a State Archeological Landmark must complete and return to the commission a nomination form, and must give notice of the nomination at the individual's or group's own expense, in a newspaper of general circulation published in the city, town, or county in which the building or site is located. If no newspaper of general circulation is published in the city, town, or county, the notice must be published in a newspaper of general circulation in an adjoining or neighboring county that is circulated in the county of the applicant's residence. The notice must:

(A) be printed in 12-point boldface type;

(B) include the exact location of the building or site; and

(C) include the name of the group or individual nominating the building or site.

(D) An original copy of the notice and an affidavit of publication signed by the newspaper's publisher must be submitted to the commission with a nomination form. The commission will not consider a site owned by a political subdivision for designation as a State Archeological Landmark unless the notice and affidavit required by this section are attached to a nomination form. This notification must be received by both the commission and the public agency a minimum of 60 days prior to a regularly scheduled public meeting of the commission at which the nomination may be considered. All decisions regarding when a nomination will be considered by the commission will be made by the executive director of the commission.

(2) If the commission's staff wishes to nominate a site or historic building or structure for State Archeological Landmark designation it must give the public agency that owns the property a written notification that a nomination will be considered by the commission at one of its regularly scheduled public meetings. This notification must be received by the public agency a minimum of 15 days prior to the regularly scheduled public meeting of the commission at which the nomination is scheduled to be presented. The commission must also send the public agency complete site information on the proposed nomination.

(b) Evaluation. The commission's staff will review the property and determine if it is eligible according to the criteria for evaluation specified in Sections 26.7-26.10 of this title (relating to Criteria for Evaluating Historic Structures; Criteria for Evaluating Archeological Sites; Criteria for Evaluating Caches and Collections; and Criteria for Evaluating Shipwrecks).

(c) Interim protection and notification. Once a valid nomination for a landmark building or structure has been received and the commission's staff determines the property is eligible for designation, no project work may be undertaken on the property without a permit issued by the commission unless or until the commission denies the nomination or designation. Information regarding this protection will be included in the commission's notice on the nomination to the property owner.

(d) Presentation of nominations. Following staff evaluation and recommendations, nominations will be presented to the Antiquities Advisory Board. Written notice of the presentation will be sent to the owner. The Antiquities Advisory Board will review each nomination, the staff recommendations related to each nomination, and any testimony given by the owner of the property and the public at large. The Antiquities Advisory Board will then pass on its recommendations regarding each nomination to the commission. The chair of the Antiquities Advisory Board, or one of the other commission members who serve on the board, will present the nomination and recommendations to the commission at one of its public meetings.

(e) Comment period. No vote on final designation may be taken by the commission for a minimum period of 30 days, during which time all concerned parties may present evidence in support of or against designation of the property. Comments should address the property's merits in light of the criteria specified in Sections 26.7-26.10 of this title (relating to Criteria for Evaluating Historic Structures; Criteria for Evaluating Archeological Sites; Criteria for Evaluating Caches and Collections; and Criteria for Evaluating Shipwrecks).

(f) Presentation of designation and designation vote. After the minimum comment period of 30 days has elapsed, the commission may consider the property for designation at one of its public meetings. The owners of the property will be informed of the agenda by written notice at least 15 calendar days in advance of the meeting date. Anyone may present evidence or testify at the meeting when the final decision is to be made. The commission may then vote to designate, to deny designation, to request further information, or to make any other appropriate decision.

(g) Additional evidence. If designation of a property is denied, interested parties may present additional evidence at any time for the commission's reconsideration. The evidence will be considered by the commission at one of its meeting dates.

(h) Additional hearings. Any owner of a property designated as a State Archeological Landmark who is aggrieved by the designation procedure as applied to his or her property will receive a full evidentiary hearing upon request, or the formal designation can be removed by action of the commission.

(i) Notification of designation. Written notification of the commission's decision on designation of a property as a State Archeological Landmark will be forwarded to the owner.

(j) Listing of State Archeological Landmarks. If a property is officially designated as a State Archeological Landmark, the property will be listed in the commission's inventory and may be marked with the standard State Archeological Landmark marker, if deemed appropriate by the commission. A current list of all historic structures, sites, and objects so designated will be maintained in the office of the commission.

(k) Privileged or restricted information. The location of archeological sites is not public information. However, information on sites may be disclosed to qualified professionals as provided for under Title 13, Part 2, Chapter 24 of the Texas Administrative Code.

§26.17. Issuance and Restrictions of Archeological Permits.

(a) Review by controlling entities. It is the responsibility of the permit applicant to obtain all necessary permissions and signatures prior to submitting an archeological permit application.

(b) Special regulations. When a permit is issued, it will contain all special regulations governing that particular investigation; it must be signed by the director of the Archeology Division of the Texas Historical Commission, or his or her designated representative.

(c) Permit period. No permit will be issued for less than one year, nor more than ten years, but may be issued for any length of time as deemed necessary by the commission in consultation with the principal investigator, sponsor, and permittee.

(d) Transferal of permits. No permit issued by the commission will be assigned by the permittee in whole or in part to any other institution, museum, corporation, organization, or individual without the consent of the commission.

(e) State site survey forms. Standard state site survey forms and/or TexSite electronic forms for all sites recorded as a result of activities undertaken through an Antiquities Permit will be completed and submitted to the Texas Archeological Research Laboratory at the University of Texas in Austin, upon the completion of field work.

(f) Permit expiration. The expiration date is specified in each permit and is the date by which all terms and conditions must be completed for that permit. It is the responsibility of the permittee(s), sponsors, investigative firms, and principal investigators prior to the expiration date listed on the permit to meet any and all permit submission terms and conditions.

(1) Expiration notification. Principal investigators will be notified 60 days in advance of permit expiration.

(2) Expiration extension. Principal investigators must complete and submit a Permit Extension Form to the commission if they desire an extension of the final due date for the completion of an Antiquities Permit that was issued to them. The Archeology Division (AD) of the commission will review the submitted Permit Extension Form, determine whether an extension is warranted and extended the permit completion due date once for no less than one year and no more than ten years as deemed appropriate. In addition, and upon review and recommendations by the Antiquities Advisory Board, the commission may by a majority vote of its members, approve or disapprove an additional extension of the final due date of an Antiquities Permit, beyond the single extension that the AD staff of the commission is authorized to issue under Section 26.17(f)(2) of this title, provided that the following conditions are met:

(A) the principal investigator (PI), and/or the investigative firm listed under an Antiquities Permit must provide written documentation to, and give an oral presentation before, the Antiquities Advisory Board justifying why an additional permit due-date extension is warranted;

(B) the justification for the additional extension must show that the additional extension is needed due to circumstances beyond the control of the PI. Examples include, but are not limited to: funding problems, death of the PI, and artifact curation problems.

(g) Expiration responsibilities. Investigative firms must insure that a principal investigator is assigned to a permit at all times, regardless of whether the permit is active or has expired. Both the principal investigator and investigative firm should insure that a new principal investigator is assigned to the permit, if for any reason the original principal investigator must leave the project. The assignment of a new principal investigator must be approved by the commission and agreed to by both the original and the new (proposed) principal investigator.

(h) Permit amendments. Proposed changes in the terms and conditions of the permit must be approved by the commission.

(i) Permit cancellation. The commission may cancel an Antiquities Permit as long as one or more of the following conditions are met:

(1) the death of the principal investigator;

(2) failure of the project sponsor to fully fund investigation;

(3) cancellation of the project by the sponsor or permittee prior to the completion of the archeological field investigations;

(4) violation of Section 26.3 of this title (relating to Compliance with Rules) and/or;

(5) destruction of the permit area or associated cultural resources due to natural causes, prior to the substantive completion of the field investigations being performed under the permit.

(j) Permit censuring. The commission may censure a principal investigator and/or investigative firm if it is found that two or more permit application offenses have occurred in one calendar year. Permit application offenses result when investigations are performed without first obtaining a permit from the commission. Permit censuring will render a principal investigator and investigative firm ineligible for issuance of another permit for six months after a finding by the board that two or more permit application offenses have occurred in one calendar year.

§26.22. Application for Historic Structure Permits.

(a) Permit application procedure.

(1) Applicant qualification. Only the controlling agency, organization, or political subdivision having administrative control over a publicly owned landmark or the owner of a privately owned landmark (applicant) may be issued an architectural permit.

(2) Notification. The commission must be notified of any anticipated, planned or proposed work to a State Archeological Landmark, including publicly owned buildings or structures that are eligible to be designated as landmarks. Such notice should be made early enough to allow adequate time to prepare the formal application as described in paragraph (6) of this subsection. The notification must include a brief written description of the project and at least one photograph of the structure or affected portion of that structure. The commission staff will provide the applicant with the appropriate permit application form and notify him or her of the necessary attachments or application reports within 30 days of receipt of notification.

(3) Normal maintenance or repair. Work that does not have the potential to cause removal, damage or alteration to the integrity, form or appearance of the materials, features or landform of the historic structure and its site, is considered to be normal maintenance and repair, and therefore exempt from the required notification process. For example, permanent masonry damage can result from use of inappropriate cleaning methods, such as sandblasting, high pressure water cleaning or the use of unsuitable chemicals, or from use of damaging repointing techniques and materials. Replacing historic windows damages the historical integrity of a building and painting previously unpainted surfaces constitutes alteration. Such work is not considered normal maintenance or repair. Cleaning surfaces with non-corrosive mild solutions and low-pressure water, repainting window frames or doorways with similar paints, or minor repairs such as replacing putty on windows are examples of normal maintenance and repair.

(4) Interior spaces. Nonpublic interior spaces are exempt from the authority of the Antiquities Code. The interior spaces to be considered public and therefore not exempt are those spaces, which are or were accessible to the public (lobbies, corridors, rotundas, meeting halls, courtrooms, offices of public officials, public employees and services, etc.), or those that are important to the public because of any significant historical, architectural, cultural, or ceremonial value.

(5) Advance review. For more complex projects, it is advisable that the commission staff be consulted early in the planning or design process in order to avoid delays in issuing the final permit.

(6) Formal application. The project professional personnel must be a project architect who has the required experience on historic structures in the type of project work proposed, has submitted a resume and completed application form along with any required attachments or application reports at least 60 days prior to commencement of work or issuance of bid documents, whichever comes first. All applications must be submitted with original signatures on forms approved by and available from the commission (print copies available from the commission by mail or online at www.thc.state.tx.us).

(7) Emergency application. If emergency preservation or hazard abatement work must be performed quickly in a crisis situation or due to extenuating circumstances, the minimum 60 day submission requirement may be waived with approval from the commission staff if all required project documents and a valid permit application have been received.

(8) Attachments. All permit applications must be accompanied by plans, specifications, and other documents prepared for the project that adequately describe the full scope of work. In addition, 4 by 6 inch color photographs of the overall structure and all areas of proposed work are required.

(9) Application reports. See Section 26.25(a) of this title (relating to Reports Relating to Historic Structures Permits) for a discussion of each type of report. In the case of more complex projects, one or more of the following reports may be required to be submitted with the permit application:

(A) historic structure report;

(B) historical documentation;

(C) architectural documentation; and/or

(D) archeological documentation.

(10) Project reports. Depending upon the scope of work, one or more of the following reports may be required as a condition of a permit to be prepared during the course of a project and to be submitted upon completion of that project prior to expiration of the permit. All historic structures permits, except for new structures permits, require a completion report. Any other required reports will be specified when the permit is issued. See Section 26.25(b) of this title (relating to Reports Relating to Historic Structures Permits) for a discussion of each type of report:

(A) architectural documentation;

(B) archeological and historical documentation;

(C) storage report; and/or

(D) completion report.

(11) Issuance of permit. Contract documents must not be issued for bidding purposes before a permit has been issued by the commission. If no response has been made by the commission within 60 days of receipt of any permit application, the permit shall be considered to be granted.

(b) Permit categories for historic structures. All work done on historic structures and their sites will be reviewed, and issued permits when appropriate, in accordance with one or more of the following treatments. These treatments are based on the Secretary of the Interior's Standards for the Treatment of Historic Properties, which are available in printed form by mail or online from the commission at www.thc.state.tx.us.

(1) Preservation is defined as the act or process of applying measures necessary to sustain the existing form, integrity, and materials of a cultural resource, including preliminary measures to protect and stabilize the building, structure or site.

(2) Rehabilitation is defined as the act or process of making possible a compatible use for a property through repair or alteration while preserving those portions or features of the property which are significant to its historical, architectural, and cultural values.

(3) Restoration is defined as the act or process of accurately depicting the form, features, and character of a property and its setting as it appeared at a particular period of time by means of the removal of features from later periods in its history and reconstruction of missing features from the restoration period.

(4) Reconstruction is defined as the act or process of depicting, by means of new construction, the exact form, features, and detailing of a non-surviving site, landscape, building, structure, or object for the purpose of replicating its appearance at a specific period of time and in its historic location. Reconstruction of a non-surviving cultural resource, or any part thereof within the described limits of a designated State Archeological Landmark, will be reviewed and permitted in light of its impact on the historical, architectural, or and cultural integrity of that site.

(5) Architectural Investigation/Hazard Abatement. If the applicant can demonstrate that careful investigation of a structure through controlled dismantling, or sampling and testing of historic material or later modifications will contribute to the understanding of that structure's history, or of the history and culture of Texas in general, a permit for architectural investigation may be issued. If hazardous materials exist in a historic structure, and must be abated or removed in a project unrelated to other preservation, restoration or rehabilitation work, then a permit for hazard abatement may be issued. These types of permits do not indicate approval for rehabilitation, demolition or any other type of work, but may require replacement of removed materials or storage of selected samples.

(6) Relocation. Under most circumstances, a permit to relocate a structure from its original site will not be issued unless the commission has been satisfied that there is a real and unavoidable threat to

the structure's existence, and that the applicant has made a thorough effort to find the means to preserve the structure on its original site. If relocation is unavoidable, the structure should be relocated to a site that resembles its original setting as closely as possible. A relocation permit will require thorough documentation of the relationship between the structure and its existing site, and documentation of the proposed new site and placement of the structure to demonstrate that the new site and setting are comparable to the original. An archeological investigation of both the old and new site locations may also be required.

(7) Demolition. Under most circumstances, a permit to demolish a structure will not be issued unless the commission is satisfied that there is a necessity due to deterioration of the structure that constitutes a threat to the health, safety, or welfare of citizens, or a real and unavoidable threat to the structure's existence. The applicant must show that he or she has made a thorough effort to find the means to preserve the structure on its original site or, failing that, to relocate the structure to another site with a comparable setting. The applicant must show evidence that he or she has, in good faith, conducted a feasibility study and obtained estimates from appropriate professionals, invited and considered alternative suggestions and proposals, and otherwise explored all reasonable possibilities. A demolition permit will require thorough documentation of the structure and its relationship to its existing site, as well as archeological investigation, as defined and required by the commission.

(8) New construction. Any new construction to be built within the described limits of a State Archeological Landmark must be reviewed and permitted in light of its impact on the historical, architectural, and cultural integrity of that cultural resource and its site. The applicant must submit plans, elevations, and sections that adequately describe the full scope of the project and its relationship to the existing structure and site.

(c) Standards for the treatment of historic properties. The Secretary of the Interior's Standards for the Treatment of Historic Properties (1995, and subsequent revisions) are hereby adopted by reference by the commission and shall be considered to be a part of these rules for practice and procedure. Copies of these standards are available in printed form from the commission and online at www.thc.state.tx.us. Failure to comply with these standards, failure to complete any required reports, or failure to complete a project according to the approved plans, specifications, addenda, or other terms of a permit shall be considered grounds for refusing the services of any architect, contractor, or craftsman for future permits.

§26.25. Reports Relating to Historic Structure Permits.

(a) Application reports. It is important in the case of complex projects to ensure the historical accuracy and/or appropriateness of the project by gathering and assessing important information relating to the property through investigation, research, and documentation. When the scope of a project indicates it is advisable, one or more of the following application reports may be required to be submitted as a part of the permit application. A permit may not be issued before all required application reports have been received. All application reports must be prepared under the supervision of professionally qualified individuals as specified in Section 26.5 of this title (relating to Definitions).

(1) Historic structure report.

(A) Purpose. This report should be utilized to evaluate the existing conditions of the structure, to establish preservation objectives for the property, and to schedule the accomplishment of these preservation objectives. The applicability of the various areas for research and analysis will vary, depending upon the preservation objectives and the physical condition of the historic property.

(B) When required. When a proposed rehabilitation, restoration, or reconstruction project involves fabricating significant missing architectural or landscape features, recapturing the appearance of a property at one particular period of its history, removing later additions or significant changes to the building for rehabilitation, a historic structure report must be completed prior to application for a historic structure Antiquities Permit.

(C) Minimum report requirements. Documentation must include the following:

(i) written explanation and evaluation of existing conditions;

(ii) photographic documentation of the existing conditions (preferably black and white 8 by 10-inch photographs);

(iii) written explanation of preservation objectives and intended modifications to the structure; and

(iv) architectural drawings of the existing condition and a schedule of objectives.

(2) Historical documentation.

(A) Purpose. Historical research and documentation are required in order to understand the changes to a historic property over time and to better support proposed project work. Documentation of cultural resources that will be lost or damaged due to rehabilitation, relocation or demolition will preserve a record of the cultural resource.

(B) When required. When a proposed rehabilitation, restoration, or reconstruction project involves fabricating significant missing architectural or landscape features, or removing later additions to recapture the appearance of a property at one particular period of its history, historical documentation must be done. Historical documentation is required for all relocation or demolition permits.

(C) Minimum report requirements. Historical documentation must include the following:

(i) name of original architect and date of construction;

(ii) history of the use of and known modifications to the structure;

(iii) brief history including information on important historical events or persons associated with the structure; and

(iv) copies of extant historic plans and photographs of the building or structure and site, or documentation of the specific historic features, areas or materials to be affected by proposed restoration or reconstruction work; and

(v) oral history documentation to support proposed restoration or reconstruction work, or to document historic structures and buildings proposed for relocation or demolition.

(3) Architectural documentation.

(A) Purpose. Investigation and documentation of physical evidence regarding architectural design and technology enables the study of the structure in question and its comparison with other structures of the period, type, or region. This information is important to support decisions regarding proposed project work, and in conjunction with historical and archeological documentation for the synthesis and study of all related materials.

(B) When required. Architectural documentation must precede any work that will damage, alter, obscure or remove significant

architectural configurations, elements, details, or materials. Documentation that meets the required standards must be submitted for rehabilitation and restoration projects that will significantly alter a structure or other cultural resource, and for all relocation and demolition permits.

(C) Minimum report requirements. Architectural documentation must include the following:

(i) a thorough explanation of the reasons for the proposed work, including the purposes and objectives of the proposed changes;

(ii) photographs of the existing conditions of the overall building or structure and site, including photographs of all areas where work is proposed, with each view clearly labeled and keyed to a plan indicating the location and direction of the view;

(iii) measured drawings of the existing building or structure and site. If the proposed damage, alteration, obscuring or removal of significant materials, features or areas will be relatively small within the overall scope of project work, then with the approval of the commission the measured drawing documentation may be limited to the specific materials, features or areas involved.

(D) Documentation standard required. All documentation of existing conditions must meet the Secretary of the Interior's Standards and Guidelines for Architectural and Engineering Documentation (available online at www.thc.state.tx.us), sometimes referred to as Historic American Buildings Survey (HABS) standards. The commission will assign the level of documentation required (levels I-IV) based on the project work proposed and the significance of the cultural resource.

(4) Archeological documentation.

(A) Purpose. Almost all standing structures have an archeological component, and archeological remains exist in urban areas as well as rural areas. The information available from archeological investigations in and around a structure is important in conjunction with architectural and historical documentation for the synthesis and study of all related material.

(B) When required. When development or historic preservation treatment of a historic property makes disturbance of the earth unavoidable, the specific areas affected may need to be tested archeologically to determine if the undertaking will disturb or destroy archeological remains, including subsurface features of an aboveground structure. If the exploratory tests indicate the area has archeological value and if the development plans cannot be altered, the archeological data directly affected by the project are to be recovered.

(b) Project reports. When the situation indicates it is advisable, one or more of the following project reports may be required to be compiled during the course of a project and submitted along with the completion report. All project reports must be compiled under the supervision of professionally qualified individuals as specified in Section 26.5 of this title (relating to Definitions).

(1) Architectural documentation. When investigation and documentation is not possible prior to commencement of work because of physical obstruction, or when previously obscured conditions are subsequently discovered, architectural documentation may be required during the course of a project (see paragraph (3) of this subsection).

(2) Archeological documentation. When investigation and documentation are not possible prior to commencement of work because of physical obstruction, or when previously obscured evidence is subsequently discovered, archeological documentation may be required during the course of a project. Archeological documentation may be required for relocation or demolition permits (see paragraph (4) of this subsection).

(3) Storage report.

(A) Purpose. Historic features or materials original to the structure or otherwise significant to the structure's evolution are important to the understanding of Texas culture and history.

(B) When required. When historic features or materials original to the structure or otherwise significant to the structure's history are removed during the course of a project, selected samples must be stored at the site or at a site approved by the commission, and a storage report must be filed.

(C) Minimum report requirements. Documentation must include the following:

(i) photo documentation of the structural or architectural elements to be removed in their original position and in storage;

(ii) written documentation of the existing condition of the elements prior to removal; and

(iii) written documentation of the storage (preservation) efforts, including the method and location of storage and any conservation efforts made.

(4) Completion report.

(A) Purpose. When work is done to a historic structure, it is important to record the changes that take place so that the structure's historic evolution might be completely documented for future study.

(B) When required. All historic structures permits, except for new structures permits, will require completion reports.

(C) Minimum report requirements. Written documentation must include the following:

(i) title page, including:

(I) project name;

(II) city, county;

(III) permit number;

(IV) date of report;

(ii) text, including:

(I) property name and location;

(II) primary personnel (names, titles, addresses, and telephone numbers), including:

(-a-) owner;
(-b-) lessee;
(-c-) architect;
(-d-) engineer;
(-e-) contractor;
(-f-) consultant(s);
(-g-) others;

(III) scope of work (major categories with corresponding costs);

(IV) project dates (beginning and ending);

(V) project narrative, including:

(-a-) description of work and description of anticipated future work (if any) ;

(-b-) description of special products, materials, and/or building techniques;

(-c-) description of intended use of the property; and

(VI) labeled photographs with index: minimum 4 by 6 inch clear color prints; digital prints must be equivalent in quality and clarity to clear prints from 35mm film negatives;

(-a-) before construction conditions;

(-b-) during construction;

(-c-) after construction is complete.

(D) Photographic record. The photographic documentation is a significant part of the record of the project work. Each view, before, during, and after, should be of the same area, to clearly illustrate the project work as it progresses.

(E) Report submittal. Submit one copy of the required completion report with original photographic documentation; photo copies are not acceptable. All completion reports must be submitted unbound. Submit copies to the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205162
F. Lawrence Oaks
Executive Director
Texas Historical Commission
Effective date: August 28, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 463-5711

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 62. COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

19 TAC §62.1071

The Texas Education Agency (TEA) adopts an amendment to §62.1071, concerning the administration of wealth equalization, without changes to the proposed text as published in the July 5, 2002, issue of the *Texas Register* (27 TexReg 5938) and will not be republished. The section addresses wealth equalization provisions relating to identification, alternative calculation of wealth, actions and costs to equalize wealth, administrative requirements, noncompliance, excellence exemption, and property value decline. The adopted amendment clarifies requirements pertaining to the exercise of an option under Texas Education Code (TEC), Chapter 41, Subchapter E, relating to education of nonresident students.

Questions raised concerning the benefits that may accrue to a district that may exercise an option under TEC, Chapter 41, warrant clarification of policies and adoption of those permissible actions in rule form. The effect of the adopted amendment to 19 TAC §62.1071 is to express clear requirements for the satisfactory use of this option for reduction in taxable wealth per student. A school district that exercises an option must conform to certain requirements that will limit the benefits available to the district, as well as require the disclosure of any other relevant financial transactions between parties.

Adopted language in subsection (d)(1) provides clarification of provisions relating to districts purchasing attendance credits in accordance with TEC, Chapter 41, Subchapter D.

Adopted language in subsection (d)(2) provides clarification of provisions relating to districts paying to educate nonresident students from a partner district in accordance with TEC, Chapter 41, Subchapter E. The amendment places into rule provisions relating to discounts that have been previously described in the wealth equalization handbook.

Adopted language in subsection (e) places into rule administrative requirements that have been previously described in the wealth equalization handbook.

The following public comment was received on the proposed amendment to 19 TAC §62.1071.

Comment. Representatives from Region X Education Service Center suggested an addition to the text for subsection (d)(3). The suggested text would require a district subject to wealth equalization that participates in an Education Service Center cooperative to pay the cooperative the fees established by the service and prohibit the district from receiving the service at a reduced cost.

Agency Response. The Agency disagrees with the recommended change because it was inconsistent with the intent of the new rule in that the suggested language would not take into account the reduction in cost of the service due to the gain from the option 4 arrangement.

The amendment is adopted under the Texas Education Code (TEC), §41.006, which authorizes the commissioner of education to adopt rules necessary for the implementation of TEC, Chapter 41, Equalized Wealth Level.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205230
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: September 1, 2002
Proposal publication date: July 5, 2002
For further information, please call: (512) 463-9701

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING

SUBCHAPTER C. ADOPTIONS BY REFERENCE

19 TAC §109.41

The Texas Education Agency (TEA) adopts an amendment to §109.41, concerning the "Financial Accountability System Resource Guide" without changes to the proposed text as published in the June 21, 2002, issue of the *Texas Register* (27 TexReg 5349) and will not be republished. 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 http://www.tea.state.tx.us/school.finance/ on the TEA website.

The adopted amendment to §109.41 changes the date from "December 2001" to "September 2002" to reflect the effective date of the adopted 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 adopted amendments to the "Resource Guide" include changes to auditing, financial accounting, and reporting guidelines due to changes required by General Accounting Standards Board 34; changes to fund codes for state and federally funded projects as a result of the No Child Left Behind Act; and other minor edits.

No comments were received regarding adoption of the proposed amendment.

The amendment is adopted 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205231
Cristina De La Fuente-Valadez
Manager, Policy Planning
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Effective date: September 1, 2002
Proposal publication date: June 21, 2002
For further information, please call: (512) 463-9701

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 241. PRINCIPAL CERTIFICATE

19 TAC §241.40

The State Board for Educator Certification (SBEC or Board) adopts a correcting amendment to 19 TAC §241.40, relating to standard principal certificate implementation dates, without changes to the proposed text as published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6168), and will not be republished.

This amendment is adopted because of errors in the original rule-amendment proposal and adoption notices. No substantive change is made or intended from what the Board originally proposed and adopted or from what the State Board of Education originally reviewed and did not reject.

The original proposal for the amendment to 19 TAC §241.40, relating to standard principal certificate implementation dates, appeared in the March 30, 2001, *Texas Register* (26 TexReg 2473). On page 26 TexReg 2475, however, the proposed new subsection (d) did not correctly reference the new section heading for §241.20. The amendment should have appeared as follows:

(d) September 1, 2002 -- §241.20 of this title (relating to Requirements for the First-Time Principal in Texas).

As published, the proposed new subsection incorrectly referred to the title of §241.20 as "relating to Requirements for the Issuance of the Conditional Principal Certificate and the Induction Period." The first set of proposed and eventually adopted amendments to §241.20 deleted provisions for and references to the conditional certificate and its associated induction period, both of which the Board eliminated. Amended §241.20 instead established requirements for school districts to mentor and support principal employed as such for the first time in Texas. New subsection (d) was added to §241.40 to specify when the mentoring and support requirements in new §241.20 must begin.

A correction-of-error notice was published in the April 27, 2001, *Texas Register* (26 TexReg 3245) to this effect, with the text of the correct version of new subsection (d) to §241.40. However, when the adoption of amended §241.40(d) was published in the June 1, 2001, *Texas Register* (26 TexReg 3929), the notice stated that it was being adopted "without changes to the text of the proposed rules as published in the March 30, 2001, issue of the *Texas Register* (26 TexReg 2473)." For these reasons, then, the originally intended amendment to §240.40(d) is adopted now.

No comments were received regarding adoption of the rule.

The rule is adopted under the authority of the following sections of the Texas Education Code: §21.040(4), which requires the Board to appoint for each class of educator certificate an advisory committee composed of members of that class to recommend standards for that class to the Board; §21.041(b)(2)-(4), which requires the Board to specify the classes of certificates to be issued, specify the period of validity for each class of educator certificate, and specify requirements for the issuance and renewal of an educator certificate; §21.046, which specify the minimum qualifications for certification as a principal; and §21.054, which requires the Board to establish a process for identifying continuing education courses and programs that fulfill continuing education requirements, including an individual assessment of a principal's knowledge, skills, and proficiencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205223
William Franz
Executive Director
State Board for Educator Certification
Effective date: September 1, 2002
Proposal publication date: July 12, 2002
For further information, please call: (512) 469-3011

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TITLE 22. EXAMINING BOARDS

PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 371. EXAMINATIONS

22 TAC §371.3

The Texas State Board of Podiatric Medical Examiners adopts amendments to §371.3, concerning Qualification of Applicants with changes to the proposed text as published in the February 15, 2002, issue of the *Texas Register*(27 TexReg 1094). Changes to the proposed rule reflect non-substantive variations from the proposed amendments. The board's legal counsel has advised that the changes to the proposed rule affect no new persons, entities, or subjects other than those given notice. The rule will be republished.

The amendment is being adopted to make the necessary changes to include the Texas Occupations Code numbering system that replaces the old Texas Civil Statutes and to change the rules for the administration of the examination from an oral to a jurisprudence exam.

The changes to the proposed rule that is being adopted are as follows: In §371.3(c), the words "All applicants" at the beginning of the sentence is changed to "Each applicant". Also, in §371.3(f), the words "all applicants" is being changed to "the applicant" in the first sentence, and "their" is being changed to "the applicant's" in the last sentence.

The amendments make the necessary changes to allow the board to administer a jurisprudence examination instead of an oral examination.

No comments were received in response to the proposed rule amendments.

The amendments are being adopted under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The adopted amendment implements Texas Occupations Code, §202.254.

§371.3. Qualification of Applicants.

(a) All applicants shall have attained the age of 21 years.

(b) If the applicant has ever been convicted of a felony or a crime of moral turpitude under the state laws of any state or the federal laws of the United States, the approval for licensure shall be at the discretion of the Board.

(c) Each applicant shall have completed the number of college courses required by the Texas Occupations Code, §202.252(b)(3), and graduated from an accredited college of Podiatric Medicine in the United States. The applicant's entire course of instruction must be from such an approved college, and the college must have been so approved during the entire course of the applicant's course of instruction.

(d) All applicants shall have successfully completed a course in cardiopulmonary resuscitation within the year previous to the application for licensing and provide a certification to that effect.

(e) All applicant's shall have successfully passed all sections of the National Board and provide their scores directly from the National Board of Podiatric Medical Examiners to the Texas State Board of Podiatric Medical Examiners.

(f) If §371.6(e) of this title (relating to Administration of Examination) applies, the applicant must meet the overall minimum cut score for the jurisprudence exam. Each applicant shall cause the applicant's test scores from such exam to be sent directly from the testing entity to the Board.

(g) Every applicant shall have completed at least one year of gpme with a hospital, clinic or institution acceptable to the Board in a gpme program approved by the Council of Podiatric Medical Education of the American Podiatric Medical Association. Certified documentation of enrollment in said gpme program must accompany the application to the Board for licensing. This subsection, becomes effective at 12:01 a.m., July 1, 1995.

(h) The Board approves and adopts by reference the standards for accreditation of gpme programs adopted by the Council on Graduate Podiatric Medical Education of the American Podiatric Medical Association. The standards are available from the Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216. The Board considers any college of podiatric medicine accredited by the Council on Podiatric Medical Education of the American Podiatric Medical Association as a college approved by the Board.

(i) The applicant shall submit evidence sufficient for the Board to determine that the applicant has met all the requirements of this section and any other information reasonable required by the Board. Any application, diploma or certification, or other document required to be submitted to the Board that is not in the English language must be accompanied by a certified translation thereof into English.

(j) At the discretion of the Board, the gpme requirement set forth in subsection (g) of this section (relating to Qualification of Applicant) may be waived if the applicant has been in active podiatric practice for at least five continuous years in another state under license of that state, and upon application to the Board can show an acceptable record from that state and from all other states under which the applicant has ever been licensed.

(1) A showing of an acceptable record under this subsection is defined to include, but is not limited to, a showing that the applicant has not had entered against him a judgment, civil or criminal, in state or federal court or other judicial forum, on a podiatric medical-related cause of action, no conviction of a felony or a crime of moral turpitude, no disciplinary action recorded from any medical institution or agency or organization, including, but not limited to, any licensing board, hospital, surgery center, clinic, professional organization, governmental health organization or extended-care facility, and no dishonorable discharge from military service.

(2) If any judgment or disciplinary determination under this subsection, has been on appeal, reversed, reversed and rendered, or remanded and later dismissed, or in any other way concluded in favor of the applicant, it shall be the applicant's responsibility to bring such result to the notice of the Board by way of certified letter along with any such explanation of the circumstances as the applicant deems pertinent to the Board's determination of admittance to licensure in the State of Texas.

(3) The applicant shall obtain and submit to the Board a letter from any and all state boards under which he or she has ever been previously licensed stating that the applicant is a licensee in good standing with each said board or that said prior license or licenses were terminated or expired with the licensee in good standing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205168
Janie Alonzo
Staff Services Officer III
Texas State Board of Podiatric Medical Examiners
Effective date: August 28, 2002
Proposal publication date: February 15, 2002
For further information, please call: (512) 305-7000

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CHAPTER 378. CONTINUING EDUCATION

22 TAC §378.1

The Texas State Board of Podiatric Medical Examiners adopts an amendment to §378.1, concerning Continuing Education Required without changes to the proposed text as published in the February 8, 2002, issue of the *Texas Register*(27 TexReg 866). The text will not be republished.

The amendment is being adopted to allow practice management and home study courses.

No comments were received in response to the proposed rule amendments.

The amendments are being adopted under Texas Occupations Code, §202.151, which provided the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The adopted amendment implements Texas Occupations Code, §202.305.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 8, 2002.

TRD-200205169
Janie Alonzo
Staff Services Officer III
Texas State Board of Podiatric Medical Examiners
Effective date: August 28, 2002
Proposal publication date: February 8, 2002
For further information, please call: (512) 305-7000

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 83. PUBLIC HEALTH IMPROVEMENT GRANTS

SUBCHAPTER A. PERMANENT FUND FOR CHILDREN AND PUBLIC HEALTH

25 TAC §§83.1 - 83.8, 83.10, 83.11, 83.13

The Texas Department of Health (department) adopts amendment to §§83.1 - 83.8, 83.10 - 83.11, and 83.13 relating to innovation grants for essential public health services. Sections 83.2-83.7 and 83.10-83.11 are adopted with changes to the proposed text as published in the May 24, 2002 issue of the *Texas Register* (27 TexReg 4524). Sections 83.1, 83.8, and 83.13 are adopted without changes, and therefore will not be republished.

The amendments are needed to accomplish the following: amend the title, intent and goal of the grant program; define terms; provide the department's philosophy in making the grants; discuss the sources and allocation of funds; establish who is eligible to receive the grants; provide the requirements for receiving the grants; establish the procedures for grant announcements; establish the procedures for grant applications; describe the competitive review process; and outline the selection criteria for awarding new and continuation grants.

The amendments more clearly outline how this program will help improve public health in Texas. By renaming the program, amending some of the key definitions included in the rules and the criteria for awarding grants, potential applicants will have a better understanding of the types of projects that will be eligible for funding from this program. In addition, the criteria for continuation funding is more clearly defined.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning the competitive review process, the department deleted §83.10(c) regarding the time specified for the department's review process. The department's review process should be determined for each request for proposal based on the needs of the program and the department at the time the request for proposal is published.

Change: Concerning the selection criteria in §83.11(b)(3), the department clarified the preference language regarding financial commitment to emphasize that sustaining proposed activities after the project has been completed is a preference. This preference will help to further enhance public health practice in Texas.

Change: Concerning the selection criteria in §83.11(b)(4), the department changed the preference language to include plans for evaluating project activities and measuring project outcomes. This preference will help to further enhance public health practice in Texas.

Change: Concerning the selection criteria in §83.11(b)(5), the department changed the preference language to providing a plan for a cost analysis for sustaining project activities within the targeted community or replicating the project in other areas of the state. The previous language on cost-effectiveness or cost benefit had created some confusion for applicants. This preference will help to further enhance public health practice in Texas.

Change: Concerning the selection criteria in §83.11(b)(7), the department clarified the preference language relating to strengthening the public health infrastructure.

The following comments were received concerning the proposed sections. Following each comment is the department's response and any resulting changes.

Comment: Concerning the program name change in §83.1, one commenter asked why the department proposed changing the name of the grant program.

Response: The department believes the change in the program name more clearly describes the focus of the grants as improving the practice of public health. No changes were made as a result of the comment.

Comment: Concerning the program name change in §83.1, one commenter suggested that the program name should reflect the focus on community health by including the term in the title.

Response: The department disagrees. The department believes that this grant program will improve public health infrastructure at both the local and state levels by developing more effective methods for providing public health services. No change was made as a result of the comment.

Comment: Concerning the program name change in §83.1, one commenter suggested that applicants applying for these grants must either demonstrate participation in the provision of public health services or apply for a grant through a public health provider since the name change focuses the grants toward the provision of public health services.

Response: The department disagrees. The current rules specify the eligibility criteria in §83.6 and reflect the intent of the legislature. In addition, the department believes the above comment on demonstrating participation in public health services can be more appropriately addressed in the preferences in and responses to a request for proposal document. No changes were made as a result of the comment.

Comment: Concerning the program name change in §83.1, nine commenters agreed with and supported the name change.

Response: No action is required by the department.

Comment: Concerning the definition of innovation in §83.2(5), five commenters requested clarification of the term and asked why the term was still included as criteria in §83.11 if the focus of the grants had changed.

Response: The department agrees that the definition of innovation is difficult to clarify and has removed the term as criteria of this grant program. The department has renumbered the subsequent paragraphs accordingly.

Comment: Concerning the definition of minority population in proposed §83.2(6), one commenter appreciated the inclusion of other populations within the minority populations.

Response: The department agrees. No action is required by the department.

Comment: Concerning the definition of minority population in proposed §83.2(6), one commenter suggested that the department use broader language such as populations demonstrating a disparity rather than listing specific ethnic groups.

Response: The department disagrees. The department believes listing specific ethnic groups in this definition is true to the legislative intent of the law. The additional language regarding other populations in Texas for which a health disparity can be demonstrated was proposed as an expansion of the definition to allow applicants to propose projects that target other populations impacted by a health disparity. No action was taken as a result of this comment.

Comment: Concerning the philosophy of the grants in §83.3(b), five commenters suggested clarifying or deleting the term "delivery" with respect to improved essential public health services.

Response: The department agrees and has modified the rule accordingly.

Comment: Concerning the philosophy of the grants in §83.3(b), one commenter suggested adding "public health education" as a means of strengthening the public health infrastructure.

Response: The department disagrees. Public health education is already included as one of the ten essential public health services. No action was taken by the department.

Comment: Concerning the philosophy of the grants in §83.3(d), four commenters suggested the rules define direct health care services.

Response: The department disagrees. Although the definition of direct services will assist in clarifying the types of proposals that will be accepted for consideration for funding, the department believes the term would be more appropriately defined in a request for proposal. No action was taken by the department.

Comment: Concerning the goal of Part II grants in §83.4(2), one commenter asked if teen pregnancy would be an appropriate health disparity to address in a proposal.

Response: The proposed changes to §83.4(2) will allow potential applicants to address any population and type of health disparity that can be demonstrated in a proposal for Part II funds. No changes were made as a result of the comment.

Comment: Concerning the goal of Part II grants in §83.4(2), two commenters asked how minority populations are defined and why minority populations are targeted in Part II.

Response: The proposed rules define minority populations in §83.4(2) as African-Americans American Indians, Asians or Hispanics in Texas or other population in Texas for which a health disparity can be demonstrated by the applicant. The department believes this language is true to the intent of the law that specifies the second goal of this grant program should address public health priorities. The department's intent in expanding the definition of minority population is to allow potential applicants to address any health disparity within a community that can be demonstrated to exist. The department reworded this section to clarify the language.

Comment: Concerning the goal of Part II grants in §83.4(2), one commenter suggested replacing the word "minority" with the word "any", and replacing the list of specific conditions with the words "demonstrate disparities in recurring and/or chronic health conditions." The commenter also suggests defining health disparity in the rules.

Response: The department disagrees. The department believes the term "minority" and the list of specific conditions reflects the language of the law. The department believes the term "health disparity" would be more appropriately defined in a request for proposal. No changes were made as a result of this comment.

Comment: Concerning applicant eligibility in §83.6(a)(1), nine commenters stated the department's regional offices should be eligible for funds to conduct projects that build capacity for providing essential public health services in areas not served by a local health department for Part I purposes. The commenters stated

that the department's regional offices should be required to partner with an entity within the community on projects to build public health infrastructure in these areas. In addition, commenters suggested that the department allocate funds for this purpose outside the grant and request for proposal process.

Response: The department agrees and has modified the rules by adding §83.5(i). The department will allocate not more than 10% of the estimated appropriation for the purposes of Part I grants to fund department regional projects to build capacity for providing essential public health services in areas not served by a local health department. These funds will be allocated outside the grant and request for proposal process.

Comment: Concerning eligibility for grants in §83.6(a)(1), one commenter suggested the words "except the department" should be deleted in describing the eligibility criteria for Part I funds. Other commenters stated concerns about competing against the department for grant funds, keeping the department's funds separate from the grant funds, funding department projects with grant funds instead of with department appropriations, and the ability of the department to build capacity in a community if a local organization was not involved in the project.

Response: The department believes the department should fund some department regional projects outside the grant and the request for proposal process. The department agrees that regional offices should collaborate with community organizations on these projects. The rules have been modified by adding §83.5(i).

Comment: Concerning eligibility for grants in §83.6(b), two commenters asked for clarification as to whether the proposed language relates to funding for a grant cycle or to an applicant's ability to be funded under multiple parts for multiple applications.

Response: A single application in proposed §83.6(b) refers to a single project or proposal and not the funding cycle. It is the department's intent that an applicant may submit as many proposals as they wish but must specify for each proposal a single "Part" under which the proposal should be considered for funding. An awarded project cannot receive funding from more than one Part during the funding cycle of the grant. The department has modified the rule to clarify this subsection.

Comment: Concerning eligibility for grants in §83.6(b), one commenter asked if the department could re-categorize an application at the department's discretion.

Response: No, the department may not re-categorize an application. No changes were made as a result of this comment.

Comment: Concerning the requirements for grants in §83.7(b), two commenters stated they were glad to see the expanded language regarding the proposal requirements as it added clarity that would be helpful in preparing proposals.

Response: The department reworded this section to clarify the language.

Comment: Concerning the procedures for grant announcements in §83.8(c)(4), one commenter suggested clarifying the percentage of funds that would be allocated to fund projects for small rural areas with a population of 50,000 or less.

Response: The department disagrees. The department does not believe the rule should specify the percentage of funds to be allocated to these types of projects. The rule allows some flexibility in focusing funds on the most pressing needs of the program and public health in Texas at the time a request for proposal is published. No changes were made as a result of this comment.

Comment: Concerning the procedures for grant announcements in §83.8(c)(4), one commenter asked if the department's definition of a rural area was an area with a population of 50,000 or less.

Response: The department's definition is in renumbered §83.2(7) and states a rural area is a county that had a population in the most recent decennial United States census of 150,000 or less, or that part of a county with a population of greater than 150,000 that is not delineated as urbanized by the United States Census Bureau. This definition applies to the requirement to equally distribute Part III funds between rural and urban areas. The department wants to focus some funds specifically on rural areas with a population of 50,000 or less to identify models for improving public health infrastructure in small rural communities. The rule change will assist small rural communities by allowing them to compete only against other small rural communities for grant funds. No changes were made as a result of this comment.

Comment: Concerning funds for rural areas in §83.8(c)(4), one commenter asked if this proposed allocation was a carve-out subsection for rural areas under Part III.

Response: A request for proposal could include details for these small rural community projects under any part. No changes were made as a result of this comment.

Comment: Concerning funds for rural areas in §83.8(c)(4), one commenter suggested replacing the proposed language with "the department will determine preference points for rural areas."

Response: The department disagrees. The department believes it is very important to identify models for building capacity for providing essential public health services in rural areas and that the rules should require that a portion of the funds be allocated in a request for proposal for these types of projects. No changes were made as a result of this comment.

Comment: Concerning procedures for grant applications in §83.9, one commenter stated that the proposed rules indicated no change for §83.9(a) only.

Response: The department disagrees. Changes were not proposed for any of the language in §83.9. No action is required by the department.

Comment: Concerning the selection criteria in §83.11(b)(1), one commenter stated capacity building was a much better standard than replication.

Response: Capacity building is the standard being adopted in these rules.

Comment: Concerning the selection criteria relating to innovation in §83.11(b)(4), three commenters stated they were confused with the wording in this section and suggested either deleting the innovation criteria or providing additional clarification.

Response: The department agrees and has modified the rule by deleting the criteria in (b)(4) and revising the criteria in (b)(5). The staff changes earlier in the preamble explain the new language.

Comment: Concerning the selection criteria relating to innovation in §83.11(b)(4), one commenter suggested including a definition or award criteria for outcomes.

Response: The department disagrees. The department believes the definition and award criteria relating to project outcomes would be more appropriately addressed in a request for proposal. No changes were made as a result of this comment.

Comment: Concerning continuation funding in §83.13(a), one commenter asked if proposed funding would be impacted by the initial round of projects that are currently being evaluated.

Response: The language is only meant to outline the criteria on which requests for continued funding will be reviewed and approved or disapproved and does not address the funding allocation for continuation projects. No action is required by the department.

The comments on the proposed rules received by the department during the comment period were submitted by: Coastal Area Health Education Center, TDH Region 2/3, Healthcare for the Homeless-Houston, CoPrima Association Inc, Healthcare Extensions by Local Physicians, Community Health Center of Lubbock, Houston Health and Human Services Department, Texas Medical Association, Brazos Area Health Education Center, Maverick County Health Department, Texas A & M University, East Texas Area Health Education Center, University of Texas School of Public Health-Houston, Office of Rural Community Affairs, Denton County Health Department, Tarrant County Health Department, Harris County Health Department, San Antonio Metropolitan Public Health District, Texas Association of Counties, Social and Health Researchers, Williamson County Health District, and Scott and White Hospital. The commenters were generally for the rules in their entirety; however, they raised questions, offered comments for clarification purposes and suggested clarifying language concerning specific provisions in the rules as discussed in the summary of comments.

The amendments are adopted under the Government Code, §403.1055 which provides the Texas Board of Health (board) with the authority to adopt rules concerning the Permanent Fund for Children and Public Health; the Health and Safety Code, §121.0065 which provides the board with the authority to adopt rules for grants for essential public health services; and the Health and Safety Code, §12.001 which provides the board with authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§83.2. Definitions.

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

(1) Closing date--Date specified in the request for proposals as the date on which applications must be received or postmarked.

(2) Commissioner--Commissioner of Health or his or her designee.

(3) Department--Texas Department of Health.

(4) Essential public health services--As defined in the Health and Safety Code, §121.002, services to:

(A) monitor the health status of individuals in the community to identify community health problems;

(B) diagnose and investigate community health problems and community health hazards;

(C) inform, educate, and empower the community with respect to health issues;

(D) mobilize community partnerships in identifying and solving community health problems;

(E) develop policies and plans that support individual and community efforts to improve health;

(F) enforce laws and rules that protect the public health and ensure safety in accordance with those laws and rules;

(G) link individuals who have a need for community and personal health services to appropriate community and private providers;

(H) ensure a competent workforce for the provision of essential public health services;

(I) research new insights and innovative solutions to community health problems; and

(J) evaluate the effectiveness, accessibility, and quality of personal and population-based health services in a community.

(5) Minority populations - African-Americans, American Indians, Asians or Hispanics in Texas or other population in Texas for which a health disparity can be demonstrated by the applicant.

(6) Nonprofit organization - A private, nonprofit, tax-exempt corporation, association or organization under Internal Revenue Code of 1986, §501(c)(3) (26 United States Code §501(c)(3)).

(7) Rural area - A county that had a population in the most recent decennial United States census of 150,000 or less, or that part of a county with a population of greater than 150,000 that is not delineated as urbanized by the United States Census Bureau.

(8) Urban area - A county or part of a county that is not a rural area.

§83.3. Philosophy.

(a) The intent of the grants is to build capacity to address public health issues, and identify and/or develop improved intervention and prevention strategies.

(b) In making these grants, the goal of the department is to improve public health outcomes at the community level and to strengthen the public health infrastructure through improved public health practice.

(c) To the maximum extent possible, the grants are intended to bring about improvements in health status that are demonstrable or measurable.

(d) Grant funds will not be used to fund direct health care services except when those services are incidental to an essential public health service being addressed.

§83.4. The Grants.

The grants shall consist of three parts:

(1) Part I. Grants for developing and demonstrating cost-effective prevention and intervention strategies for improving health outcomes for children and the public (Part I grants);

(2) Part II. Grants to local communities to address disparities in health status that can be demonstrated in minority populations, including sickle cell anemia, diabetes, high blood pressure, cancer, heart attack, stroke, keloid tissue and scarring, respiratory disease and other conditions or diseases relating to minority populations that demonstrate disparities in health status (Part II grants); and

(3) Part III. Grants to local communities for essential public health services (Part III grants).

§83.5. Sources and Allocation of Funds.

(a) Funds for the grants shall be provided in accordance with the Government Code, §403.1055, relating to the Permanent Fund for Children and Public Health. Funds for Part III grants are also governed by the Health and Safety Code, §121.0065, relating to Grants for Essential Public Health Services.

(b) All grants shall be awarded competitively according to the provisions of this subchapter.

(c) Grants shall be made only to the extent that funds are appropriated and available.

(d) The department shall have the authority and discretion to:

(1) determine the purpose(s) of the grants pursuant to law and this subchapter;

(2) approve or deny grant applications;

(3) determine the number, size and duration of grants; and

(4) modify or terminate grants.

(e) The department shall determine the proportion of available funds to be granted under each part, provided that the funds available for each part shall be not less than 25% of the total amount of funds available. Such proportion shall be published in the request(s) for proposals.

(f) Grants made under Part III shall be allocated in such a way so that the total amount of funds available is equally divided between services for rural and urban areas of the state.

(g) If the funds for a part are not completely expended or allocated, the department shall have the authority to redistribute funds among the other two parts based on unfunded responses to a previous or current request for proposals. The percentage in subsection (e) of this section shall not apply to the redistribution of funds.

(h) The department shall not be liable, nor shall grant funds be used, for any costs incurred by applicants in the development, preparation, submission, or review of applications.

(i) Funds appropriated from the Permanent Fund for Children and Public Health to the department may be used by the department for Part I purposes and will not be subject to the grant and request for proposal process described in this chapter. The funds used by the department shall not be more than 10% of the estimated appropriation from the Permanent Fund for Children and Public Health as reflected in the General Appropriations Act, Article XII, Tobacco Settlement Receipts or in subsequent General Appropriations Acts. The department will use these funds to build capacity for providing essential public health services in areas not served by a local health department.

§83.6. Eligibility for Grants.

(a) The following persons shall be eligible for the grants:

(1) Part I grants. Any person or other entity, public or private, except the department;

(2) Part II grants. Any county, municipality, public health district, other political subdivision or nonprofit organization in Texas; and

(3) Part III grants. Any county, municipality, public health district, or other political subdivision in Texas.

(b) An applicant may submit multiple proposals and must designate under which part the proposal should be considered for funding. An applicant may not be funded under multiple parts for a single proposal.

§83.7. Requirements for Grants.

(a) The department shall specify reasonable requirements for grant applications.

(b) Applicants for grants shall submit, as a part of their application, a preliminary plan that identifies a public health issue and outlines strategies to evaluate the effectiveness, accessibility, and quality of the essential public health services that are provided under the grant to address the public health issue, and to demonstrate how the project will build capacity within the community to continue to address the public health issue after the project has been completed. If the applicant is awarded a grant, the grant recipient will work with the department to finalize the preliminary plan required in this section. The plan must, at a minimum:

(1) identify the outcomes that are intended to result from the use of the grant money and establish a mechanism to measure those outcomes; and

(2) establish performance standards for the delivery of essential public health services and a mechanism to measure compliance with those standards.

(c) Grant recipients shall make quarterly reports to the department, in a form and at a time determined by the department.

(d) Grant recipients under Part III must assure that they have a local health authority, as defined under the Local Public Health Reorganization Act, Health and Safety Code, Chapter 121, prior to the grant funds being awarded. A department regional director cannot serve as the local health authority for Part III grant recipients.

§83.10. Competitive Review Process.

(a) Each application shall be reviewed by the department for completeness, relevance to the published request for proposals, adherence to department policies, general quality, technical merit, and budget appropriateness.

(b) The department may invite an advisor or advisors to provide review and make recommendations concerning the grant process. Such advisor(s) may include any number of members from inside or outside the department, at the discretion of the commissioner. Advisor(s) from outside the department shall receive no compensation or reimbursement for expenses. No such advisor(s) shall be a current applicant for a grant under any part on which the advisor(s) would be making recommendations.

§83.11. Selection Criteria.

(a) No grant shall be approved unless, in the opinion of the department:

(1) the application addresses one or more essential public health services;

(2) the application includes a workable plan to bring about improvements in health status that are demonstrable or measurable, or the application identifies specific positive outcomes;

(3) the applicant provides a plan and method for evaluating the effectiveness of the activities carried out under the grant; and

(4) with regard to Part II grants, the application addresses disparities in morbidity, mortality, or health status in minority populations.

(b) A grant application will be given funding preference, in a manner determined by the department and announced in the request for proposal, to the extent that it:

(1) demonstrates how the project will build capacity within the community to address the public health issue identified in the application;

(2) documents the intent and ability of the applicant to communicate and collaborate with elements of the community that deliver essential public health services, health care providers, consumers, businesses, educational institutions, governmental agencies, law enforcement agencies, or religious institutions and how community needs have been or will be determined and addressed;

(3) demonstrates a strong financial commitment on the part of the applicant toward sustaining the proposed activities after the project has been completed including direct funding or significant in-kind contributions from the applicant, local entities, private donors, state agencies, federal grantors, or private foundations;

(4) clearly describes an effective strategy for evaluating project activities and measuring project outcomes;

(5) includes a plan to provide a cost analysis for sustaining the project or activities within the targeted community after the project has been completed or replicating the project in other areas of Texas;

(6) includes a plan for the dissemination of methods, findings or conclusions;

(7) with respect to Part III grants, clearly describes how the project will strengthen public health infrastructure;

(8) with respect to Part III grants, demonstrates that the applicant has or will develop a local health board or other appropriate advisory group during the grant period; or

(9) contains such other information or criteria that the commissioner may specify and include in the request for proposals.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205181
Susan K. Steeg
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Effective date: August 29, 2002
Proposal publication date: May 24, 2002
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CHAPTER 157. EMERGENCY MEDICAL CARE

SUBCHAPTER C. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

The Texas Department of Health (department) adopts the repeal and a new §157.38 concerning minimum standards and requirements for approval of continuing education (CE) for emergency medical services (EMS) personnel. New §157.38 is adopted with changes to proposed text as published in the April 5, 2002 issue of the *Texas Register* (27 TexReg 2720), and the repeal of §157.38 is adopted without changes and therefore will not be republished.

Specifically, the new rule section addresses one of the options permitted for the recertification process in §157.34 of this title (relating to Recertification). In accordance with Health and Safety Code, Chapter 773, 76th Legislature, 1999, the department is required to adopt rules concerning minimum requirements for recertification of EMS personnel. The benefit anticipated for the EMS community is that the expanded content of CE categories and the increased availability of CE resources will confront the obstacles of location and diversity of resources, without compromising standards set to ensure the safety of the public.

The department is making the following changes due to staff comments.

Change: Concerning §157.38(d)(8), (e)(1), (i)(1)(B), (i)(2), (i)(3)(A), (j), (k)(2), (k)(3), and (k)(5), language was changed from an EMS certificant or licensee to a certified or licensed EMS personnel.

Change: Concerning §157.38(e)(3)(B) and (i)(3)(A), clarifying a participant making written findings of the study which becomes published in an EMS related material.

Change: Concerning §157.38(h)(1), a reference to a specific subsection have been added.

Change: Concerning §157.38(i)(3)(B), language has been amended for clarification and references the related subsection.

Change: Concerning §157.38(h)(1)(J), (h)(4)(D), and (k)(8), language has been amended for clarification.

The following comments were received concerning the proposed rules. Following each comment is the department's response and any resulting changes. Other minor editorial changes were made for clarification purposes.

Comment: Concerning the definition of credit course in §157.38(d)(9), a commenter stated that "Semester and quarter credit hours will be applied towards continuing education requirements as follows: one quarter credit hour will be granted 11 continuing education contact hours; one semester credit hour will be granted 16 continuing education contact hours." should not be part of the definition because all courses do not have equal ratios. The commenter suggested deleting the language and adding to the definition "for semester or quarter credit hours".

Response: The department agrees with the commenter and has changed the language.

Comment: One commenter requested that the term "course" be defined.

Response: The department agrees with the commenter and has added a definition for "course" to §157.38(d)(11).

Comment: Concerning §157.38(j)(2) and §157.38(j)(3), one commenter suggested changing "certifications" to broaden the meaning and make it more inclusive.

Response: The department agrees and has deleted "certifications" and added modified language of "documentation".

Comment: Concerning §157.38, one commenter opposed the requirement for "clinical learning experiences" as part of the CE program, stating personnel would be assigned to locations such as laboratories, acute medical care facilities or other approved locations, in turn the Fire/EMS department would incur additional fiscal impacts.

Response: The department disagrees because the provision for "clinical learning experiences" is merely an option and not a requirement. After correspondence with the stakeholder, the stakeholder is in agreement with the rule. No change was made as a result of this comment.

The commenters were individuals and were generally in favor of the rule, but expressed concerns, asked questions, and made recommendations.

25 TAC §157.38

The repeal is adopted under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning the standards and requirements for recertification of emergency medical services (EMS) personnel; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205226
Susan K. Steeg
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Effective date: September 1, 2002
Proposal publication date: April 5, 2002
For further information, please call: (512) 458-7236

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25 TAC §157.38

The new rule is adopted under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning the standards and requirements for recertification of emergency medical services (EMS) personnel; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

§157.38. Continuing Education.

(a) Purpose. The purpose of this section is to establish minimum standards and guide- lines for educational activities that may be used by EMS personnel to earn continuing education (CE) contact hours toward recertification or relicensure in accordance with §157.34 of this title, (relating to Recertification) and §157.40 of this title, (relating to Paramedic Licensure). The EMS continuing education consists of educational activities designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of professional practice, thus improving the quality of emergency medical services provided to the public.

(b) Local Credentialing and Authorization to Practice. Nothing in this section is intended to restrict the authority of EMS providers or medical directors to establish higher standards and requirements for continuing education activities that must be completed to acquire or maintain authorization to practice within a local or regional EMS system.

(c) Content requirements. Candidates at each certification level shall, at a minimum, accrue department-approved CE in the following content areas.
Figure: 25 TAC §157.38(c)

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

(1) Accrediting agency -- An organization approved by the department as having met predetermined criteria to approve programs and providers of EMS continuing education.

(2) Approved -- Recognized as having met established standards and pre-determined criteria of the accrediting agencies which have been approved by the department. Applies to EMS continuing education providers and programs.

(3) Continuing Education Audit -- Examination and verification of EMS continuing education contact hours claimed to have been successfully and timely completed by certified or licensed EMS personnel.

(4) Classroom instruction -- Workshops, seminars, conferences, or short-term courses that an individual personally attends and which is directly related to one of the content areas noted in subsection (c) of this section.

(5) Clinical learning experiences -- Faculty-planned and guided learning experiences designed to assist students to meet course objectives in the noted content areas of subsection (c) of this section and to apply EMS knowledge and skills in the direct care of patients. These experiences can include settings in laboratories, acute medical care facilities, extended medical care facilities, and participation in other department approved health related activities. Practica approved by the Texas Higher Education Coordinating Board may also be considered a form of clinical experience under these rules.

(6) Contact hour -- Fifty consecutive minutes of participation in a learning activity.

(7) Continuing education -- Educational activities that are related to the content areas noted in subsection (c) of this section and are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of professional practice, thus improving the quality of emergency medical services provided to the public.

(8) Continuing education program -- An organized educational activity designed and evaluated to meet a set of behavioral objectives, which may be presented in one session, or a series of sessions, designed to enhance or elevate EMS knowledge and practice of certified or licensed EMS personnel.

(9) Credit course -- A specific set of learning experiences offered at a regionally accredited institution of higher education for semester or quarter credit hours.

(10) Continuing Education Provider -- An individual, partnership, organization, agency, or institution that offers EMS continuing education programs, courses, credit courses, classroom instruction, or other EMS educational activities.

(11) Course -- An organized and specific set of learning experiences offered by an approved provider. Courses include credit and continuing education courses, short-term courses, organized clinical learning experiences and other coherent sequences of learning experiences, approved by the department.

(12) Self-directed study -- An educational activity in which the learner takes the initiative and the responsibility for assessing, planning, implementing, and evaluating the activity. Self-directed study may include program development, home study, electronically programmed instruction, and authorship.

(e) Types of Acceptable Continuing Education.

(1) In this section "approved educational activities" refers to workshops, seminars, conferences, short-term courses, credit courses or continuing education courses provided by accredited

institutions of higher education, clinical learning experiences, individualized instruction, distributive learning courses, and other learning activities that are related to EMS or that enhance the professional EMS practice of the certified or licensed EMS personnel.

(2) Continuing education contact hours applied toward EMS recertification or relicensure may be earned by participating in approved educational activities that are offered or sponsored by:

(A) A continuing education provider, approved under subsection (f) of this section.

(B) A hospital or other health-care facility accredited by the Joint Commission on Accreditation of Health Care Organizations.

(C) A person, agency, entity, or organization approved by the department as an EMS continuing education provider.

(D) A person, agency, entity, or organization recognized by a national association or organization representing members of the emergency medical services profession that has been approved by the department.

(E) A state or national organization in a related field such as medicine, nursing, respiratory care, and similar fields of health care practice that has been approved by the department.

(3) Developing, teaching or presenting activities defined in paragraph (1) of this subsection.

(A) Precepting students in the clinical or field internship phases of Initial education. Contact hours for precepting of students may be accrued only in Additional Approved Category content area.

(B) Participating in a self-directed study of an EMS related topic or issue that results in the participant making written findings and conclusions of the study which becomes published in an EMS related textbook, or in a state or national EMS related journal or magazine, or which results in the presentation of the findings and conclusions of the study in a department approved workshop, seminar, conference or class, and which is directed toward, or is applicable to, the EMS profession.

(f) Activities Unacceptable as Continuing Education. The following activities are not acceptable toward re-certification or re-licensure.

(1) Education incidental to the regular professional activities of EMS personnel such as learning occurring from experience or personal research which is not published.

(2) Orientation programs sponsored by employers to provide employees with information about the philosophy, goals, policies, procedures, role expectations, and physical facilities of a specific workplace.

(3) Meetings and activities such as in-service programs that are required as part of employment unless the in-service training is a type of acceptable continuing education under subsection (e) of this section.

(4) Organizational activity such as serving on committees, councils, or as an officer or board member in a professional organization.

(5) Institutions of higher education credit courses that are audited.

(6) Courses in basic cardiopulmonary resuscitation or other instructional activities designed for lay persons, including first aid courses.

(7) Any experience that does not fit the types of acceptable continuing education defined under subsection (e) of this section.

(8) Any identical CE repeated more than once during the accrual period.

(g) Approval of Continuing Education Provider.

(1) No person, agency, entity, or organization shall offer continuing education for emergency medical services personnel unless the department has authorized that person, agency, entity, or organization to be an approved continuing education provider.

(2) A person, agency, entity, or organization seeking approval as a continuing education provider shall file an application with the department.

(3) The applicant shall certify on the application that:

(A) all programs offered by the provider for EMS continuing education will comply with the appropriate criteria defined in subsection (h) of this section; and,

(B) the provider shall be responsible for verifying successful completion by a participant of each program and shall provide a certificate of completion to the participants.

(4) The department may require applicants for approval as continuing education providers to.

(A) Demonstrate they possess the financial, administrative, and educational resources necessary to provide the type(s) of educational activities proposed.

(B) Provide evidence that they are capable of designing and delivering educational activities that comply with the appropriate criteria defined in subsection (h) of this section.

(h) Criteria for Acceptable Continuing Education Activity.

(1) The following criteria have been established to guide EMS personnel in selecting appropriate programs and to guide providers of EMS continuing education in planning and presenting activities. The following criteria shall apply to all activities except those involving self-directed study concluding in a published writing or a presentation, as described in subsection (g)(3)(B) of this section.

(A) The program's content, teaching methodologies, and evaluation methods shall be based on written learning objectives which are specific, attainable, measurable, and descriptive of expected learner outcomes.

(B) The target audience shall be identified and there shall be evidence of program planning based on the needs of the potential target audience.

(C) Content shall be relevant to emergency medical services practice and/or health care, shall be related to and consistent with the program's objectives, and shall provide for the professional growth and/or maintenance of the certificant or licensee.

(D) Principles of adult education shall be used in the design and delivery of the program.

(E) There shall be documentation of the program developer's expertise in the content area.

(F) Learning experiences and teaching methods shall be appropriate to achieve the objectives of the program.

(G) Time allotted for each activity shall be sufficient for the learner to meet the objectives of the program.

(H) The program shall include activities to evaluate participant achievement of the program's learning objectives with clearly defined, stated criteria for successful completion.

(I) Participants shall complete a written evaluation of the program and instruction. State and/or National conferences may be exempt from this requirement.

(J) The continuing education provider shall timely furnish each participant with a written record of the participant's successful completion of the EMS educational activity. The record shall specify the name of the continuing education provider, the title, date and location of the educational activity, a description of the content area, the number of contact hours awarded, and the name of the organization granting approval.

(K) Program records of a continuing education provider shall be maintained by the provider for a minimum period of five years from the date of the program completion and shall include target audience, objectives, and documentation of instructor qualifications, teaching strategies and materials, evaluation instruments and results, and a list of names of participants.

(2) Classroom Instruction. In addition to the criteria listed in paragraph (1) of this subsection, programs consisting of or including a component of classroom or laboratory instruction shall meet the following criteria.

(A) The program shall be at least one contact hour in length.

(B) There shall be documentation of the instructor's expertise in the content area.

(C) A schedule of the program shall be provided which describes content with corresponding time frames.

(D) Facilities and educational resources shall be adequate to implement the program.

(3) Clinical Instruction. In addition to the criteria listed in paragraph (1) of this subsection, programs consisting of or including a component of clinical instruction shall meet the following criteria.

(A) There shall be documentation of a formal relationship between the program's provider and all facilities serving as sites for clinical instruction.

(B) Facilities used for clinical instruction must provide access to types of patients in sufficient variety and number to enable students to meet the program's objectives.

(C) Individuals who possess appropriate expertise and credentials shall provide clinical supervision and instruction.

(D) Continuing education student participants shall possess appropriate insurance for professional liability while engaging in clinical activities.

(4) Individualized Instruction. In addition to the criteria listed in paragraph (1) of this subsection, programs consisting of individualized instruction, including programmed instruction, directed study, or directed research shall meet the following criteria.

(A) Instruction shall follow a logical sequence based on the program's stated learning objectives.

(B) Instruction shall involve the learner in an active response to the educational materials presented.

(C) The amount of instructional time applied shall be appropriate to the learning objectives specified.

(D) Provider shall insure that contact hours are awarded to the actual certificant to whom intended.

(5) Individual submission by the participant of study activity for review by the department. The following information must be submitted for review.

(A) A course syllabus defining the content, the learning objectives, the dates and times of presentation, and the number of contact hours.

(B) A description of the presenters' qualifications and expertise.

(C) Verification by the presenter of successful participation.

(i) Additional Criteria for Specific Continuing Education Programs. In addition to those listed in subsection (h) of this section, the following guidelines shall apply to the selection and/or planning and implementation of specific CE programs.

(1) Semester or quarter credit hour courses.

(A) The course shall be within the framework of a curriculum that leads to degree in emergency medical services or any credit hour course relevant to emergency health care.

(B) Certified or licensed EMS personnel, upon audit, shall be able to present an official transcript indicating successful completion of the course with a passing grade.

(2) Certified or licensed EMS personnel, upon request by the department, shall provide documentation on the accredited institution's letterhead giving the name of program, location, dates, subjects taught, and total clock hours of teaching or instruction for all continuing education activity, including credit hour courses. Documentation may include course completion certificates, diplomas, and/or transcripts.

(3) Authorship.

(A) Certified or licensed EMS personnel may receive EMS continuing education contact hours for participating in an approved self-directed study that results in the participant making written findings and conclusions of the study which becomes published in an EMS related textbook, or in a state or national EMS related journal or magazine, or which results in the presentation of the findings and conclusions of the study in a department approved workshop, seminar, conference or class, and which is directed toward, or is applicable to, the EMS profession.

(B) Continuing education contact hours shall be awarded only once to the certificant or licensee making written findings and conclusions that result from a department approved self-directed study that becomes published or presented as described in subparagraph (3)(A) of this paragraph.

(4) Out of state programs. A continuing education activity successfully attended and completed or undertaken in a jurisdiction outside Texas may be accepted for continuing education if all criteria are met and if it is approved by the department.

(j) Responsibilities of certified or licensed EMS personnel.

(1) It shall be the responsibility of the certified or licensed EMS personnel to select and participate in continuing education activities that meet the criteria listed in subsections (h) and (i) of this section.

(2) The certified or licensed EMS personnel shall be responsible for maintaining written certifications of successful completions of EMS continuing education courses or educational activities for five years after the dates of completion. These records shall document

successful completion, specifying the name of the EMS continuing education provider, the title, description, date, and location of the educational activity, a description of the content area, the number of contact hours awarded, and the organization granting approval. Complete and accurate copies of these shall be timely submitted to the department upon the department's request.

(3) Complete and accurate copies of this written documentation shall be timely submitted to the department upon the department's request.

(k) Audit.

(1) The department may audit the records of individuals seeking recertification through continuing education.

(2) The department may audit specific certified or licensed EMS personnel in response to a complaint, or if there is reason to suspect that the certified or licensed EMS personnel may have given false or inaccurate information about the continuing education requirements completed.

(3) An audit shall be automatic for certified or licensed EMS personnel who have been found non-compliant in an immediately preceding audit.

(4) Failure to notify the department of a current mailing address shall not absolve the certificant from audit requirements.

(5) Within 30 days following notification of audit, certified or licensed EMS personnel shall submit documentation as specified in subsection (j)(2) of this section and any additional documentation the department determines is necessary to verify compliance with continuing education requirements.

(6) The department may use on-site observation, audits of records, and other appropriate methods to evaluate the performance of continuing education providers. Evaluation of a continuing education provider may take place randomly, in response to a complaint, or if there is reason to suspect that a continuing education provider is not complying with the criteria established by subsections (h) and (i) of this section.

(7) Falsification of CE documentation shall be cause for reprimand, probation, suspension, or revocation of a certificate or license as described in §157.36 of this title (relating to Criteria for Denial and Disciplinary Actions for EMS Personnel and Voluntary Surrender of a Certificate or License).

(8) Falsification of CE documentation by a CE provider or failure to comply with the criteria established by subsections (h) and (i) of this section shall be cause for reprimand, probated suspension, suspension, or revocation of approval.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205227
Susan K. Steeg
General Counsel
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Effective date: September 1, 2002
Proposal publication date: April 5, 2002
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES
SUBCHAPTER W. COVERAGE FOR ACQUIRED BRAIN INJURY

28 TAC §§21.3101 - 21.3105

The Commissioner of Insurance adopts new Subchapter W, §§21.3101 - 21.3105, concerning coverage for acquired brain injury. Sections 21.3101 and 21.3102 are adopted with changes to the proposed text as published in the May 10, 2002 issue of the *Texas Register* (27 TexReg 3912). Sections 21.3103 - 21.3105 are adopted without changes and will not be republished.

These new sections are necessary to implement the provisions of Insurance Code Article 21.53Q, as added by Acts 2001, 77th Texas Legislature, in House Bill (HB) 1676, relating to health benefit plan coverage for certain benefits related to acquired brain injury. The adopted sections prohibit issuers of health benefit plans from excluding certain services necessary as a result of and related to an acquired brain injury. The adopted sections also implement Article 21.53Q, §3 which requires training of personnel responsible for preauthorization of coverage or utilization review under the plan to prevent wrongful denial of coverage required under the article and to avoid confusion of medical benefits with mental health benefits.

Section 21.3101 sets forth general provisions, including severability and applicability. Section 21.3102 sets forth various definitions related to acquired brain injury, and includes definitions for various therapies and services enumerated in Article 21.53Q, §2(a). Section 21.3103 prohibits issuers of health benefit plans from excluding coverage for certain services necessary as a result of and related to an acquired brain injury. The section also sets forth what limits or standard coverage provisions may be placed on coverage for services for acquired brain injury. The section also addresses items including the deductibles, copayments, exclusions for experimental therapies or services, and limitations or exclusions that may be applied to services for coverage for acquired brain injury under a health benefit plan. Section 21.3104 sets forth the training requirements as described in Article 21.53Q, §3. The section addresses development of written preauthorization and utilization review policies and procedures for the purpose of identifying services to be covered for acquired brain injury. The new section also sets forth the minimum training requirements for employees or staff responsible for preauthorization of coverage or utilization review, or for any individual performing these processes, and addresses the means by which the training requirement under the rules may be satisfied, including documentation and verification of such training. Section 21.3105 addresses the provision of CPT codes and is necessary to enable the department to comply with the requirements of Section 2 of HB 1676.

General.

Comment: Several commenters commended the department for its thoroughness and voiced their support for the rule.

Agency Response: The department appreciates the commenters' support.

Comment: A commenter stated that the rules contain omissions in the consideration of time and costs associated with training. The commenter believes it will take a nurse and a physician some amount of time to be able to meet the rules' requirements with respect to developing and implementing policies and procedures for training. This commenter also stated concerns about the time and costs associated with staff members being away from patients to attend training. Another commenter disagreed with the labor figures used by the department, stating that the commenter's health benefit plan finds the costs for its medical directors and nursing staff to be significantly higher than the "mean" presented in the cost note in the proposed rule.

Agency Response: Costs involving training time were not included in the cost note for the proposed sections because any time and costs associated with the training requirements of the rules are the direct result of Article 21.53Q, §3 which specifically requires the commissioner, by rule, to require issuers of health benefit plans to provide adequate training to personnel responsible for preauthorization of coverage or utilization review under the plan to prevent wrongful denial of coverage required under the article and to avoid confusion of medical benefits with mental health benefits. It is reasonable to assume that the statute, which requires training, envisioned that health benefit plan staff would be required to take time away from usual job activities such as patient contacts to attend such training. Therefore, costs associated with loss of time spent by staff in direct patient contact and other tasks to attend training are directly attributable to the statute's training requirement, and are not the direct result of the adoption, enforcement, or administration of the new sections. The department clarifies that the cost estimate presented in the proposal is based upon labor figures from the Texas Workforce Commission Occupational Employment Statistics for 2001 (produced in cooperation with the Bureau of Labor Statistics), with figures adjusted by the department for the year 2002. It is the department's position that these figures are the most reliable and reasonable means of determining labor cost figures for issuers of health benefit plans doing business in Texas. The department recognizes that not all persons required to comply with the new training sections will pay the same rate for various personnel, but does not believe the law requires individual polling of issuers of health benefit plans to determine individual costs associated with compliance with the sections. Rather, the costs cited in the proposed rule are estimates intended to provide a reasonable and supportable representation generally as to the costs required to comply with the sections.

Comment: A commenter addressed cost concerns associated with identification of common procedural terminology (CPT) codes, related to the fact that identification of CPT codes without identification of underlying diagnoses is inaccurate because a CPT code in and of itself does not indicate if a therapy is for an underlying acquired brain injury (ABI). The commenter stated that the health benefit plan will have to consider ICD-9 codes, the diagnostic codes associated with those codes, and HCPCS codes for durable medical equipment.

Agency Response: Any costs associated with a health benefit plan's need to take into consideration identification of underlying diagnoses, or underlying diagnosis codes in conjunction with CPT codes, is attributable to the statute. Article 21.53Q prohibits health benefit plans from excluding certain services for ABI. Even absent the rules, a health benefit plan, in order to comply with Article 21.53Q §2(a) and §3(b), would have to identify underlying diagnoses and diagnosis codes that constitute an ABI in order to avoid improperly denying a service for a diagnosis of ABI in violation of the statute. The rules only require issuers of health benefit plans to compile a list of CPT codes (§21.3104(b)(1)), as opposed to underlying diagnoses codes, since payment by a health benefit plan under a CPT code can vary depending upon the underlying diagnosis. As such, the rules require persons performing preauthorization and utilization review to have knowledge of the CPT codes which should alert persons performing preauthorization and utilization review to look at the underlying diagnoses codes associated with certain CPT codes that, in the context of ABI diagnoses, should be paid when they might otherwise be denied. The department recognizes that some issuers of health benefit plans may wish to automate this process in their computer systems, but clarifies that the rules do not address such a requirement, either by inclusion or preclusion, and therefore do not impose any costs on issuers of health benefit plans that wish to use an automated system to tie in CPT codes with diagnoses codes.

Comment: A commenter stated that the rules are too broad, specifically mentioning terms and definitions that exceed medically acceptable guidelines for patients with ABI. The commenter further stated that as a result, health benefit plans will have difficulty implementing the rules, and will be unable to determine the CPT codes for those services stated in the rule, and that interpretation of covered services may differ between health benefit plans.

Agency Response: The department disagrees. The terms in the rule are set forth in the statute. Since the definitions, as well as language for the rule provisions, were developed after consultation with clinicians, a review of the medical literature regarding ABI and rehabilitation, and the department's understanding of the legislative intent of HB 1676, the department does not believe that plans will have difficulty with the rules or determining CPT codes. The department does not believe it is feasible in the rule to identify all the potential therapies and CPT codes that could fall under the broad services identified in Article 21.53Q.

Comment: A commenter stated that the rule's broad definitions and prescriptive nature will cause implementation to have a significant financial impact on a health benefit plan. The commenter requested an accurate cost impact statement to be included "due to the expanding nature of the rules."

Agency Response: The department believes that the cost note contained in the proposed rule sufficiently assesses and reflects the costs associated with implementation of the rule. The commenter's remaining concerns relate to costs that are the direct result of the legislative enactment of Insurance Code Article 21.53Q, and not the result of the adoption, enforcement, or administration of the new sections. The department believes that the statute takes into consideration costs associated with the statute and these rules as it requires the Sunset Advisory Commission (SAC) to determine the impact of costs of the required coverage. Additionally, the department will assist the SAC as required by Article 21.53Q.

Comment: A commenter requested that the language of the rule specifically identify that psychiatric and psychological services will at times be the appropriate care for an ABI.

Agency Response: The department agrees that psychiatric and psychological services may be the appropriate care, but does not agree that specific language is required to recognize this fact. Section 21.3101(a)(2) recognizes that if these or any other services required by the statute or rule are provided for the treatment

of an ABI, they must be provided under a plan's medical/surgical benefits so as not to be subject to maximum payment limits otherwise applicable to mental/behavioral benefits.

Comment: A commenter stated its understanding that the rules would not designate any specific treatment recommendations for ABIs. The commenter referred to testimony delivered during consideration of HB 1676, and noted that a variety of witnesses testified that hyperbaric therapy, bio-feedback, cognitive therapy, neuro-feedback, and several other forms of treatment are effective procedures for individuals with ABI. The commenter requested that the proposed rules accurately convey that none of these specific treatments are excluded. Another commenter stated its understanding that the treatments for brain injury listed in the statute include coverage for hyperbaric oxygen therapy (HBOT).

Agency Response: The rule does not preclude the provision of any treatment if it falls within one of the covered services enumerated in Article 21.53Q §2 and §21.3103, and the service is medically necessary, efficacious, and not experimental or investigational for the diagnosis for which it is prescribed. The department believes that the rules reflect the requirements of HB 1676 and its intent.

§21.3101(a)(1).

Comment: A commenter stated that the language, "based on an individualized treatment plan, or provided or ordered by a licensed healthcare practitioner," seems to allow for unlicensed "therapists" to be covered and reimbursed.

Agency Response: The department believes that there are individuals who are not required to be licensed, but who may provide some of the therapies outlined in the statute and rule under the direction of a licensed healthcare practitioner. As such, the language, "or ordered by a licensed healthcare practitioner," was intended to recognize that certain therapies may be provided by unlicensed persons performing the services under the direction or order of a licensed healthcare practitioner. The department recognizes, however, that the provision cited by the commenter could be clarified further, and has changed the language to: "provided by, or ordered and provided under the direction of a licensed healthcare practitioner." A similar change has also been made to §21.3101(c)(2).

Comment: A commenter stated that Article 21.53Q §2(a) is expressed as a prohibition of an exclusion of coverage for certain services relating to acquired brain injuries, and these rules affirmatively require that such coverage be provided. This results in potential conflict with §21.3103(a), which parallels the statutory prohibition against excluding coverage for ABI. The commenter suggested that the rule mirror the statutory language in this regard.

Agency Response: The department does not believe that the provision of services to enrollees will differ based upon whether the provision is stated as a prohibited exclusion or as required coverage. The department believes that the purpose statement is most clearly stated in the affirmative.

Comment: A commenter stated that the "most integrated living environment" standard is inflexible, and may preclude other appropriate and more cost-effective results. The commenter suggested that the provision of care be revised.

Agency Response: The department agrees and has made the following change: ..."the most integrated living environment appropriate to the individual."

§21.3101(a)(2).

Comment: One commenter noted that this subsection automatically requires that all services related to ABIs be provided under medical/surgical health coverage, but that some ABI services may be appropriately delivered as mental health services, and would then be subject to mental health benefits and limits. Another commenter noted that many patients with ABI have concurrent psychological problems that may require similar therapies, but which are not related to the brain injury itself. This commenter asked whether the rule requires health benefit plans to pay until the neurological diagnosis is ruled out and then apply psychiatric benefits or, if an enrollee with an ABI has a psychiatric diagnosis, whether health benefit plans must apply the psychiatric benefits until a neurological diagnosis is established. Because the testing and therapies may not be covered under psychiatric benefits, the commenter requested clarification of how the department interprets application of those benefits.

Agency Response: The department disagrees with the comment that ABI services delivered as mental health services should be appropriately subject to mental health benefits and limits. Under Article 21.53Q, a diagnosis that falls within the definition of an ABI is a medical, not a mental/behavioral health diagnosis and therefore is not subject to mental/behavioral health limits. The intent of Article 21.53Q is, among other things, to prohibit health benefit plans from limiting or excluding coverage for ABI services by identifying or classifying them as behavioral health services in lieu of medical services.

The benefits required to be provided by this rule only apply upon a diagnosis that falls within the definition of ABI. If an enrollee is diagnosed with an ABI, and services are provided due to the ABI, then the enrollee should be covered under the health plan's medical/surgical benefits even if the required services are psychiatric or behavioral health services or are provided by behavioral health professionals. In instances where the individual has an existing mental/behavioral condition, and subsequently sustains an ABI, then a health benefit plan can continue to cover the pre-existing mental/behavioral diagnosis under the mental/behavioral benefits of the health benefit plan, and such benefits may be subject to applicable limitations and exclusions. To the extent the condition is a result of the ABI, it would be covered as a medical/surgical benefit.

§21.3101(c)(2): A commenter questioned the intention of this paragraph, stating that the original purpose of HB 1676 was to enable persons with ABI to obtain insurance coverage by their carriers for cognitive rehabilitation services as traditionally offered within a rehabilitation setting. The commenter noted that too many individuals with ABI were being denied coverage based upon the exact terminology used in subsection (c)(2) by their carriers. The commenter also referenced several medical authorities in support of the need to provide cognitive rehabilitation services for persons with ABI. In summary, the commenter noted that the language in subsection (c)(2) controverts the entire purpose of HB 1676, and the commenter recommended that it be deleted.

Agency Response: The department disagrees with the commenter's interpretation and/or application of the language in this section. This subsection does not permit outright exclusion of services for ABI. Rather, it recognizes that there are, or may be, situations where coverage for a given service is not appropriate for that individual.

§21.3101(a)(1) and (c)(2): A commenter requested clarification that the terms "medically necessary, clinically proven, goal-oriented, etc." do not establish different standards for services required by Article 21.53Q than for other mandated benefits regulated in other statutes and rules enforced by TDI.

Agency Response: The rules are written to capture the same criteria that health benefit plans are currently required to comply with in determining medical necessity for any mandated benefit or procedure. The rules do not establish standards different from those used for other benefits regulated in other statutes or rules enforced by the department.

§21.3102. Definitions.

§21.3102(1): A commenter stated that the definition of ABI is too broad and unclear, and recommended the following definition: "A neurological insult to the brain, which is not hereditary, congenital, or degenerative. In an infant, the injury to the brain has occurred after 30 days of life and results in a change in neuronal activity, which results in an impairment of physical functioning, sensory processing, cognition, or psychosocial behavior."

Agency Response: The department disagrees. The definition of ABI was developed in consultation with various clinicians, a review of literature on ABI and rehabilitation, a review of the legislative history of HB 1676, and the department's understanding of the legislative intent. The definition represents a synthesis of current clinical knowledge regarding ABI. Nothing in the statute allows the department to arbitrarily exclude coverage of these services for the first 30 days of life.

§21.3102(2): A commenter stated that the definition of cognitive communication therapy is too broad, and recommends removal of the word "all."

Agency Response: The department agrees and has deleted the word "all."

§21.3102(3), (4), (18), (22): A commenter is concerned with omission of language in the definitions to include certain adaptive aids and assistive devices which many of the covered therapies incorporate. The commenter recommended inclusion of language to address "augmentative and alternative communications systems," intended to include electronic and non-electronic aids for either aided or unaided communication, "electronic and non-electronic cognitive enhancement aids," and "aids for daily living." This commenter also noted that the term "services" as used in the definitions may exclude interpretations that include assistive aids and devices. The commenter noted that some devices, i.e., durable medical equipment, may be covered by policy riders, and that other specific devices may be significant in facilitating some individuals' rehabilitation and reintegration following ABI.

Agency Response: The department disagrees that it is necessary to include the suggested language in the definitions. Adaptive aids and assistive devices may be covered if the individual's health benefit plan covers durable medical equipment or other benefits cover the specific device. The coverage for assistive aids and adaptive devices is consistent with coverage for other medical diagnoses.

§21.3102(4): A commenter stated that the definition of community reintegration services does not appear to specify an ending point, and asked the department to clarify the definition.

Agency Response: The commenter's concerns are addressed in §21.3101(a) and (c)(2). Duration of treatment and therapy is based on each individual's medical needs and will vary depending on the individual's situation.

§21.3102(8): A commenter recognized that the language in the definition of "neurobehavioral testing" regarding the interviewing of family members or significant others could place health benefit plans in the position of having to pay for services for interviewing non-members. The commenter suggested deletion of the last sentence of the definition.

Agency Response: The department disagrees and does not believe the deletion is necessary. The interviewing of family members or significant others is considered the standard of practice and is usually included as part of the comprehensive fee for assessment and testing of an individual requiring neurobehavioral testing.

§21.3102(9): A commenter recommended adding to the definition of "neurobehavioral treatment" language identifying psychiatric and psychotherapeutic interventions and behavioral management and modification techniques as examples of interventions that may be included. The commenter stated its belief that, unless these interventions are specifically identified as appropriate under the statute and rule, payors are likely to provide them, if at all, as a mental health benefit subject to policy limits. The commenter based its opinion on its experience that providers are already doing this. The commenter noted that as attempts were made to get insurers to cover psychiatric or psychotherapeutic interventions or to employ behavior management or modification techniques needed as a result of an ABI, the insurers insist on covering them under their more limited mental health benefits.

Agency Response: The department acknowledges the commenter's concerns; however, the services recommended by the commenter are covered under the rule's current definition. Additionally, the department believes that the treatments identified by the commenter are required to be covered under the medical/surgical benefits of the health benefit plan as required by §21.3103(d) and (e) and also recognized at §21.3101(2).

§21.3102(17): A commenter stated that the inclusion of physical illness or injury in the definition of "other similar coverage" precludes recognition of those circumstances in which mental/behavioral health services are appropriately utilized to treat acquired brain injuries.

Agency Response: The department points out that nothing in the rule precludes the use of any appropriate services to treat individuals with ABI even when those services are provided by, or through, a behavioral health provider. The intent of Article 21.53Q is to, among other things, prohibit health benefit plans from limiting or excluding coverage for services for ABI by identifying or classifying them as behavioral health services in lieu of medical services. When services are necessary for the treatment of an individual with an ABI, this places treatment and hence, coverage, in the realm of a medical diagnosis, and services should be provided under the medical benefit portion of the plan.

§21.3103(c).

Comment: A commenter stated that the provision as written will require insurance companies, and, therefore, the public, to pay for coverage for ABI forever. The commenter stated that there needs to be an end to an insurance company's obligation, and that families have to take some responsibility for those individuals with ABI.

Agency Response: The commenter's concerns are addressed in §21.3101(a) and (c)(2). Services for ABI should be medically necessary, goal-oriented, and efficacious, and based on an individualized treatment plan. Duration of treatment and therapy is based on each individual's medical needs and will vary depending on the particular situation.

Comment: A commenter noted that the phrase, "required by subsection (a) of this section" implies that this is a mandated benefit rather than a prohibited exclusion. The commenter suggested that the phrase be replaced with "necessary as a result of and related to an acquired brain injury ...".

Agency Response: The language in §21.3101(a) already states that the services for ABI may not be excluded if they are necessary as a result of and related to an ABI. The department notes that subsection (c) refers to subsection (a) which already contains the language suggested by the commenter.

§21.3103(e): A commenter stated that it is unclear what is allowed under this section and recommended the following language: "The coverage for services required by subsection (a) of this section may be *limited to those provided or prescribed by a provider acting under the scope of his or her license. Health maintenance organizations may further limit such services to those provided by providers participating in the provider network, to the extent allowed by Chapter 20A, Texas Insurance Code. The coverage for services required by subsection (a) may exclude services that are solely educational in nature and experimental or investigational, if such exclusions also apply to similar coverage under the health benefit plan*."

Agency Response: The department disagrees that the suggested language is necessary for this rule as network requirements are addressed in the Texas HMO Act, Insurance Code Chapter 20A. In addition, the suggested language would not be appropriate for all health benefit plans required to comply with the rules.

§21.3104.

Comment: A commenter stated that this section is too prescriptive in regard to how health benefit plans generally handle cases of special need. The commenter stated that there is already a process for case management and identification of all persons with special needs and that an ABI diagnosis should be included in that process. The commenter recommended that this section reference the current requirements already set forth in §11.1902(4) (Quality Improvement Program), with some changes.

Another commenter stated that health benefit plans agree that training is appropriate, but that identification of special therapies above and beyond those listed in the statute exceeds the requirements in the statute, and noted that there is already a requirement for training in the utilization review statute (Insurance Code Article 21.58A). The commenter recommended deleting paragraphs (1), (2) and (3) from subsection (c) and recommended the department require training on the benefits required by the statute or rule as stated in paragraph (4).

With respect to the section's documentation and verification requirement, a commenter recommended that a one-time special training be performed in a manner reported to the department, and that once the initial training has been completed, ABI training should be included in the trainings required by the utilization review statute and the HMO and PPO statutes and rules. The commenter stated that documentation of such special training could be made available upon examination of the health benefit plan.

Agency Response: The department disagrees. Article 21.53Q requires the department to set forth standards for training of persons performing preauthorization and utilization review for ABI. The department believes that the rules allow health benefit plans maximum flexibility in implementing the training requirement, and points out that the proposed rule's cost note addresses various mechanisms by which health benefit plans may control the costs associated with requirements of the rule. Additionally, §11.1902 would not apply to all types of health benefit plans.

Comment: A commenter stated concerns about language addressing "avoiding confusion between medical and mental health benefits," as it may not be feasible for any health benefit plan to be able to differentiate between the two. The commenter provided an example of a patient with sociopathic behavior or borderline personality disorder who subsequently sustains a closed head injury in an automobile accident, and noted the difficulties of identifying whether subsequent behavioral problems stem from the existing sociopathic behavior or borderline personality disorder, or whether the problems stem from the closed head injury in the automobile accident.

Agency Response: If an enrollee is diagnosed with an ABI, and services are provided due to the ABI, then the enrollee should be covered under the medical/surgical benefits of the health benefit plan even if the services required are psychiatric or behavioral health services, or are provided by behavioral health professionals. The benefits required to be provided by this rule only apply once a diagnosis is made that falls within the definition of ABI. For individuals with mental/behavioral issues where no ABI diagnosis has been made, the department believes it is appropriate for health benefit plans to cover the services as mental/behavioral services under the health benefit plan. In instances where the individual has a pre-existing mental/behavioral condition, and subsequently sustains an ABI, it may be reasonable for a health benefit plan to continue to cover the pre-existing mental/behavioral diagnosis under the mental/behavioral benefits of the health benefit plan, and such benefits may be subject to applicable limitations and exclusions. To the extent the condition is a result of the ABI, it would be covered as a medical/surgical benefit.

For: Rep. Lon Burnam.

For with changes: Centre for Neuro Skills, Texas Technology Access Project, Texas Traumatic Brain Injury Advisory Council, CIGNA Health Care.

Against: Transitional Learning Center at Galveston, Texas Association of Health Plans, Scott & White.

Neither for nor against: Rep. Harryette Ehrhardt, Lt. Governor Bill Ratliff, Senator David Cain.

The new sections are adopted under Insurance Code Article 21.53Q and §36.001. Article 21.53Q provides that the commissioner shall adopt rules as necessary to implement the article. Article 21.53Q also requires the commissioner by rule to require the issuer of a health benefit plan to provide adequate training to personnel responsible for preauthorization of coverage or utilization review under the plan to prevent wrongful denial of coverage required under the article and to avoid confusion of medical benefits with mental health benefits. Section 36.001 provides that the Commissioner of Insurance may adopt rules to execute the

duties and functions of the Texas Department of Insurance as authorized by statute.

§21.3101. General Provisions.

(a) Purpose. The purpose of this subchapter is to:

(1) ensure that enrollees in health benefit plans receive coverage for certain services for acquired brain injury and to facilitate the recovery and progressive rehabilitation of survivors of acquired brain injuries to the extent possible to their pre-injury condition by making available therapies that are medically necessary, clinically proven, goal-oriented, efficacious, based on individualized treatment plans, and provided by, or ordered and provided under the direction of a licensed healthcare practitioner with the goal of returning the individual to, or maintaining the individual in, the most integrated living environment appropriate to the individual;

(2) ensure that an issuer provides coverage for services related to an acquired brain injury under the medical/surgical provisions of the health benefit plan;

(3) require the issuer of a health benefit plan to provide adequate training of individuals responsible for preauthorization of coverage or utilization review under the plan in order to prevent wrongful denial of coverage required under Article 21.53Q and this subchapter, and to avoid confusion of medical/surgical benefits with mental/behavioral health benefits; and

(4) gather information to allow the department to cooperate with, and to assist, the Sunset Advisory Commission in determining to what extent the coverage required by Article 21.53Q and this subchapter is being used by enrollees in health benefit plans to which the article and this subchapter apply, and to determine the impact of the required coverage on the cost of those health benefit plans.

(b) Severability. If a court of competent jurisdiction holds that any provision of this subchapter is inconsistent with any statutes of this state, is unconstitutional, or for any other reason is invalid, the remaining provisions shall remain in full effect. If a court of competent jurisdiction holds that the application of any provision of this subchapter to particular persons, or in particular circumstances, is inconsistent with any statutes of this state, is unconstitutional, or for any other reason is invalid, the provision shall remain in full effect as to other persons or circumstances.

(c) Applicability.

(1) These sections apply to all health benefit plans delivered, issued for delivery, or renewed on or after January 1, 2002.

(2) Nothing in this subchapter requires the issuer of a health benefit plan to provide coverage for services that are not medically necessary, clinically proven, goal-oriented, efficacious, based on an individualized treatment plan, or provided by, or ordered and provided under the direction of a licensed healthcare practitioner.

§21.3102. Definitions.

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

(1) Acquired brain injury -- A neurological insult to the brain, which is not hereditary, congenital, or degenerative. The injury to the brain has occurred after birth and results in a change in neuronal activity, which results in an impairment of physical functioning, sensory processing, cognition, or psychosocial behavior.

(2) Cognitive communication therapy -- Services designed to address modalities of comprehension and expression, including understanding, reading, writing, and verbal expression of information.

(3) Cognitive rehabilitation therapy -- Services designed to address therapeutic cognitive activities, based on an assessment and understanding of the individual's brain-behavioral deficits.

(4) Community reintegration services -- Services that facilitate the continuum of care as an affected individual transitions into the community.

(5) Enrollee -- A person covered by a health benefit plan.

(6) Health benefit plan -- As described in Insurance Code Article 21.53Q, §1.

(7) Issuer -- Those entities identified in Article 21.53Q, §1(a)(1) - (9).

(8) Neurobehavioral testing -- An evaluation of the history of neurological and psychiatric difficulty, current symptoms, current mental status, and premorbid history, including the identification of problematic behavior and the relationship between behavior and the variables that control behavior. This may include interviews of the individual, family, or others.

(9) Neurobehavioral treatment -- Interventions that focus on behavior and the variables that control behavior.

(10) Neurocognitive rehabilitation -- Services designed to assist cognitively impaired individuals to compensate for deficits in cognitive functioning by rebuilding cognitive skills and/or developing compensatory strategies and techniques.

(11) Neurocognitive therapy -- Services designed to address neurological deficits in informational processing and to facilitate the development of higher level cognitive abilities.

(12) Neurofeedback therapy -- Services that utilize operant conditioning learning procedure based on electroencephalography (EEG) parameters, and which are designed to result in improved mental performance and behavior, and stabilized mood.

(13) Neurophysiological testing -- An evaluation of the functions of the nervous system.

(14) Neurophysiological treatment -- Interventions that focus on the functions of the nervous system.

(15) Neuropsychological testing -- The administering of a comprehensive battery of tests to evaluate neurocognitive, behavioral, and emotional strengths and weaknesses and their relationship to normal and abnormal central nervous system functioning.

(16) Neuropsychological treatment -- Interventions designed to improve or minimize deficits in behavioral and cognitive processes.

(17) Other similar coverage -- The medical/surgical benefits provided under a health benefit plan. This term recognizes a distinction between medical/surgical benefits, which encompass benefits for physical illnesses or injuries, as opposed to benefits for mental/behavioral health under a health benefit plan.

(18) Post-acute transition services -- Services that facilitate the continuum of care beyond the initial neurological insult through rehabilitation and community reintegration.

(19) Psychophysiological testing -- An evaluation of the interrelationships between the nervous system and other bodily organs and behavior.

(20) Psychophysiological treatment -- Interventions designed to alleviate or decrease abnormal physiological responses of the nervous system due to behavioral or emotional factors.

(21) Remediation -- The process(es) of restoring or improving a specific function.

(22) Services -- The work of testing, treatment, and providing therapies to an individual with an acquired brain injury.

(23) Therapy -- The scheduled remedial treatment provided through direct interaction with the individual to improve a pathological condition resulting from an acquired brain injury.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205071
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 26, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS
SUBCHAPTER F. ACTION BY THE COMMISSION

30 TAC §50.113

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §50.113, Applicability and Action on Application. The commission adopts these revisions to Chapter 50, Subchapter F, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 50.113 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2922) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history."

The commission currently has procedures for actions on applications and other authorization in Chapter 50. Specifically, in §50.113, there is a discussion under subsection (d) regarding what the commission may act on without holding a contested case hearing. Subsection (d)(4) states that the commission may act on an application for a wastewater discharge permit renewal or amendment under TWC, §26.028(d) without holding a contested case hearing, unless the commission determines that an applicant's compliance history for the preceding five years raises issues regarding the applicant's ability to comply with a material term of its permit.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* as part of this rulemaking to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. Chapter 60 will be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and compliance history specifics currently provided for elsewhere in commission rules are being deleted. For this reason, the amendment to §50.113 is adopted. Other chapters of existing regulations (30 TAC Chapters 55, 116, 122, and 281) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being adopted in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The adopted changes to §50.113 will remove the reference to the length of time of the compliance history, and will instead reference Chapter 60, Compliance History. The commission adopts these modifications because, in implementing the requirements

of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. Further, the commission adopts these changes to reflect the changes made to TWC, §26.028(d)(4) through HB 2912, as TWC, §26.028(d) is referenced in §50.113(d)(4), and §50.113(d)(4) reflects the statutory language.

No changes to §§50.113(a) and (b), 50.113(c)(1) - (3), or to 50.113(d)(1) - (3) were proposed. The commission adopts a minor administrative change to §50.113(c)(4) to conform with *Texas Register* style requirements.

The commission adopts modification to existing §50.113(d)(4) by deleting "for the preceding five years," and adding in its place "as determined under Chapter 60 of this title (relating to Compliance History)." This modification is adopted because compliance history is addressed in Chapter 60. The new sections to Chapter 60 which are being adopted in concurrent rulemaking will address the classification and use of compliance history. Section 60.1 already defines the components of compliance history as well as the length of time a compliance history encompasses. Therefore, the commission is adding a reference to Chapter 60 to the text.

This adoption reflects the modification to TWC, §26.028(d)(4), as found in HB 2912, §16.05, in which a similar change to the statutory language was made. Specifically, the phrase "for the preceding five years" was deleted, and was replaced with "under the method for evaluating compliance history developed by the commission under Section 5.754." TWC, §26.028(d)(4) now reads, "Notwithstanding any other provision of this chapter, the commission, at a regular meeting without the necessity of holding a public hearing, may approve an application to renew or amend a permit if: ... the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit."

No changes to §50.113(d)(5) were proposed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it 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. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because it is consistent with the requirements of TWC, §5.754. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not being adopted solely under the general powers of the agency, but is being adopted under the express requirements of TWC, 5.754. The commission invited public comment on the draft regulatory impact analysis determination and received no comments in response.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rule is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, 5.754.Promulgation and enforcement of the adopted rule would not affect private real property which is the subject of the rule because the adopted rule sets forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. The commission invited public comment on the CMP determination and received no comments in response.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 50 at the hearing.

STATUTORY AUTHORITY

The amendment is adopted under THSC, §361.017 and §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The amendment is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires

the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205170
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

30 TAC §55.211

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §55.211, Commission Action on Requests for Reconsideration and Contested Case Hearing. The commission adopts these revisions to Chapter 55, Subchapter F, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 55.211 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2927) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history."

The commission currently has procedures for requests for reconsideration and contested case hearings in Chapter 55. Specifically, in §55.211, there is a discussion under subsection (d) regarding when the commission may refer an application to the State Office of Administrative Hearings (SOAH). Subsection (d)(3) states that the commission may refer an application to SOAH if the commission determines that the application is for renewal of a hazardous waste permit and the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit. Subsection (d)(4) states that the commission may refer an application to SOAH if the application is for renewal of a wastewater discharge permit and the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (26 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* as part of this rulemaking to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. Chapter 60 will be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and compliance history specifics currently provided for elsewhere in commission rules are being deleted. For this reason, the amendment to §55.211 is adopted. Other chapters of existing regulations (30 TAC Chapters 50, 116, 122, and 281) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being adopted in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The adopted changes to §55.211 will remove the references to the length of time of the compliance history, and will instead reference Chapter 60, Compliance History. The commission adopts these modifications because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. Further, the commission adopts these changes to reflect the changes made to THSC, §361.088(f) and TWC, §26.028(d)(4) through HB 2912, as §55.211(d)(3) reflects the statutory language in THSC,

§361.088(f), and §55.211(d)(4) reflects the statutory language in TWC, §26.028(d)(4).

No changes to §55.211(a) - (c), (d)(1) or (2), or (e) or (f) were proposed.

The commission adopts modification to §55.211(d)(3) by deleting "for the preceding five years" from the text, and adding in its place "as determined under Chapter 60 of this title (relating to Compliance History)." This modification is adopted because compliance history is addressed in Chapter 60. The new sections to Chapter 60 which are being adopted in concurrent rulemaking will address the classification and use of compliance history. Section 60.1 already defines the components of compliance history, as well as the length of time a compliance history encompasses. Therefore, the commission adopts an added reference to Chapter 60 in the text.

This adoption reflects the modification to THSC, §361.088(f), as found in HB 2912, §16.11, in which a similar change to the statutory language was made. Specifically, the phrase "for the preceding five years" was deleted and replaced with "under the method for evaluating compliance history developed by the commission under Section 5.754, Water Code." THSC, §361.088(f) now reads, "Notwithstanding Subsection (e), if the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754, Water Code, raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing."

The commission also adopts modification to §55.211(d)(4) by deleting "for the preceding five years" from the text, and adding in its place "as determined under Chapter 60 of this title." These modifications are adopted because compliance history is addressed in Chapter 60. The new sections to Chapter 60 which are being adopted in concurrent rulemaking will address the classification and use of compliance history. Section 60.1 already defines the components of compliance history as well as the length of time a compliance history encompasses. Therefore, the commission adopts an added reference to Chapter 60 in the text.

This adoption reflects the modification to TWC, §26.028(d)(4), as found in HB 2912, §16.05, in which a similar change to the statutory language was made. Specifically, the phrase "for the preceding five years" was deleted and replaced with "under the method for evaluating compliance history developed by the commission under Section 5.754." TWC, §26.028(d)(4) now reads, "Notwithstanding any other provision of this chapter, the commission, at a regular meeting without the necessity of holding a public hearing, may approve an application to renew or amend a permit if: ... the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754 raises no issues regarding the applicant's ability to comply with a material term of its permit."

The commission adopts an administrative change to §55.211(g) by deleting "(relating to Judges)" to avoid repetition.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it 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. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because it is consistent with the requirements of TWC, §5.754. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not being adopted solely under the general powers of the agency, but is being adopted under the express requirements of TWC, 5.754. The commission invited public comment on the draft regulatory impact analysis determination and received no comments in response.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rule is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, 5.754. Promulgation and enforcement of the adopted rule would not affect private real property which is the subject of the rule because the adopted rule sets forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. The commission invited comment on the CMP determination and received no comments in response.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 55 at the hearing.

STATUTORY AUTHORITY

The amendment is adopted under THSC, §361.017 and §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The amendment is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205171
Stephanie Bergeron
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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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CHAPTER 60. COMPLIANCE HISTORY

30 TAC §60.2, §60.3

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts new §60.2 and §60.3. The commission adopts these new sections to Chapter 60 in order to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, relating to compliance history. Section 60.2 and §60.3 are adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2930).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history" and to provide for the use of compliance history classifications in certain commission decisions. The purpose of these adopted rules is to establish the classification and use of the components of compliance history.

HB 2912 modified some existing statutes and has added new statutory requirements relating to the classification and use of compliance history. Specifically, these include: TWC, §§7.053, 7.302, 7.303, 26.028(d), 26.0281, 26.040(h), 27.051(d), (e), and (h); and Texas Health and Safety Code (THSC), §§361.084(a) and (c), 361.088(f), 361.089(a), (e), and (f), 382.0518(c), 382.055(d), 382.056(o), 401.110, and 401.112(a). Recently adopted §60.1 (see January 4, 2002, issue of the *Texas Register* (27 TexReg 191)) implements HB 2912, §4.01, which created TWC, §5.753, requiring the commission to "develop a uniform standard for evaluating compliance history," by specifying the components to be considered in evaluating compliance history for permit decisions, as well as decisions for other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. HB 2912 further states, in TWC, §5.574(e), that compliance history must be utilized in agency decisions relating to enforcement, the use of announced investigations, and participation in innovative programs. HB 2912 compliance history provisions apply to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27; and THSC, Chapters 361, 382, and 401. Section 60.1 reflects this application.

In addition, HB 2912, §18.05 specifies that the classification and use of compliance history will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018; and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112 only to applications submitted on or after September 1, 2002. The classification and use of compliance history will apply in the consideration of compliance history for actions taken by the agency relating to investigations and flexible permitting effective September 1, 2002. Additionally, it will also apply in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission only in proceedings that are initiated or brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) will begin September 1, 2002. These applicability dates are specified in §60.1.

Section 60.1 implemented the first phase of HB 2912, §4.01, as it relates to the definition, or components of, compliance history. This next phase of the implementation of HB 2912, §4.01, is related to the classification and use of compliance history. HB 2912, §18.05(a), specifies that, not later than September 1, 2002, the commission by rule shall establish the standards for the classification and use of compliance history, as required by TWC, §5.754. This adopted additional rulemaking includes modifications to Chapter 60, as well as to other applicable chapters of commission rules (30 TAC Chapters 50, 55, 116, 122, and 281) which are being adopted concurrently in this issue of the *Texas Register* for the purpose of implementing the compliance history requirements of HB 2912, §4.01.

In addition to specifying through rule what the agency is *required by statute* to do with regard to a person's compliance history, the commission is also adopting actions which the agency *may* take in response to a person's compliance history through this rulemaking.

The commission solicited comments relating to the compliance history classification, the formula, and how classification will be utilized. The commission received 538 comment letters in response to the public comment period referenced in the PUBLIC

COMMENT section of this adoption preamble. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this adoption preamble.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rules do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of these rules is to protect the environment and reduce the risk to human health from environmental exposure, they are not "major environmental rules" because they do 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. The rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rules merely establish the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rules do not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because the federal laws applicable to program areas/media subject to these rules do not provide specific compliance criteria for the activities regulated by this rule (permitting, investigations, enforcement, and innovative programs). The applicable federal laws, Federal Clean Air Act, Clean Water Act, Solid Waste Disposal Act, Safe Drinking Water Act, and the Atomic Energy Act, with respect to implementation by the states generally require that the states have authority to enforce the federal program, but the federal laws provide the states discretion in law to enforce permitting, investigation, and enforcement standards. The adopted rules do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The adopted rules do not exceed the requirements of a delegation agreement, because the delegation agreements do not establish express requirements for consideration of compliance histories in permitting, enforcement, investigation, and innovative program decisions. Finally, the rules are not being adopted solely under the general powers of the commission, but are being adopted under the express requirements of TWC, §5.754, as well as THSC, §§361.017, 361.024, 382.017, and 401.051; and TWC, §§5.103, 5.105, 26.011, and 27.019.

The commission invited public comment on the draft regulatory impact analysis determination, but received no comments specific to this chapter.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because the adopted rules are an action that is taken in response to a real and substantial threat to public health and safety; are designed to significantly advance the health and safety purpose; and do not impose a greater burden than is necessary to achieve the health and safety purpose. Texas Government Code, §2007.003(b)(13), provides that an action that is taken in response to a real and substantial threat to public health and safety, that is designed to significantly advance the health and safety purpose, and that does not impose a greater burden than is necessary to achieve the health and safety purpose is exempt from Chapter 2007.

The real and substantial threat to public health and safety in this rulemaking involves regulated activity by poor performers and repeat violators, as specified in HB 2912, and how to consider such persons' compliance history when determining whether to authorize certain additional activities at a site, as well as how to determine appropriate enforcement and investigation requirements. The adopted rules minimize the threat to public health and safety by providing a uniform standard for evaluating compliance history by specifying the components to be considered in evaluating compliance history for permit decisions, as well as decisions for other specified types of authorizations. Specifically, the rules specify the circumstances in which the commission may revoke the permit of a repeat violator and establish enhanced administrative penalties for repeat violators. They also provide for additional oversight of, and review of applications relating to, facilities owned or operated by poor performers.

The adopted rules do not impose a greater burden than is necessary to achieve the health and safety purpose because the rules track the standards, purposes, and requirements of HB 2912. Further, the rules clearly set out the standards for the classification of a person's compliance history and how those classifications will be used in certain commission decisions. As a result, the rules also clearly describe how a person can improve his compliance history classification.

The adopted rules are not subject to Texas Government Code, Chapter 2007 because they are exempt under the provisions of §2007.003(b)(13).

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to establish the standards for classification and use of a person's compliance history. The adopted rules substantially advance this purpose by providing for the executive director to evaluate the compliance history of, and classify, each site and person as needed for certain actions listed in the rules; also, annually thereafter the executive director shall evaluate the compliance history of, and classify, each site and person. Further, for permit actions subject to compliance history review identified in the rules, the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's site-specific compliance history and classification and aggregate compliance history and classification, especially considering patterns of environmental compliance.

The adopted rules do not burden private real property because they promote compliance with existing laws and rules. Because the adopted rules do not impose new substantive standards for persons and sites, they do not burden real property in a manner which would be a statutory or constitutional taking. Specifically, the subject rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce

its value by 25% or more beyond that which would otherwise exist in the absence of the proposed regulations. Finally, there is no reasonable alternative that would accomplish the specified purpose of the rule because the rule is implementing a specific legislative mandate.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in, or will affect an action/authorization identified in, the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission prepared a consistency determination for the rules under 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies. CMP goals applicable to the rule include: §501.12(1), to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); §501.12(2), to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; §501.12(3), to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs; §501.12(5), to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone; §501.12(6), to coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs; §501.12(7), to make agency and subdivision decision-making affecting CNRAs efficient by identifying and addressing duplication and conflicts among local, state, and federal regulatory and other programs for the management of CNRAs; and §501.12(8), to make agency and subdivision decision-making affecting CNRAs more effective by employing the most comprehensive, accurate, and reliable information and scientific data available and by developing, distributing for public comment, and maintaining a coordinated, publicly accessible geographic information system of maps of the coastal zone and CNRAs at the earliest possible date. The commission has reviewed these rules for consistency with applicable goals of the CMP and determined that the rules are consistent with the intent of the applicable goals and will not result in any significant adverse effect to CNRAs.

CMP policies applicable to the proposed rule include: §501.14(d), Construction and Operation of Solid Waste Treatment, Storage, and Disposal Facilities; §501.14(e), Prevention, Response, and Remediation of Oil Spills; §501.14(f), Discharge of Municipal and Industrial Wastewater to Coastal Waters; §501.14(g), Nonpoint Source (NPS) Water Pollution; §501.14(h), Development in Critical Areas; §501.14(j), Dredging and Dredged Material Disposal and Placement; §501.14(m), Development Within Coastal Barrier Resource System Units and Otherwise Protected Areas on Coastal Barriers; and §501.14(q), Emission of Air Pollutants. This rulemaking does not relax existing standards for issuing permits related to the construction and operation of solid waste treatment, storage, and disposal facilities in the coastal zone or for governing the prevention of, response to, and remediation of coastal oil spills. This rulemaking does not relax existing commission rules and regulations governing the discharge of municipal and industrial wastewater to coastal waters, nor does it affect the requirement that the agency consult with the Texas Department of Health (TDH) regarding wastewater discharges that could significantly adversely affect oyster reefs. This rulemaking does not relax the existing requirements that state agencies and subdivisions with the authority to manage NPS pollution cooperate in the development and implementation of a coordinated program to reduce NPS pollution in order to restore and protect coastal waters. Further, it does not relax existing requirements applicable: to areas with the potential to develop agricultural or silvicultural NPS water quality problems; to on-site disposal systems; to underground storage tanks (USTs); or to Texas Pollutant Discharge Elimination System (TPDES) permits for stormwater discharges. This rulemaking does not relax the standards related to dredging, the discharge of dredge material, compensatory mitigation, and authorization of development in critical areas or to dredging, the discharge, disposal, and placement of dredged material, compensatory mitigation, and the authorization of development in critical areas. This rulemaking does not relax existing standards for issuing permits related to development of infrastructure within Coastal Barrier Resource System Units and Otherwise Protected Areas. Rather, the intent of the rulemaking is to increase compliance with existing standards and rule requirements. This rulemaking has been conducted consistent with the THSC, Chapter 382. Promulgation and enforcement of these rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed the rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of CNRAs (31 TAC §501.12(l)). The CMP policy applicable to this rulemaking is the policy (31 TAC §501.14(q)) that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal area (31 TAC §501.14(q)).

The commission invited public comment on the consistency of the proposed rule with applicable CMP goals and policies, but received no comments specific to this section.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. Four individuals provided oral comments at the hearing. The following provided written comments during the comment period: the Honorable J.E. "Buster" Brown, Texas Senate (Senator Brown); the Honorable Warren Chisum, Texas House of Representatives (Representative Chisum); 7-Eleven, Inc. (7-Eleven); Alliance for a Clean Texas (ACT); Allied Waste Systems, Inc. (Allied); American Electronics Association, Texas Chapter (AeA); AquaSource, Inc. (AquaSource); Association of Electric Companies of Texas, Inc. (AECT); Association of Texas Intrastate Natural Gas Pipelines (ATINGP); BFI Waste Systems of North America, Inc. (BFI); BP Products North America Inc. (BP); Brown McCarroll LLP (Brown McCarroll); Business Council for Sustainable Development (BCSD); Cantey & Hanger, LLP (C&H); Chaparral Steel (Chaparral); City of

Fort Worth Water Department (Fort Worth); City of Garland (Garland); City of Plano (Plano); City of San Antonio (San Antonio); City Public Service (CPS); Dairy Farmers of America, Inc. (DFA); Downwinders at Risk (DAR); ExxonMobil Downstream/Chemical (ExxonMobil); Fort Worth Aluminum Foundry, Inc. (FWAF); Fort Worth Chamber of Commerce (Fort Worth COC); Greenville Electric Utility System (GEUS); Gull Industries Incorporated (GI^2); Hunton & Williams (H&W); Huntsman Corporation, Huntsman Petrochemical Corporation, Huntsman International, and Huntsman Polymers Corporation (Huntsman); League of Conservation Voters Education Fund (LCVEF); Lone Star Chapter, Solid Waste Association of North America (TxSWANA); Lone Star Steel Company (LSS); Lower Colorado River Authority (LCRA); Martin Marietta Materials, Inc. (MMM); Midland Mfg. Co. (MMC); National Solid Wastes Management Association Texas Chapter (NSWMA); North Texas Municipal Water District (NTMWD); Occidental Chemical Corporation and Occidental Permian Ltd./Oxy USA LP (OxyChem and Oxy Permian); Oil City Iron Works, Inc. (OCIW); Onyx Environmental Services, LLC (Onyx); Port of Houston Authority (PHA); Public Citizen (PC); the commission's Public Interest Counsel (PIC); Reliant Energy (Reliant); Saint-Gobain Vetrotex America, Inc. (SGVA); San Miguel Electric Cooperative (SMEC); Southwest Steel Casting Company (SSCC); Texas Association of Business (TAB); Texas Association of Dairymen (TAD); Texas Broiler Council (TBC); Texas Campaign for the Environment (TCE); Texas Cattle Feeders Association (TCFA); Texas Chemical Council (TCC); Texas Committee on Natural Resources (TCONR); Texas Compliance Advisory Panel (TCAP); Texas Department of Agriculture (the Honorable Susan Combs, Commissioner) (TDA); Texas Egg Council (TEC); Texas Farm Bureau (TFB); Texas Fund for Energy and Environmental Education SEED Coalition (SEED Coalition); Texas Industries, Inc. (TXI); Texas Industry Project (TIP); Texas Mining and Reclamation Association (TMRA); Texas Municipal League (TML); Texas Oil & Gas Association (TXOGA); Texas Pork Producers Association (TPPA); Texas Poultry Federation (TPF); Texas Turkey Federation (TTF); Thompson & Knight LLP (T&K); Trinity Coatings Company, Inc. (TCCI); TXU Energy (TXU); United States Department of Defense, Department of the Air Force (DOD); the University of Texas System (UT); Valero Energy Corporation (Valero); Vinson & Elkins, LLP (V&E); Waste Management of Texas, Inc. (WM); and 483 individuals.

The following commenters supported the proposal, either in general, or in part: ACT, Allied, AeA, AquaSource, AECT, BFI, BP, Brown McCarroll, Fort Worth, Garland, San Antonio, CPS, DAR, GEUS, Huntsman, LCVEF, TxSWANA, LSS, LCRA, NSWMA, NTMWD, OxyChem and Oxy Permian, PC, PIC, SMEC, TAB, TCE, TCC, TCONR, SEED Coalition, TMRA, TML, TXOGA, T&K, and TXU.

The following commenters opposed the proposal in part and suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble: Senator Brown, Representative Chisum, 7-Eleven, ACT, Allied, AeA, AquaSource, AECT, ATINGP, BFI, BP, Brown McCarroll, BCSD, C&H, Chaparral, Fort Worth, Garland, Plano, San Antonio, CPS, DFA, DAR, ExxonMobil, FWAF, Fort Worth COC, GEUS, GI^2, H&W, Huntsman, LCVEF, TxSWANA, LSS, LCRA, MMM, MMC, NSWMA, NTMWD, OxyChem and Oxy Permian, OCIW, Onyx, PHA, PC, PIC, Reliant, SGVA, SMEC, SSCC, TAB, TAD, TBC, TCE, TCFA, TCC, TCONR, TCAP, TDA, TEC, TFB, SEED Coalition, TXI, TIP, TMRA, TML, TXOGA, TPPA, TPF, TTF, T&K, TCCI, TXU, DOD, UT, Valero, V&E, WM, and 483 individuals.

SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS

The commission adopts new §60.2 and §60.3 in order to implement the requirements of HB 2912. New §60.2, Classification, and §60.3, Use of Compliance History, are adopted with changes to the proposed text. These adopted new sections will implement the requirements of TWC, §5.754. Specifically, the adopted language establishes a set of standards for the classification of a site's and a person's compliance history, and provides for the use of compliance history and classification in certain commission decisions, thereby meeting statutory directives. The framework for this rulemaking was begun with the adoption of §60.1, regarding compliance history components. The current rulemaking builds on the previous rulemaking by providing the process as to how the compliance history components will be utilized in classifying the environmental performance of sites and persons. Further, the current rulemaking establishes how the compliance histories and classifications will be used in applicable agency decisions. The commission's objective through this rulemaking has been to establish a compliance history classification system which provides an accurate and meaningful representation of the environmental compliance patterns of sites and persons. The commission's further objective is to create a uniform standard of evaluating and utilizing compliance histories and classifications, recognizing that the commission has a large regulated universe with vast ranges in the types of programs regulated, the size of owners and operators, the size and/or complexity of sites, and the amount of regulatory oversight (investigations) of the program. This is by no means a simple task, and it is further compounded by the limits of resources (staff and information) available to the agency.

The commission has invited the participation of stakeholders in both phases of the compliance history rulemakings, and has taken very seriously the comments, suggestions, and criticisms of those stakeholders. The commission believes that, after thorough consideration, it has developed a compliance history rule that meets its objectives fairly, accurately, and in a manner that is meaningful to the agency, the regulated community, and to the citizens of the State of Texas, while meeting the statutory directives in HB 2912. Having said this, the commission also notes that it intends to monitor the implementation of this rule closely, and if it determines that modifications are necessary, additional rulemaking will be initiated. The rule achieves the commission's objectives by providing a formula through which point values are assigned to various compliance history components according to such things as the severity of violations noted, what type of enforcement action was utilized to address violations, whether violations were self-reported, what types of positive compliance measures have been taken, and how many investigations have been performed at a site. The adopted rule also addresses designation of a repeat violator, utilizing criteria required by the statute, by taking into account the number and complexity of sites.

General

OxyChem and Oxy Permian, AquaSource, NTMWD, AeA, Brown McCarroll, TXOGA, Allied, BFI, TxSWANA, NSWMA, TML, LSS, TAB, AECT, TRMA, Garland, San Antonio, GEUS, SMEC, Huntsman, BP, TXU, ACT, TCC, LCRA, Fort Worth, TCONR, TCE, LCVEF, DAR, SEED Coalition, PC, and 476 individuals all made comments to the effect that, in general, they are supportive of the development of the compliance history rules for the betterment of Texas; they believe the commission has made a good effort

in carrying out legislative directives; they appreciate the difficulty of the task; and/or they commend staff for their efforts in drafting the rules and working with stakeholders.

The commission appreciates the positive comments in support of the rules and the rulemaking.

MMM asked, with regard to the database in which all "site" and "person" information will be compiled: who will be able to access this database; can every company access their information; how will the commission assure database accuracy; will industry have the opportunity to proof the database before it is finalized by the commission; and how will a company's operations out-of-state be listed in the database?

The commission responds that, at least for the foreseeable future, only agency staff will be able to access the applicable databases; this is in order to ensure accuracy of information that has been fully collected and assembled.

Public access to the in-progress database could inaccurately reflect or prematurely disclose part of the agency's internal deliberations that will take place during and as part of development of the database. Consideration of mitigating factors for sites and persons may affect the results reflected in the database; until mitigating factors have been considered and applied, the database information is essentially still part of an agency deliberation as to how the database will be finalized. The database is under construction at the time this rule is being adopted. Generally, information will be made available when it is technically feasible to produce the information, and the information has been collected and assembled, including having been subject to quality assurance and quality control (QA/QC) procedures and any errors corrected.

In response to the comment questioning how accuracy will be achieved, the agency will use QA/QC procedures. Although a person will not have the opportunity to proof the database, a person can always request information concerning records, compare it with its own documents, provide corrected or updated information, or question the accuracy of data. To the extent that factual information in question is independently available from other agency sources and in other formats, not in the format especially organized for development of the database, it will remain available from those sources, consistent with the Texas Public Information Act. New §60.3(f) sets forth the procedure for corrections of classifications for clerical errors. A person's operations out-of-state will not be listed in the database. Rather, the executive director will utilize a United States Environmental Protection Agency (EPA) database system to obtain information relating to out-of-state compliance.

GI^2, Fort Worth COC, C&H, TAB, TCC, TCCI, TCAP, PHA, OxyChem and Oxy Permian, Huntsman, BP, TXI, and AECT all provided similar comments suggesting that entities should have the ability to review and comment on their compliance histories prior to the information being made public, with some also suggesting that a method for requesting that inaccuracies be corrected be provided. Furthermore, TCCI stated that it believes that "historical compliance history information should not be made public." AECT recommended the addition of a new §60.2(g) to allow a 15-day preview period by a site to review the compliance history for completeness and accuracy. TXU, Garland, San Antonio, GEUS, and SMEC supported the comments of AECT.

The commission responds that it did not modify the rules to allow a person to review compliance information prior to posting publicly due to the large number of sites and persons evaluated. The commission plans to make the classification ratings (poor, average, or high, by site as well as by person) available via the worldwide web. The classifications will be available as completed for permitting, enforcement, review of innovative programs, and for public review beginning September 1, 2002. On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history for each site, and classify each site and person. A person or interested party can then review the files and compare the compliance information with the compliance history developed by the agency. Staff will be available to discuss any errors, omissions, or other discrepancies. New §60.3(f) sets forth the procedure for corrections of classifications for clerical errors. Information related to compliance history is available as provided by the Texas Public Information Act. No changes have been made in response to these comments.

TCAP suggested "that a process be established for key areas of the agency (including Small Business and Environmental Assistance) to review decisions based on compliance history before those decisions are made public. This would help ensure that any activities that the executive director must evaluate as mitigating factors for the site are accounted for."

The commission responds that appropriate instructions and guidance documents will be developed to ensure consistency in review, evaluation, and decision-making. Small Business and Environmental Assistance (SBEA) is part of the executive director's staff, and will participate in the review process and evaluation, as appropriate. However, resources will not permit individual review by SBEA, and such a provision would impact the ability to provide technical services.

MMM stated that the hierarchy of penalties, and the point system and how it relates to violations need to be better defined. MMM further stated that a company having many operating sites "will be at a disadvantage for their rating."

The commission responds that this rule is not a penalty rule, except as it relates to the commission's authorization to utilize compliance history classification and repeat violator designation in assessing administrative penalties. Each site owned by a company will receive a site classification based upon its compliance history. Further, a company having many sites will receive additional criteria points that are used to determine the designation of repeat violators. All the site ratings will be averaged to obtain a person classification. No changes to the rule have been made in response to this comment.

MMM asked, "What is the precedence of compliance history in other states? How were laws written, and how are they being enforced?"

The commission responds that this is outside the scope of this rulemaking, as the use of compliance history in other states is not an issue for this rulemaking.

H&W stated that, throughout the compliance history rules, "it is unclear whether TNRCC intends to review a new site owner or operator's compliance history prior to the transfer of the permit to the new owner or operator," and requested that such clarification be made. By way of example, H&W referenced that in proposed §116.110, which is part of the compliance history rulemaking effort, it would seem that the commission does not intend to consider the new owner's compliance history prior to the transfer of a preconstruction air permit. However, H&W went on to say that under the current underground injection control (UIC) permit

provisions, the commission "has recently required the preparation of the new owner's compliance history prior to transferring the permit to the new owner."

The commission responds that Chapter 60 does not require a compliance history review prior to the transfer of a permit to the new owner or operator. HB 2912, §18.05, states that compliance history is to be considered in decisions by the commission for the issuance, amendment, modification, or renewal of permits. Further, the comment is correct that while proposed §116.110 does not include consideration of the transferee's compliance history prior to the transfer, the current UIC permit provisions, for example, do require consideration of the transferee's compliance history prior to the transfer. Current rules found at 30 TAC §305.64, adopted under separate authority, and relating to consolidated permits, require the commission to consider the compliance history of a transferee. These requirements will continue to apply to consideration of compliance history of a transferee, where otherwise required. The commission notes that facilities regulated under Chapter 116 are not subject to 30 TAC Chapter 305, whereas UIC facilities are. The requirement to consider compliance history under Chapter 305 has not changed as a result of the adoption of new Chapter 60.

AquaSource stated that the rule proposal makes no mention of the inclusion of a person's activities in programs under the commission's jurisdiction which do not fall under TWC, Chapters 26 or 27, or THSC, Chapters 361, 382, or 401, and suggested that compliance with these other provisions should be recognized in the compliance history, perhaps under mitigating factors.

The commission disagrees with this comment, and responds that HB 2912 specifically includes only programs under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. For that reason, it is consistent with legislative direction to limit the scope of the compliance review to activities regulated under these chapters. No changes have been made in response to this comment.

Four individuals provided similar comments, recommending that the rules include not only the complete compliance history of a site, but also all the companies who owned the site, with one of the individuals asserting that this should include affiliates of the owner. One commenter further asserted that "using only violations that occurred after February 2002" will allow companies to mask their long-term performance. One individual stated a compliance history should include "violations, enforcement actions, citizen complaints and inquires made on any facility or company for perpetuity," negative and positive components, and that it should not be limited to "only the last few years, or only violations occurring after a certain date, or only violations where enforcement was issued." One individual also asserted, "The cumulative effects of surrounding sites should also be taken into consideration, especially when poorly performing facilities are adjacent to each other, because the compliance history of two or more sites may significantly elevate the risk factor in a community." One individual stated that compliance history should include both current and long-term history as many sites have a long-lasting impact on the environment. This individual also asked how the performance of a new facility can equitably be compared to the performance of a facility built 20 years ago. He further stated, "An overall or additional rating based on the degree of protection to the environment of the facility would also be relevant to the public and TNRCC when evaluating a facility."

The commission responds that these comments are all outside the scope of this rulemaking, as the compliance period, components, and the issue of person were all addressed during Phase I of the compliance history rulemaking. The issue of cumulative effects is not a part of the directives in HB 2912, Article 4, nor was it included in the definition of compliance history. Cumulative effects will be addressed in policies developed in response to the requirements of TWC, §5.130. Further, the commission does not intend to change how it compares the performance of a new facility to an older facility, to the extent that the current rules provide for facility age to be taken into consideration. In fact, as recommended by the commenter, "the degree of protection to the environment" is often the type of factor considered in evaluating a facility, not a facility's age, as many compliance criteria are "environmentally-based"; they relate to air and water standards rather than the specific technology of the facility.

TCONR stated that it believes some of the provisions would undermine the legislative intent to create a "uniform compliance history program that will reward highly compliant regulated entities while assuring stricter oversight of chronic violators." TCONR asserted that the problems with the proposal "will likely provoke a new round of legislation" on the issue, unnecessarily taxing the resources of the TNRCC, the regulated community, and the public. ACT stated that the rulemaking "must not lose sight of the overall purposes of HB 2912's provisions regarding the development, classification and use of compliance history." ACT asserted first that HB 2912 provided consistency across programs regarding components of compliance history. Second, ACT asserted that HB 2912 provides for two central purposes for the classification system: to provide incentives for high performers (through the strategically-directed regulatory structure), and to ensure that poor performers receive extra scrutiny without being afforded the greater flexibility awarded to some regulated entities. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals support the comments made by ACT. Reliant asserted that generally, the rules "do not effectively encourage environmental improvement" which it believes should be one of the objectives, and that this is inherent in the legislation. TCE and LCVEF commented that they are "concerned that the proposed rules on compliance history are not strong enough and do not follow legislative intent." One individual expressed similar concerns.

This rulemaking encourages improved environmental performance and provides for additional oversight of poor performers. Further, the rules, as proposed and adopted, do meet legislative intent and will ensure consistency when evaluating a permit application or taking other actions. In addition, because almost all of the compliance history data can be maintained electronically, after the initial programming is complete, the impact on agency resources is expected to be minimal. These rules, as adopted, address a person's historical violations and set the stage for evaluating that history for patterns that can be effectively addressed through better permit provisions and enforcement. The strategically-directed regulatory structure provision of HB 2912 will be implemented through phased rulemaking, required to be effective by September 1, 2003, and September 1, 2005, respectively, and will further enhance the agency's efforts to develop a uniform standard for evaluating compliance history.

AeA stated that it believes the rules should contain incentives for high performers, including: all permit actions for the site should be classified as Priority 1 under the agency's Permit Timeframe

Reduction Project; more flexibility in negotiating permit conditions; and easier or quicker access to information or resources that would affect a site's requirements.

The commission responds that this rulemaking seeks only to implement the requirements of TWC, §5.754, concerning classification and use of compliance history. Incentives will be the subject of a future rulemaking to implement TWC, §5.755, concerning strategically-directed regulatory structure. No changes have been made in response to this comment. However, the commission notes that adopted §60.2(e)(1)(M) provides that implementation of an environmental management system (EMS) certified under 30 TAC Chapter 90 is a positive factor in the formula for determining a site rating. Likewise, adopted §60.2(e)(1)(K) provides positives in the site rating formula for submittal of a notice of intent to perform an audit, as well as disclosures of violation(s) for which the site was granted immunity from administrative or civil penalty for those violation(s), under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995. Although these are not "incentives for high performers" in the sense of those suggested by the commenter, they do provide incentives for performing EMSs and environmental audits beyond the basic incentive that such things are beneficial to the environment and the State of Texas.

Huntsman expressed concern that the proposed rule does not include a uniform standard for evaluating compliance history as mandated by the legislature, adding that this requirement "is not a technicality. The regulated community is entitled to notice of the standard by which their compliance history will be evaluated, the standard must be neutral and must be adequate to assure that the elements of a facility's compliance history are placed into a context that is both fair and useful. At a minimum, ambiguity in language and the role of unfettered discretion should be kept to a minimum. In addition, a mechanism should be present in the text of the phase 2 rule to mitigate against what would otherwise be an unfair application of the uniform standards caused by forces outside the control of the agency (i.e., legislative appropriations which affect the size and duties of the agency's workforce)." Huntsman added that a site designated as a poor performer will be publicly stigmatized, and that sites should not suffer this unless the rating is based on fair and objective criteria.

The commission has substantially revised the proposed rule. The commission believes the rule is reasonable and will provide consistent application. The rule also provides for a limited consideration of mitigating factors. Additionally, because almost all of the compliance history data can be maintained electronically, after the initial programming is complete, the impact on agency resources is expected to be minimal.

TML urged the commission to schedule reviews, and possible amendment of the compliance history rules on a periodic basis, citing as rationale for this suggestion, "Environmental regulation based on compliance history is a new concept about which neither TNRCC, the regulated community, or the environmental community can claim much expertise. Effectiveness of the rules cannot be ascertained until they have been experienced in practice, and the agency should plan to have stakeholder meetings on their effectiveness within at least two years of its adoption."

The commission agrees that the rules should be evaluated after a reasonable period of time following adoption. If the commission determines that the rules need to be amended or changed, a rulemaking project can be initiated for this purpose. Any subsequent rulemaking will provide for stakeholder input. No change was made to the rules as a result of this comment.

DOD stated that the TNRCC's intent to employ a multimedia compliance history approach exceeds any congressional waiver of federal sovereign immunity. States are not authorized to impose requirements relying on a waiver of sovereign immunity in a media-specific statute that incorporates requirements under a different statute. The proposed rule impermissibly provides TNRCC with greater enforcement authority against DOD installations than Congress has expressly allowed. Furthermore, DOD stated that the rule also violates sovereign immunity by considering environmental compliance outside of the State of Texas. The waivers of sovereign immunity do not give states the authority to enforce environmental regulations of other states. As such, DOD proposed the addition of subsection (e) to §60.3, with the heading "Department of Defense Installations or Facilities," and the following language: "The compliance history for each military service shall be limited to in-state compliance. Out-of-state compliance shall not be considered. Only such aspects of compliance history that correspond to the specific media for which the permit is being sought shall be considered."

The commission disagrees with this comment. Nothing in the proposed rule attempts to circumvent any immunity enjoyed by military installations. While federal entities are immune from civil penalties for environmental violations under certain circumstances, federal entities are not immune from complying with applicable environmental regulations. The TWC specifically directs the agency to consider the multimedia compliance history of an entity in both this state, and in other states. To the extent that a federal entity is immune from civil penalties, it remains so. However, the commission is free to consider a federal entity's compliance history in an effort to ensure that a federal entity fully complies with all applicable environmental regulations. The agency is also permitted to consider a federal entity's compliance history to determine what, if any, additional requirements may be necessary in a permit to achieve compliance with environmental regulations. Furthermore, the proposed rule does not attempt to enforce the environmental regulations of other states. The rule simply follows the legislative directive to consider orders from other states. This consideration is necessary to get an accurate picture of a federal entity's compliance record in other states. The rule does not attempt to enforce specific regulations from other states in Texas. No changes have been made in response to this comment.

BCSD suggested that the commission "investigate the State of New Jersey's proposed Deferral Track Rule as a possible addition to the Texas compliance history rule," submitted material to further inform the TNRCC of the New Jersey process, and requested that TNRCC participate in the Technology Acceptance Reciprocity Partnership (TARP), which is a common pathway for participating states to evaluate and approve certain environmental technologies.

The commission responds that TWC, §5.755 requires the commission to develop, by rule, a strategically-directed regulatory structure to provide incentives for enhanced environmental performance. During development of that rule, the commission will be looking at other states' programs. It is not appropriate or necessary to add the Deferral Track Rule concept to the compliance history rules. The commission, in developing a strategically-directed regulatory structure, is reviewing other states' programs for applicability to Texas. Additional rule development in 2003 will establish procedures for the use of incentives to enhance environmental performance. Also, decisions regarding participation in TARP are outside the scope of this rulemaking. No changes have been made in response to these comments.

Fiscal Note

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, TDA commented regarding the proposed Fiscal Note. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the examples of compliance costs provided in the proposal preamble are unrealistically low. The commenters asserted that the costs provided are "generally for governmental units," and not reflective of costs to the private sector to obtain or renew permits. As an example, the commenters stated that "a contested permit hearing for an individual TPDES permit would normally involve a minimum cost of $50,000 to $100,000. Such costs need to be considered by the Commission, especially if the Commission would reduce the term of a permit, in response to a person's compliance history." Furthermore, the commenters stated that the fiscal note does not "account for the increased costs of permitting associated with changing the form or authorization from a registration to an individual permit. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." CPS commented regarding the proposed Public Benefits and Costs section that there is significant cost associated with permit renewals, and that some of these costs are not accounted for the Fiscal Note section in the proposal preamble. CPS stated that in addition to permit renewal fees, there are also costs associated with publication of notices in newspapers, and the posting and maintenance of signs. According to CPS, it spent $15,000 for public notice requirements for its five power plants' federal operating permits.

In response to comments that costs provided are unrealistically low, and that the costs provided are "generally for governmental units and not reflective of costs to the private sector," the commission disagrees that is necessarily the case. All applicants are required to meet the same requirements for permitting, for example, whether or not the applicants are governmental entities or from the private sector. Similarly, costs for a contested permit can vary widely, and typically would depend more on the complexity of the contested case hearing and the associated issues rather than on whether the applicant is from the public or the private sector.

The commission agrees that there could be additional costs associated with permitting for entities classified as poor performer, including some of the costs described in the comments. The costs provided in the fiscal note are only provided as examples because there are many variables that could affect cost. The commission intends to work closely with each site that is rated as a poor performer to provide assistance in improving its compliance history so, if it is so motivated, the entity may raise the classification of the site. The agency will try to use options to minimize cost. No change to the rule has been made in response to these comments.

§60.2. Classification

The commission adopts new §60.2 with modifications to the proposal, as described in the following responses to comments.

§60.2

7-Eleven commented regarding proposed §60.2, stating that the adoption preamble should explain the commission's rationale and authority for the use of the word "average" throughout the compliance history classification scheme. 7-Eleven asserted, "The term 'average' has an inherently mathematical meaning that requires calculation of an average, mid-point or 'mean' point along a continuum of points," and added that as proposed, the rule's references to "below" and "above" average are misleading and even meaningless. 7-Eleven stated that the proposed rule appears to incorporate language from TWC, §5.754(b)(1) - (3), assuming that the statutory language equates "average" with "acceptable," and further, stated, "Neither the text of the rule nor the current preamble to the draft rule offers any basis for concluding that the commonly understood meaning of the term 'average' regulatory performance (i.e., 50% have fewer violations, 50% have more violations) is intended to be 'acceptable' in the eyes of the legislature." 7-Eleven asserted that, if the commission is authorized to use the non mathematical meaning of the term "average," then it should explain this in the preamble, and could use the word "acceptable" instead of "average," but if the commission cannot identify such authority, it must build a meaningful use of the mathematical concept of average into the classification formula.

The legislature defined the term "average performer" in TWC, §5.754 as "an entity that generally complies with environmental regulations." Within the context of this section, average is not utilized as a mathematical term, but rather a qualitative label of performance. In other words, the use of the term "average performer" is intended to cover those sites or persons with an acceptable compliance history. As the commission has developed its formula, and intends on classifying each site and person, average is the group in the middle based upon the assigned points and other considerations.

§60.2(a)

Under adopted §60.2(a), the executive director will evaluate the compliance history of each site, and classify each site and person as needed for the actions listed in §60.1(a)(1). Due to the complexity of compiling all the required information, beginning September 1, 2002, the executive director will classify sites and persons as needed. The commission is developing an electronic database that will allow for the preparation of classifications electronically. The commission expects to be able to perform electronic analyses of each site and person by September 1, 2003. Additionally, for purposes of classification in this chapter and except with regard to portable units, "site" shall mean all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. This definition clarifies what information will be included in the evaluation and classification. The commission will also make updates to a person's classification at regular intervals, with an adequate period of time between intervals to allow the site sufficient time to improve its compliance with applicable requirements should it so choose. The commission adopts an annual interval for this purpose. Additionally, adopted §60.2(a) reflects that a site and a person will be classified into one of three categories. The three classifications in adopted §60.2(a)(1) - (3), as required by TWC, §5.754(b), are: a high performer, which is a site or person that has an above-average compliance record; an average performer, which is a site or person that generally complies with environmental regulations; or a poor performer, which is a site or person that performs below average.

The commission has modified the text of adopted §60.2(a). The text, "Beginning September 1, 2002," has been added to this subsection, to provide a specific date for beginning to classify compliance histories under Chapter 60. The proposed rule

required the executive director to evaluate compliance history of a site every six months, beginning September 1, 2003. After reviewing comments on this issue, the rule is revised to require reclassifications annually. An annual review will allow the executive director to assess compliance history for planning announced versus unannounced investigations, and additional assistance and oversight of poor performers. Re-evaluation will assist in determining whether permits should be revoked or amended, statutes permitting. Additionally, the word "will" has been changed to "shall" in the first sentence, and the phrase "of each site" has been added to reflect that compliance histories are prepared by site. The phrase "and person" has been added after "each site" in the first sentence in order to reflect that, in response to comments received, the commission has modified the rule to include compliance history classifications for sites *and* persons. For added clarity, the reference to September 1, 2003, and the annual reclassification has been broken out into a new sentence which reads, "On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify easy site and person." Additionally, the word "regulated" has been moved from its proposed location to precede the word "units" so that it modifies all of the items in the list in the sentence, appropriately reflecting that the term "site" for purposes of this chapter refers to those things at the site regulated by the commission. In response to comments received, the next sentence has been expanded to read, "Site includes any property *identified in the permit or* used in connection with the regulated activity *at the same street address or location*." (Emphasis added). The additions to this sentence were made to more clearly reflect that the property may not always be "at the same street address or location" but is considered part of the site if it is inherent in the permit for the site, and further to clarify that "site" is intended to encompass the location, even if the location has more than one street address. Further, the phrase, "and except with regard to portable units," has been added to this sentence. In conjunction with this addition, the following sentence has also been added to this subsection: "A 'site' for a portable regulated unit or facility is any location where the unit or facility is or has operated." The commission has made these additions to the definition of "Site" in §60.2(a) to ensure that the definition includes portable regulated units and facilities. Because a portable regulated unit or facility may operate at multiple locations, the operation of the unit or facility could result in site-specific compliance situations. In order to track the compliance history of a portable unit or facility, the compliance activity at each site will follow the unit or facility. For example, assume Company X owns portable units A, B, C, D, and E. Portable unit A would have its own "site" rating regardless of where, or at how many locations, unit A might have been located during the compliance period. Similarly, portable units B, C, D, and E would have their own "site" ratings. Those site ratings would then be averaged in and utilized in determining Company X's classification along with all other sites owned or operated by Company X. Several program areas including air permitting, water quality, and municipal solid waste authorize or permit units or facilities which are routinely moved, and it is important that the rule account for such portable units and facilities. Finally, "and person" was also added to the final sentence, and "will" was changed to "shall," both for the same reasons listed previously.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(a). The commenters stated that the compliance performance classification should not be limited to only a site, but should also be for the "regulated entity," or person. LCVEF, DAR, SEED Coalition, and ACT stated that HB 2912 requires the consideration of all facilities in consideration of compliance history performance. Similarly, TCONR stated that the legislation does not limit the classification to a "site" and in fact references "a person's compliance history" and "classifications for regulated entities." ACT stated that the commission is not precluded from classifying performance at a single site, but that it must also classify a person's compliance history. TCONR further asserted that the site approach, as proposed, could penalize a high performer who purchases a poor performing site. 477 individuals added that consideration "must also be made to allow for following a given entity," even when the entity operates under several different names. One individual stated that the way a company manages its facilities overall, even though it may vary from site to site, will provide a good idea regarding how the company will handle a new or expanded facility. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals support the comments made by ACT.

The commission agrees that TWC, §5.754 requires the classification of a person's compliance history. The commission is retaining the site classification also. The commission believes this meets legislative intent because this is the mechanism through which the commission can determine a person's classification. The commission disagrees that the site approach could penalize a high performer which purchases a poor performing site, because mitigation for such instances is included in adopted §60.2(e)(3). Regarding an entity operating under several different names, the definition of "person" was addressed in §60.1, relating to the components of compliance history.

Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(a). The commenters expressed concerns that certain portions of the proposed rule, specifically proposed §60.2(a) and (d), are not consistent with the legislative directives in TWC, §5.754, to "establish a set of standards for the classification of a person's compliance history," contending that the legislature did not intend that acts or omissions of one person would reflect on the compliance history of another person. While the commenters stated that although they believe the mitigating factors in proposed §60.2(f)(3)(B) and (C) are "a step in the right direction," they do not believe this is adequate. As such, they have provided recommended rule changes to further address the issue, and further recommended that the commission "clarify the limits established in these changes, if adopted, in the preamble to the final rule. We are not recommending that the TNRCC do away with the site classification ranking. We appreciate that it is necessary to rank each site as opposed to each person for implementation and use purposes. We believe, however, that the changes discussed ... provide a site-by-site approach that is consistent with the legislative directive in the Sunset Bill." Specifically, Allied, BFI, TxSWANA, and NSWMA recommended that: the text of the first sentence in proposed §60.2(a) be changed from "classify each site as needed" to "classify each person's site history as needed"; the text of the sentence which, as they proposed elsewhere in this preamble, would now be §60.2(a)(2) read "each person's site history will be classified as"; and the text of proposed §60.2(d) be modified to include "for the same person" at the end of the sentence. Allied, BFI, TxSWANA, and NSWMA added that, if the commission chooses not to adopt the changes recommended, they have provided an alternative that would add new §60.3(f) regarding change of ownership moratorium, which is discussed elsewhere in this preamble.

The commission has modified adopted §60.2(a) to indicate that a compliance history classification will be developed for each site and person. Adopted §60.2(e) establishes the standards for the classification of a site and person's compliance history. The commission adopted a specific mechanism in §60.1 that takes into account ownership changes as TWC, §5.753(b)(4) requires that changes in ownership be included as a component of compliance history. The statute does not direct the commission to shorten the compliance period reviewed based upon changes of ownership. The commission recognizes that every site has its unique circumstances, and has adopted §60.2(e)(3)(A)(iii) and (B), whereby the executive director may reclassify a poor performer site if it is acquired by a new owner or is operated by a new operator. The commission disagrees that any change to this language is necessary.

AquaSource, V&E, WM, TAB, Brown McCarroll, TCC, Allied, BFI, TxSWANA, NSWMA, MMM, TXOGA, OxyChem and Oxy Permian, Huntsman, BP, and TXI commented regarding proposed §60.2(a). The commenters expressed concern that the proposal to reevaluate compliance histories on a six-month interval raised a resource issue for the agency, which it asserted lacked sufficient staff to compile compliance histories. Additionally, they argued that there is nothing in the statute that requires reevaluation this often. Similarly, several of the commenters suggested that the reevaluation take place on an annual basis rather than every six months. TXI suggested instead that the classification would need to be reevaluated when a new action under §60.1(a)(1) is taken, and added that the language in the classification would need to be very clear that it is only a "snapshot in time" and is only intended to be utilized for the purpose for which it was prepared.

The commission agrees with the recommendation to conduct annual classifications. The statute requires the commission to classify regulated entities according to their compliance history, but does not require a specified frequency of classification. Annual classifications will meet statutory objectives and conserve limited agency resources. Section 60.2(a), as adopted, has been clarified to reflect that beginning September 1, 2002, the executive director will evaluate the compliance history and determine the appropriate classification as needed for permitting, enforcement, announced investigations, and participation in innovative programs. On September 1, 2003, and annually thereafter, the executive director will evaluate compliance history and determine the appropriate classification for all sites and persons. However, the commission does not agree that compliance histories should only be reevaluated when a new action is taken. The commission has determined that a regularly-scheduled reevaluation is necessary because it allows the executive director to assess compliance history for planning purposes such as announced versus unannounced investigations and additional assistance and oversight of poor performers. Additionally, regular reevaluation allows the commission to consider whether proceedings should be initiated to revoke a permit, or to amend a permit where statutes allow, of a poor performer or someone whose performance is unacceptable.

In regard to sanitary sewer overflows (SSOs), Fort Worth commented regarding proposed §60.2(a). Fort Worth recommended that the definition of site be modified "to reflect that each street address where a SSO occurs within a municipal sewer collection system will be deemed a separate 'site' for purposes of the compliance history rules." Fort Worth stated that this is how such events are currently tracked by the agency, but added that if the definition of site is left as proposed, all sewer collection lines feeding a wastewater treatment plant could be deemed to be the same "site."

The commission does not agree that it is necessary to modify the definition of "site" as proposed by the commenter, because the collection system is considered an integral part of the permitted facility and as such will be considered the same site for compliance history purposes. However, the commission would also note that the complexity of municipal wastewater treatment systems is recognized in adopted §60.2(d)(2)(A)(vi), and as such will be taken into consideration when considering repeat violator status. No changes have been made in response to this comment.

ATINGP, H&W, ExxonMobil, TXOGA, and 7-Eleven commented regarding proposed §60.2(a). ATINGP recommended that the definition of site be modified to read: "'Site' shall mean all *regulated* units, facilities, equipment structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property used in connection with the regulated activity *located at the same address*." ATINGP recommended the modification to the first sentence to clarify that the definition of sites applies only "to sites with regulated facilities." ATINGP recommended the modifications to the second sentence to clarify that "property used in connection with the regulated activity" must be located at the same address referenced in the first sentence. H&W recommended amending part of this subsection to read, "Site includes any property used in connection with the regulated activity, which property is owned or operated by the owner or operator of the site." H&W asserted that this is necessary to keep from including reference to violations at an unrelated treatment, storage or disposal facility in a site's compliance history. ExxonMobil suggested that the second sentence in the definition of "site" be modified to read, "Site may include any other property used as an integral part of the regulated activity," so as to clarify who is included in a single compliance history, and keep from opening up "unintended linkage." TXOGA provided the same comment and suggested language, stating that this would clarify the inclusion of nearby properties, such as docks, located at a separate physical address, which are critical to the "site" operation. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. In a similar vein, 7-Eleven stated that the language should be modified to clarify that "site" includes only the property "used in conjunction with TNRCC-regulated activity."

The commission agrees with these comments in part. Specifically, the commission has modified the text of this subsection in part to read, "... 'site' means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person.'" The commission agrees that this change is appropriate in order to clarify that, in this definition, the word *regulated* applies not just to sources, but to units, facilities, equipment, and structures as well. Additionally, the commission has modified the next sentence to read, "Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location." The phrase "at the same street address or location" has been added in part to reflect that the activity will be in the same general physical location, although it may not literally be at the same street address, and coupled with the addition of the phrase "identified in the permit or," is intended to address situations such as those raised by TXOGA where for instance docks are nearby, and are critical to site operation, but are not located at the same street address. The commission does not agree that it is necessary to add the phrase "which property is owned

or operated by the owner or operator of the site" to the second sentence regarding "site," because the preceding sentence already addresses this issue.

TMRA commented regarding proposed §60.2(a), recommending that the last sentence of the text of this provision be amended to read, "Each person's site history will be classified as:". TMRA stated that the statute refers to a "person's" compliance history. Additionally, the commission must determine whether a "person" is a repeat violator. As such, TMRA asserted that the intent is that the focus should be on a person's acts rather than the acts of previous owners or operators of a site.

The commission responds that it agrees that the statute refers to a "person's" compliance history, and it has modified the rule to include the classification of a person as well as a site.

Reliant, TAB, and AECT all commented, regarding proposed §60.2(a), that they believe that five classifications are appropriate (high, high average, average, low average, or poor) as a single category for average is overly broad. Reliant went on to say that this approach would allow a person to have a better idea of where they stand in the classification scheme, and could assist them in improving their classification. TAB and AECT provided similar comments. TXU supported the comments made by AECT.

The commission declines to make the recommended change. Upon careful consideration, the commission has determined that it is appropriate, to denote three classifications of performers, consistent with HB 2912. Specifically, TWC, §5.754(b), establishes a minimum of three classifications for compliance history. The framework of §60.2 allows the commission, as well as the regulated community and the public, to determine the site rating based on a point system of major, moderate and minor violations; investigations; and implementation of a certified EMS under Chapter 90. Point ranges are then employed to assign a site a classification based upon its compliance history. These ranges clearly indicate the "standing" of the site and whether improved compliance with environmental laws and regulations is needed. The point ranges identified in §60.2(e)(2) and corresponding analysis are discussed in more detail in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Lastly, site ratings, as well as the site's and person's classifications, will be posted on the commission's website. A classification system based on three categories provides a clear and meaningful framework while apprising a person or site of its standing within this framework.

MMM commented regarding proposed §60.2(a). MMM asked whether a company can change its site classification from "poor" to "average" or "high" and, if so, how this can be accomplished?

The commission responds that a person can change its classification. In fact, the intent of the rule is to provide an incentive for all persons to strive to have the best compliance possible. The agency is willing to work with any person, especially poor performers, as noted through the actions described in adopted §60.3(b) and (d). The agency is required under TWC, §5.754(g), to provide additional oversight of poor performers, and if the person is improving its environmental performance at its site, that improvement will be documented in agency investigations and future compliance histories. A person can also implement "positive" compliance measures at its site, such as performing an approved environmental audit or implementing an EMS to assist in improving its performance. Furthermore, because the compliance history period is a "rolling" five-year window, simply through the passage of time improved compliance performance will be reflected in the lack of, or reduced number of, violations. In achieving and maintaining compliance with applicable rules, an entity can improve its classification.

V&E, WM, TAB, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(a). V&E and WM recommended the addition of a new §60.2(a)(1), the end result of which would also be to make the phrase "Each site will now be classified as:" which would become new §60.2(a)(2), with proposed paragraphs (1), (2), and (3) renumbered to subparagraphs (A), (B), and (C) under this new paragraph (2). The new language recommended by V&E and WM is as follows:

"(1) Following the September 1, 2003 classification, the executive director shall publish notice of each site classification in the Texas Register. Any person wishing to challenge the initial classification of a site must notify the executive director in writing no later than 30 days after publication of a site's classification. (A) The challenge shall set forth the basis for the dispute of the executive director's classification, and shall provide all documentation and argument for consideration of additional compliance history components, as defined in §60.1, or reevaluation of compliance history components already considered and recalculation of the site point score as determined below in paragraph (f). (B) If the person raising the challenge is other than the owner of the site, the owner of the site shall be notified and provided a copy of the challenge within 14 days of the executive director' receipt of the challenge. For purposes of this section only, the owner of a site is the permit holder(s) for the site. The owner shall have 14 days to reply to the challenge to the executive director and shall provide a copy of any reply to all persons that have challenged the site rating. (C) Within 30 days of the receipt of the reply or 45 days of the receipt of the challenge, whichever is later, the executive director shall evaluate the challenge(s) and reply(ies), if any, and notify the challenger and owner of the executive director's decision regarding the challenge. (D) A motion to overturn the executive director's decision may be filed within 10 days after the executive director's decision regarding the challenge is received by the challenger and owner. The disposition of any motion to overturn shall be determined in accordance with the provisions of §50.139(f). (E) The annual classifications made after the classification beginning September 3, 2002, shall be subject to the review process set forth in subparagraph (A) - (D) of this section but challenges shall be limited to evidence of new compliance history components resulting from events that occurred or actions that have been taken or concluded since the last site compliance history rating was determined, except where a compliance history component that predates the previous evaluation date is offered by someone other than the owner and the owner knew or should have known of the compliance history component. This section is limited to new compliance history components and does not apply to compliance history components previously included in the executive director's evaluation or the scoring of previously included components. (F) Notwithstanding any limitation in this section, no person is precluded from raising issues regarding the site or person's compliance history in urging permit requirements or conditions to the executive director or the commission. However, this provision is limited to requesting new or additional permit requirements to the executive director or commission and shall not be construed to allow for reevaluation of the site's compliance history classification or use of the compliance history classification."

Allied, BFI, TxSWANA, and NSWMA recommended the same language, except that they did not include subparagraph (F) in their recommendation. Allied, BFI, TxSWANA, and NSWMA stated that this proposal includes a process for initial appeals of classification decisions, providing entities a fair and adequate opportunity to challenge classifications to correct mistakes or urge the use of mitigating factors. They also asserted that without this process, the agency could be exposed to literally hundreds, even thousands of simultaneous appeals. TAB commented that it supports V&E's comments regarding establishing a process to challenge a site's compliance history classification and setting up a finite amount of time for such a consideration, adding that "it would be unfair and duplicitous to continue to subject companies to review of their 5-year compliance history every time they come before the agency for a permit or other authorization." WM stated that it recommends this addition to the rule because the proposed rule will allow for different interpretations, with the agency exercising discretion and judgment in evaluating compliance history components and classifications, resulting in "fertile ground for dispute." Therefore, WM believes the classification process and any resulting disputes should be settled outside the contested case process. WM asserted that the recommended process would result in the consideration, challenge, and settling of compliance history components being addressed annually for all purposes. WM went on to say that, "For components that pre-date the last classification date and escaped review in that classification, a challenge may be brought to include such components and an exception to the closing of the prior classification is provided." WM stated that it is not recommending that compliance history issues "be removed from contested case hearings entirely," that it accepts that compliance history information may prove useful in preparing more appropriate permits, and this is why it recommends subparagraph (E) in particular.

The commission has given careful consideration to the issues raised by the commenters and adopts changes to §60.2 and §60.3 in response. Generally, the amended rules accomplish three overall objectives. First, classification disputes are removed from the contested case process for both permitting and enforcement matters. Second, the rights of parties to introduce evidence relating to actual compliance history are preserved. Third, an informal appeal process is established for the correction of clerical errors in a classification, and a formal appeal process is established for those sites or person classifications that are poor or that have an average performer site rating of 30 points or more, where it can be demonstrated that the challenge would result in a change of classification from poor to average or average to poor.

§60.2(a)(1)

MMM commented regarding proposed §60.2(a)(1), asking whether there will be an automatic confirmation process for entities classified as high performers.

The commission responds that there will not be an "automatic confirmation process" for entities classified as high performers.

§60.2(a)(2)

CPS commented regarding proposed §60.2(a)(2), stating that the term "average performer," as the vast majority of sites will be classified, has a negative connotation, and suggested that the term be replaced with "good performer."

The commission disagrees that any change to the rule is necessary, because the term "average performer" is taken directly from the statute. As such, no change to the rule has been made in response to this comment. The term "average" should not be viewed in a negative context. It is expected that a majority of sites and persons will fall in this classification, and there are no negative consequences as a result of this classification.

§60.2(a)(3)

MMM and ExxonMobil commented regarding proposed §60.2(a)(3). MMM asked whether all of an entity's sites will be classified as poor performers if one site has a poor classification, or if it will be a site-specific classification. Exxon Mobil recommended that the definition of a poor performer be modified to be a person who performs significantly below acceptable levels, asserting that the proposed definition implies that almost half of sites will be poor performers.

The commission responds that each site will have its own classification, and as such it is conceivable that one of a person's sites could have a poor performance classification, while all others of that person's sites would have a high performance classification. Simply having a poor classification at one site does not mean that all other sites will be classified as poor. The commission also notes that the rule has been modified such that a person as a whole will also have a performance classification based upon the average of all individual site classifications for sites owned or operated by that person in the State of Texas. The commission disagrees that the definition of poor performer needs to be modified; the definition of high, average, and poor are taken from the statute, and provide for qualitative definitions as opposed to mathematical definitions. No change has been made in response to this comment.

§60.2(b)

The commission adopts new §60.2(b), concerning inadequate information, to address the requirement of TWC, §5.754(d), which states, "The commission by rule shall establish methods of assessing the compliance history of regulated entities for which it does not have adequate compliance information. The methods may include requiring a compliance inspection to determine an entity's eligibility for participation in a program that requires a high level of compliance." The adopted rule states that if there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as "average performer by default." The word "person's" was deleted from this sentence as it was unnecessary. The adopted rule further states that the executive director may conduct an investigation to develop a compliance history. Additionally, the subsection has been modified to include, "For purposes of this rule, 'inadequate information' shall be defined as no compliance information."

TXOGA suggested, regarding proposed §60.2(b), specifically denoting as "average by default" a site that is average because of inadequate information. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission agrees with this comment and has modified §60.2(b) to reflect that change. Specifically, the revision changes "defaults to 'average performer'" to "shall be designated as 'average performer by default.'" This change provides additional information about the basis for these classifications to interested persons.

AquaSource commented regarding proposed §60.2(b), specifically questioning whether §60.2(b) would apply to "facilities recently acquired by established businesses or those facilities that

are effectively too new to have a compliance history. If so, this would appear a disincentive for companies who would otherwise purchase undercapitalized and/or poorly operated facilities to 'turn around.'"

The commission notes that commission decisions authorizing operation at a new site will take into consideration the person's compliance history at other sites, and the person's ability to comply with all applicable regulations, in accordance with adopted §60.3. With respect to the purchase of an established business, the classification is based on the site. Any prior compliance history within the compliance period continues to apply to the site. The executive director may apply the mitigation factor in adopted §60.2(e)(3)(A)(iii) or (B) to adjust the rating of the site. If there is no prior compliance history for the site, the site's classification will be designated as "average performer by default" under adopted §60.2(b). As adopted, the rule allows for executive director consideration when an average or high performer buys a poor performer. Thus, there should not be a disincentive to purchase undercapitalized or poorly operated facilities.

PIC commented regarding proposed §60.2(b). PIC expressed concern that a new site may receive an average performer classification due to lack of information, and that there may be little or no consideration of the compliance history of the person at other sites in Texas. Additionally, PIC provided two possible alternatives to the language in this subsection. Its first preference would read: "If there is no compliance information about the person's site at the time the executive director develops the compliance history classification, the executive director will use the lowest site rating from among the site ratings determined under subsection (f)(1) for other sites in Texas which the person has owned or operated for the entire compliance period. The classification of the site will then be determined under subsection (f)(2). If there is no compliance information about the person's site at the time the executive director develops the compliance history classification and the person owns or operates no other sites in Texas, then the classification defaults to 'average performer.' The executive director may conduct an investigation to develop a compliance history." PIC's second preference would replace the text "use the lowest site rating from among the site ratings determined under subsection (f)(1) for other sites in Texas which the person has owned or operated for the entire compliance period" with "determine a site rating by averaging the site ratings of all other sites in Texas owned or operated by the person as determined under subsection (f)(1)."

The commission responds that the rule, as adopted, requires classification of a person, as well as each of its sites in Texas. The commission declines to modify the rule to incorporate one of the alternatives suggested by PIC related to how the site classification of an "average performer by default" can be incorporated into a person's classification. In adopted §60.2(e)(1)(L), a person classified as "average performer by default" will be assigned 3.01 points, which is the mathematical average of the average performer group. Without any information, the commission believes this is the most appropriate site rating to include in a person's rating because it is a true average. A person's classification will then be developed by averaging the site ratings of all the sites owned or operated by that person. No change has been made in response to this comment.

C&H commented regarding proposed §60.2(b), stating that the fact that the rule allows for a classification to default to "average" when there is no information on a regulated entity upon which to base a compliance history, and that the agency can investigate the site to create a compliance history, "may create inequitable results for small businesses." C&H provided, as an example, a situation in which a small business is investigated for the first time in order to develop a compliance history classification, the site could end up with a "disproportionately high compliance calculation" resulting in a classification of "poor performer" only because there is no complexity factor or number of investigations by which to divide (and thereby reduce) the compliance rating.

The commission responds that the commenter is correct in assessing the mathematical results of this scenario. The commission has intended for the site classifications to reflect the compliance performance of the site overall. The statute specifically provides for this method. Additionally, the formula for determining classification has been modified to allow for consideration of the number of investigations plus the addition of one point in the denominator. SBEA staff is available to provide compliance assistance to small businesses and local governments at any time.

V&E, TAB, and TXI commented regarding proposed §60.2(b). V&E stated that the rule does not adequately address the legislative requirement to establish "methods of assessing the compliance history of regulated entities for which it does not have adequate information," which could include "requiring a compliance inspection to determine eligibility in a program that requires a high level of compliance." V&E stated that the proposed rule does not make clear what differentiates between adequate and inadequate information. As such, V&E suggested that the rule should provide that the executive director shall conduct a compliance investigation at the request of any person whose site defaults into the average performer category due to inadequate information. ACT commented regarding proposed §60.2(b), stating that the rules should state that the executive director will conduct at least one investigation of a site for which there is no information pertaining to compliance history prior to making any decision regarding a permit renewal or amendment application for the site. In a similar vein, TAB and TXI suggested that the word "no" be deleted from this subsection and replaced with the word "inadequate," as the statute requires the commission to determine compliance history for a company for which the agency does not have adequate information. TAB stated that the agency could have some information about a site, but not enough to develop "an informed classification of the site." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

The commission asserts that it is appropriate to consider, for classification and use purposes, any information the commission has available that reflects the compliance history of a site or person. As a result, the commission has determined that the only circumstance in which the commission will conclude that there is inadequate information such that an entity's classification will default to average under this section of the rule, will be the situation in which there is no compliance information about the site. Based on this analysis, the commission has clarified that, for purposes of this rule, "inadequate information" shall be defined as no compliance information, and has determined that no other change to the rule is necessary in response to this comment.

H&W commented regarding proposed §60.2(b), asserting that clarification is needed in this subsection regarding what type of investigation the agency might perform to develop a compliance history, because if the language "is intended to mean the TNRCC may conduct a compliance inspection of the site, the rule should clearly state this fact, so that site owners and operators will be on notice that they are subject to being inspected whenever they

seek a permit or other agency decision in which the site's compliance history must be considered."

The commission responds that it has adopted language which reflects this intent. The definition of "investigation" included in these rules provides a wide range of options for the commission to use in gathering compliance information and through this rulemaking, regulated entities are on notice of the commission's intent to use any or all of these options. Based on this analysis, the commission has determined that no change in the rule language is necessary in response to this comment. Additionally, regulated entities are already subject to investigation at any time, including when they submit permit applications.

§60.2(c)

The commission adopts new §60.2(c), concerning major, moderate, and minor violations, to implement the requirements of HB 2912, §4.01, which enacted new TWC, §5.754(c)(1). Adopted new §60.2(c) requires the executive director to determine whether a violation of an applicable legal requirement within the commission's jurisdiction is of either major, moderate, or minor significance. This will only apply to violations of applicable legal requirements included in an order, notice of violation (NOV), court judgment, or criminal conviction issued for a violation in the State of Texas. The commission's rationale for categorizing the enumerated violations as either major, moderate, or minor is based on the commission's experience in evaluating the severity of various violations and their impacts, or potential impacts, to human health and the environment. The text of this provision has been corrected from "classifying a person's compliance history" as proposed, to "classifying a site's compliance history" in order to accurately reflect the situation in which violations are designated as major, moderate, or minor.

The commission adopts new §60.2(c)(1) to reflect which violations will be considered major. Major violations are described in adopted new §60.2(c)(1)(A) - (E): a violation of a commission enforcement order, court order, or consent decree; operating without required authorization or using a facility that does not possess required authorization; an unauthorized release, emission or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment; falsification of data, documents, or reports; or any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

The commission adopts new §60.2(c)(2) to reflect which violations will be considered moderate. Moderate violations are set forth in the items adopted in new §60.2(c)(2)(A) - (G): complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit; complete or substantial failure to maintain records, as required by a commission rule or permit; not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements; any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation; complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit; any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; or maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

The commission adopts new §60.2(c)(3) to reflect which violations will be considered minor. Minor violations are the items adopted in new §60.2(c)(3)(A) - (D): performing most, but not all, of monitoring or testing requirements, including required unit or facility inspections; performing most, but not all, of analysis or waste characterization requirements; performing most, but not all, of requirements addressing the submittal or maintenance of required data, documents, notifications, plans, or reports; or maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

Specifically, for major violations as proposed under §60.2(c)(1), the commission has deleted subparagraph (A) regarding violations for which the commission has agreed with the EPA to take formal enforcement action, in accordance with EPA/TNRCC Enforcement Memorandum Of Understanding (MOU) dated April 1, 1999. The commission decided that rather than base violation classification on enforcement initiation criteria, it would be more appropriate to assess these violations using a method similar to the method used in the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment. As a result of this deletion, proposed subparagraphs (B) - (F) have been renumbered and adopted as subparagraphs (A) - (E), respectively. Additionally, the subparagraph proposed as (D) and adopted as (C) has been modified to read "an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment." This subparagraph was restructured and clarified to reflect that the subparagraph addresses only unauthorized releases, emissions, or discharges of pollutants. Because "adverse effects" contemplated in this subparagraph are a reaction to a release, emission, or discharge of pollutants, the commission has adopted that phrase in lieu of the proposed "any action or inaction." In response to comments received recommending two levels of convictions, the subparagraph proposed as (F) and adopted as (E) has been modified to read "any violation included in a criminal conviction which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction." The subparagraph proposed as (G), regarding "any violation similar in character or impact determined by the executive director to be a major violation" has been deleted in response to comments that this was too vague and broad.

With respect to moderate violations as proposed under §60.2(c)(2), the commission has modified subparagraphs (A), (B), and (E) by adding "as required by a commission rule or permit" to the end of the proposed language to clarify that this rule does not create new requirements. The phrase "submit or" has been added to adopted subparagraph (B) just prior to the phrase "maintain records," in order to reflect that this provision addresses not only a person's failure to maintain records, but also the failure to submit records. Subparagraph (C) has been reworded for clarity. Subparagraph (D) has been modified to mirror the language in adopted §60.2(c)(1)(C). The word "required" has been replaced with "a" in adopted subparagraph (E) to correspond with the other change made to this subparagraph, and the word "or" has been deleted from the end of this subparagraph, as it no longer precedes the final subparagraph in paragraph (2). Proposed subparagraph (F) regarding "any violation similar in character or impact determined by the executive director to be a moderate violation" has been deleted in response to comments that this was too vague and

broad. In its place, the commission has adopted "any violation included in a criminal conviction, for a strict liability offense, in which the statute dispenses with any intent element needed to be proven to secure the conviction." Additionally, the word "and" is added to the end of adopted subparagraph (F), as it precedes the final subparagraph in paragraph (2). Finally, the commission has adopted a new subparagraph (G) which states "maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants." This subparagraph has been added to capture those types of operation or maintenance violations that could cause a release, emission, or discharge of pollutants, or that could cause a violation concerning the noncompliant levels of an otherwise authorized release, emission, or discharge of pollutants.

With respect to minor violations as proposed under §60.2(c)(3), the commission has modified subparagraphs (A) - (C) by changing "those violations that indicate that" to "performing" for grammatical consistency with the other subparagraph of this paragraph. Subparagraph (D) was changed to read "maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate" to clarify the difference between moderate and minor operation and maintenance issues. The commission also deleted proposed subparagraph (E) in response to comments asserting that this provision was too vague.

AquaSource stated, regarding proposed §60.2(c), that it believes that violations in NOVs should not be designated as major, moderate, or minor for scoring purposes. AquaSource argued that NOVs are merely allegations by the executive director's regional staff, and are not adjudicated decisions nor competent evidence that any violation actually occurred. Furthermore, AquaSource asserted that a regulated entity has not had an opportunity to present countervailing or rebutting evidence by the time an NOV is issued by staff, adding that it believes that it is inappropriate to classify violations alleged in NOVs because they are based on incomplete, one-sided information. AquaSource requested that the commission delete or clarify that it will not include NOVs as part of the scoring system for major, moderate, or minor classification of violations. As an alternative, AquaSource recommended that a separate category for NOVs be established, and that the formula should score allegations in an NOV as multiplied by 1.

The commission disagrees with this comment. TWC, §5.753, specifically requires the commission to include NOVs as a component of compliance history. Under TWC, §5.754(c)(1), the commission must "determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance" in classifying a person's compliance history. These sections provide the basis for categorizing violations in NOVs as major, moderate, or minor. The commission recognizes that violations in NOVs are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in NOVs than those contained in commission orders. Furthermore, as the statute requires, violations listed in NOVs will not be included in an entity's compliance history if the entity can establish that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. No changes have been made in response to this comment.

AquaSource commented regarding proposed §60.2(c), stating that the major, moderate, and minor classifications "have little meaning without an ability to assess any future changes to the commission's 1999 penalty policy" which AquaSource notes uses a similar classification system. AquaSource further asked when the commission will propose the updates to the penalty policy as mentioned in the proposal preamble, and whether the changes will be "promulgated as a rule pursuant to the Administrative Procedure Act subject to public comment and hearing?"

The commission responds that changes to the penalty policy are outside the scope of this rulemaking; however, the major, moderate, and minor classifications are based on the penalty policy.

V&E commented regarding proposed §60.2(c), suggesting that, for clarity, the text should be changed from "an applicable legal requirement is of major, moderate, or minor significance" to "an applicable legal requirement is a component that is of major, moderate, or minor significance." Additionally, V&E stated that, while it concurs with the application of major, moderate, and minor designations for violations of Texas laws and regulations, it does not believe that it is appropriate for violations of federal and other states' laws to be evaluated in this manner.

The commission disagrees that the suggested change to the proposed rule would add clarity due to the specific meaning and use of "components" in §60.1. The commission also disagrees that violations of federal laws should be exempt from the major, moderate, or minor classification because the state has substantially adopted these same federal regulations as a part of its authorized programs. Violations of other states' laws will not be classified as major, moderate, or minor. No changes have been made in response to this comment.

Fort Worth commented regarding proposed §60.2(c). For the same reasons stated under the discussion of Fort Worth's recommendation for modification to the definition of site in proposed §60.2(a), Fort Worth recommended that an SSO event for a municipal sewer collection system with an approved inflow and infiltration (I&I) prevention program should be classified as either moderate or even a minor violation, rather than a major violation, based upon the degree to which it is determined the SSO was avoidable or otherwise under the control of the city. Fort Worth added that in most cases, an SSO occurs in conjunction with excessive rainfall, and as such is significantly diluted.

The commission responds that it is inappropriate to predetermine the classification of a discharge from an SSO. Such discharges will be assessed based upon the site-specific circumstances. No change to the rule has been made in response to this comment.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, TDA, and UT commented regarding proposed §60.2(c). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF asserted that this subsection is too vague and subjective, stating, "Most violations are likely to come within the 'catchall' language set forth at the end of each category." The commenters stated that, because the rule assigns an objective value to each type of violation within the formula, this subsection should be modified to include more objective descriptions of what constitutes each type of violation. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." UT expressed concern regarding whether this subsection provides adequate guidance on how to characterize violations such that characterizations across the regulated universe will be consistent, and further

questioned "the procedure that will be used to apply these characterizations and whether the entity will have any opportunity for input or appeal." UT asserted that this is particularly important because the executive director has such wide latitude to apply a characterization to "any violation similar in character or impact determined by the executive director..." to be either major, moderate, or minor in significance.

This subsection has been modified, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, to provide more specificity and to follow the assessment of violations similar to the commission's penalty policy. The agency will institute the proper QA/QC for violation classifications and will develop appropriate instruction and guidance material for staff to ensure consistency in violation classification. Finally, the commission notes that this classification is based upon that used in the penalty policy, which has provided consistency in application for the public, regulated entities, and the agency since 1997.

PHA, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c). The commenters suggested that the rule be modified to specifically state that the agency would be classifying violations included in an order or NOV for a violation occurring in the State of Texas.

The commission disagrees that this subsection needs additional clarification. The adoption preamble to §60.1 has already clarified that violations to be classified are those violations of state law or rules or federal laws or regulations occurring in the State of Texas. No change has been made in response to this comment.

TXOGA asserted, regarding proposed §60.2(c), that generally, the ranking of violations as major, moderate, or minor "is too ambiguous for facilities to accurately replicate their rating." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees with the commenter that the process of ranking violations as major, moderate, and minor is too ambiguous for a person to accurately replicate its rating. The commission has, however, modified the descriptions of major, moderate, and minor in response to other comments received for clarity and ease of use, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The descriptions are similar to those in the penalty policy, and as such, penalty policy worksheets may provide assistance in determining designations of major, moderate, or minor. Determination of a site's ranking and classification can be replicated.

§60.2(c)(1)

TXI, BP, and Brown McCarroll commented regarding proposed §60.2(c)(1). TXI proposed that subparagraphs (A), (B), (C), (F), and (G) of this paragraph should be deleted, and stated that subparagraph (D) should be kept as the "primary example" of major significance, along with proposed subparagraph (E) which would involve "knowing violations." TXI asserted that this approach would "result in an emphasis on the nature of the violation itself rather than whether it happens to fall within a certain type of violation." BP asserted that in general, the things which should be designated as major are "felony criminal intent, severe impact to the environment, or violation of a commission order or similar decree," and expressed particular concern with how the discretionary items in the high priority violator (HPV)/significant noncomplier (SNC) criteria would be handled. Brown McCarroll suggested that the rule should exclude self-reported violations from those designated as major, to provide incentives for regulated entities to self-report, unless the violations are otherwise required to be reported by either EPA or the commission. As such, Brown McCarroll recommended that the text of paragraph (1) be modified to read: "Major types of violations are those violations listed below that are not self-reported, where such reporting is not otherwise required by EPA or Commission rule or order:". TXOGA endorsed the comments submitted by Brown McCarroll.

The commission responds that modifications to this paragraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). The commission modified the language in adopted §60.2(c)(1) from "major types of violations" to "major violations." The commission agrees that self-reported violations not otherwise required to be reported should be treated in a less negative manner. Therefore, the commission has adopted language in §60.2(e)(1)(K) that provides positive points for violations self-reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended where the site was granted immunity from administrative or civil penalty for those violations. Additionally, the commission adopted §60.2(e)(3)(A)(iv) as a mitigating factor. This factor includes voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Audit Privilege Act, or that is reported under the Audit Privilege Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

7-Eleven commented regarding proposed §60.2(c)(1). 7-Eleven recommended that this paragraph be modified to require that all major violations consist of an actual or potential adverse effect on human health, safety, or the environment, or actually or potentially prevent the enforcement of regulatory requirements. 7-Eleven asserted that, as proposed, this paragraph and associated subparagraphs imply that certain violations categorized as major will not even have the potential for harmful impacts, and added that the only other category of violation which would justify classification as a major violation would be those which "undermine or prevent the agency's ability to determine compliance." As such, 7-Eleven recommended that this paragraph be revised as follows:

"(1) A major violation is any action or omission in violation of Commission regulations which (a) has caused adverse effects on human health, safety or the environment, (b) has resulted in pollutants being released at levels or volumes sufficient to cause adverse effects on human health, safety or the environment, or (c) which actually or potentially prevents the Commission from determining a person's compliance with commission regulations; and which also involves: {Omit subpara. (D), renumber remaining sections accordingly.}"

The commission responds that modifications to this paragraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). Furthermore, actual harm should not be required in every instance, because where a person may have caused harm but failed to maintain records, the agency will not necessarily be able to show that harm resulted. This would provide a disincentive for recordkeeping and monitoring. The commission decided that rather than base violation classification on when enforcement is

initiated, it would be more appropriate to assess these violations using a method similar to the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment.

7-Eleven commented regarding proposed §60.2(c)(1), recommending that a new subparagraph (H) be added to this paragraph, to read, "notwithstanding the above, for the purpose of determining that a person is a Repeat Violator under Sub-section 60.2(d), 'major violations' shall only include final enforcement orders, court judgments and consent decrees." 7-Eleven stated that the definition of major violation, as used in designating a repeat violator, and in that it includes NOVs, appears to exceed statutory authority, adding, "It is highly unlikely that HB 2912 or resulting TWC Sections 5.752-5.754 were intended to, or actually provided authority to the Commission to deny or modify permits based on the unverified allegations of an NOV."

The commission disagrees with this comment. TWC, §5.753, specifically requires the commission to include NOVs as a component of compliance history. Under TWC, §5.754(c)(1), the commission must "determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance" in classifying a person's compliance history. These sections provide the basis for categorizing violations in NOVs as major, moderate, or minor. The commission recognizes that violations in NOVs are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in NOVs than those contained in commission orders. Furthermore, violations listed in NOVs will not be included in an entity's compliance history if the entity can establish that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. However, the commission notes that the rule has been modified from proposal with regard to what constitutes a major violation. Additionally, the commission has clarified that in order for a site to be designated as a repeat violator, the major violations must be documented on separate occasions. Given these changes, the commission has determined that major violations, whether documented in an NOV or an order, are of such significance that a repeat violator designation is appropriate when triggered according to adopted §60.2(d), except when the executive director determines that the nature of the violations and the conditions leading to the violations do not warrant the designation.

§60.2(c)(1)(A)

V&E, Reliant, TAB, NTMWD, TXI, T&K, H&W, TMRA, UT, ExxonMobil, Valero, AECT, ATINGP, TXU, TIP, Brown McCarroll, TXOGA, 7-Eleven, TCC, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(1)(A). The commenters stated that violations which are more clerical in nature should not be considered major; rather, it should only be those violations which are "substantive and have the potential to cause harm." H&W recommended that each violation in the MOU be reviewed and reclassified "in accordance with the degree to which the violation represents a significant deviation from the regulatory program and the impact the violation has or may have on the environment." TAB, TXI, T&K, ExxonMobil, Valero, TIP, AECT, TMRA, and TXOGA made comments of the same nature, stating that the Memorandum of Agreement was developed for different purposes. TXI and T&K recommended that subparagraph (A) be deleted from the rule. NTMWD, Valero, and TIP also expressed concern with certain "documentation type" violations being included as major violations, asserting that this approach is inconsistent with the commission's penalty policy, which "distinguishes for the purposes of determining the base penalty between violations that harm or have the potential to harm human health or the environment and those violations that are solely related to documentation." TMRA provided similar comments, as did UT, who recommended either deleting this subparagraph from the rule or limiting it to those HPVs or SNCs "that otherwise meet the remaining criteria."

The commission responds that modifications to this subparagraph have been made in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble with regard to §60.2(c). The commission disagrees specifically with the recommendation that every major violation must result in actual or potential harm or must be substantive. Instances of intentional wrongdoing or fraud, or ignoring requirements of orders or failing to obtain authorization may not per se harm the environment, but could undermine the entire system of environmental regulation, and are therefore of major significance. The commission has deleted proposed §60.2(c)(1)(A) because it determined that, rather than base violation classification on when enforcement is initiated, it would be more appropriate to assess these violations similar to the commission's penalty policy which generally assesses significance based upon impact or potential to impact human health, safety, or the environment.

ACT commented regarding proposed §60.2(c)(1)(A), stating that it is supportive of the proposal to make "all SNC, HPV and other similar violations 'major' violations." ACT further asserted that similar types of reporting and monitoring violations in programs which are not the subject of federal authorizations should also be considered major violations, stating, "Accurate, timely and compliant reporting and monitoring are critical to the integrity of all TNRCC regulatory programs." TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission appreciates the positive comment in support of the rules. However, the commission has deleted proposed §60.2(c)(1)(A) in response to other comments received. The commission disagrees with the suggestion that reporting and monitoring violations be classified as major violations. Although a failure to report and monitor is a significant violation, and could make it difficult to determine if one of the violations designated as "major" has occurred, such a violation reflects, at most, potential for a serious environmental consequence. Therefore, the commission has included violations for failing to monitor or report under adopted §60.2(c)(2), i.e. as "moderate violations." In addition, §60.2(c)(1), as adopted, is more consistent with the evaluations made under the commission's penalty policy relating to reporting and monitoring violations, and this consistency is important for uniform application of these rules.

§60.2(c)(1)(A) (proposed as §60.2(c)(1)(B))

AquaSource, V&E, TXI, T&K, Brown McCarroll, TXOGA, TCC, OxyChem and Oxy Permian, Huntsman, and BP commented regarding proposed §60.2(c)(1)(B). AquaSource recommended that the rule be clarified to reflect that the violation of a commission enforcement order, court order, or consent decree would have to occur while the order or decree was still in effect in order to be counted towards compliance history. Additionally, the commenters recommended that any such violation must be of one

of the order or decree's substantive requirements. T&K commented that it is inappropriate to raise violations of commission orders, court orders, and consent decrees to a major classification for violations of minor requirements such as recordkeeping and administrative provisions, and added that these violations should be accounted for in the proposed formula based on the type of violation. TXOGA also stated that not all consent decrees should be counted as major violations, stating that "EPA has recently used large company-wide consent decrees as an effective mechanism to accelerate emission reductions from Pulp & Paper Mills, Electric Utilities, Petroleum Refineries and, more recently, Chemical Refining Operations. They provide a win-win scenario for government, industry and the environment." TXOGA asserted that the proposed rules treat these consent decrees as a "blemish on the affected company's record," and as such will deter others from taking such actions. Therefore, TXOGA asserts that these consent decrees should not be counted as a negative component of compliance history. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA.

The commission acknowledges that some violations of commission orders, court orders, and consent decrees may be for violations that would otherwise be considered moderate or minor violations under the provisions of these rules. The commission believes that a person who is the subject of an enforcement action receives ample opportunity to comply. The commission expects compliance with its orders, EPA orders, and court judgments. Accordingly, it is appropriate to attach increased significance to violations of commission orders, EPA orders, and court judgments, as well as other court orders and consent decrees. Violation of a commission order, court order, or consent decree can only occur while that order or decree is still in effect.

§60.2(c)(1)(B) (proposed as §60.2(c)(1)(C))

FWAF, MMC, OCIW, SSCC, TXI, T&K, H&W, and TXOGA commented regarding proposed §60.2(c)(1)(C). FWAF, MMC, OCIW, and SSCC stated that while they agree that operating a facility without a permit constitutes a major violation, they do not agree that "authorization" should include sources that can quality for a Permit by Rule (Standard Exemption). TXI recommended the deletion of proposed subparagraph (C). In a similar vein, T&K asserted that this should be a major violation only if the facility and authorization are "major," and that "it should not apply to facilities that can be authorized by a permit-by-rule, general permit, or other similar authorization." H&W also stated that it strongly disagrees with the proposed provision categorizing the use of a facility that does not possess required authorization as a major violation, as it asserts that "it is impossible for regulated entities to always know whether a third party facility has obtained all of the required authorization necessary to conduct all of their operations," and as such recommended that this either be changed to minor or deleted from the rule. TXOGA asserted that this subparagraph should be modified by deleting the last phrase stating, "or using a facility that does not possess required authorization," stating that it is redundant, and if the phrase is left, could be read to mean that it is intended to "penalize an operator for using a third party vendor which, unknown to the contracting party, does not hold proper authorization." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that obtaining appropriate authorization prior to conducting a regulated activity is a fundamental part of the regulatory process. It is a person's responsibility to ensure that it possesses all required authorizations and to maintain compliance with such authorizations and applicable rules. Additionally, it is a person's responsibility, when utilizing a third party for such activities as waste disposal, to ensure that the third party has appropriate authorizations in order to ensure protection of human health, safety, and the environment. No changes have been made in response to these comments.

TML, TAB, TCAP, and TCCI commented regarding proposed §60.2(c)(1)(C). TML suggested that operating without necessary authorization be reduced from a major violation to a moderate violation, and based this recommendation on three reasons. First, TML asserted that this designation as a major violation seems to conflict with the Enforcement Initiation Criteria which allows that if certain requirements are met, a person found to be operating without a required permit would be provided the opportunity to come into compliance rather than automatic initiation of a formal enforcement action. Second, TML expressed concern that the rule could be interpreted to apply to a person who has a permit but has failed to pay permit-related fees in a timely manner and are, therefore, operating without the required authorization. And third, TML stated that "there is no distinction built into the rule based on the type of facility that is being operated," giving as an example the distinction, from an environmental standpoint, of a city operating without a required wastewater treatment plant permit versus a city operating a clean air fleet of vehicles without a required permit. TAB stated that, by designating operating without a required authorization as a major violation, it appears that the commission is "loading the compliance history formula in such a way that small business as a whole is almost guaranteed to fail," as this would result in "a large number of well-intentioned small businesses being thrown into the poor category without any real chance to redeem themselves prior to the classification." TAB added that as proposed, this would overturn the Enforcement Initiation Criteria B17, which allows that under certain circumstances, operating a facility without a required permit by rule does not result in automatic enforcement without an opportunity to achieve compliance first (i.e. it is a Category B violation). TCAP expressed similar concerns that this provision conflicts with Enforcement Initiation Criteria B17. TAB and TCAP, therefore, asserted that operating without a required permit by rule should be classified as a moderate violation, allowing persons "who were not aware of the permit by rule requirements to come into compliance within a specified period." In a similar vein, TCCI expressed concerns that some regulated entities would be committing a major violation by operating without required authorization, and asserted that "some voluntary correction opportunities should be given to entities that have been ignorant of the law or were under the impression that they were exempt." As such, TCCI requested that "trying to become compliant" not be counted as "major" if the regulated entity voluntarily enters the permitting process and conforms to the law.

The commission has not modified the rule in response to these comments. The classification of major, moderate, or minor as adopted is more similar to the penalty policy and does not dictate how the commission will address such a violation (e.g., NOV or order), as is the purpose of the Enforcement Initiation Criteria. If the commission addresses a violation for operating without authorization through a NOV, the subsequent assigned point value will be substantially less than if such action is addressed through other means of enforcement. With regard to the concern about

failure to pay permit-related fees in a timely manner, the commission responds that this rule does not impose additional requirements on a permittee. Failure to pay a fee is not treated as operating without authorization. With regard to TML's third point concerning the type of facility that is being operated, the commission responds that §60.1 generally defines the term "permit" to mean licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization. Further, Chapter 60 applies only to persons subject to the requirements of TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. The commission believes that authorization in any form is a critical mechanism for protection of human health, safety, and the environment, and as such, failure to obtain that authorization is of great significance. The commission is not changing its procedure of allowing small businesses to become compliant with permitting requirements in response to NOVs if the agency has not previously notified that person of such requirements. The commission is, however, in this rulemaking, indicating the significance of the need to acquire authorization prior to initiating those activities that require authorization and assigning appropriate points to those violations. A small business who receives an NOV for operating without a permit will receive five points. Only in the event that the person does not obtain the required authorization within a reasonable time will the commission initiate an additional investigation and subsequent enforcement, should the violation be continuing. The commission agrees that most small businesses are well intentioned, and does not anticipate that many of these businesses will be classified as poor performers as a result of this type of violation being considered as major. The commission also encourages TCAP and TAB to remind small businesses of the importance of obtaining authorization prior to engaging in those activities that require authorization.

§60.2(c)(1)(C) (proposed as §60.2(c)(1)(D))

AquaSource, V&E, TAB, AECT, CPS, Valero, ATINGP, TIP, and TCC commented regarding proposed §60.2(c)(1)(D). AquaSource recommended the deletion of the phrase "or that has resulted in pollutants released at levels or volumes sufficient to cause adverse effects on human health, safety or the environment" from this subparagraph, as it believes that there must be some documented harm for a violation to be designated as major. TCC asserted that the word "safety" should be stricken from the rule, as the commission is not charged with regulating safety. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. Similarly, V&E stated that the language in this subparagraph is too broad, that there should be a record of the determination made that the violation is significant, and further that the word "safety" should be stricken from the provision as safety is not part of the commission's mission or under its jurisdiction. As such, V&E recommended the following text to replace the proposed language: "(D) Any action or inaction that has caused significant adverse effects on human health or the environment, or that has resulted in pollutants released at levels or volumes sufficient to cause significant adverse effects on human health or the environment as determined by the executive director." ATINGP also recommended the insertion of the word "significant" prior to "adverse effects" where it appears in the proposed subparagraph, as it asserts the proposal is too vague and does not establish any threshold level to be met. TAB and AECT both made comments regarding the use of the word "safety" in the proposal, stating that it should be removed, as the commission does not have the authority to regulate safety, other than in reference to human health. CPS stated that the language is too vague, and recommended that "adverse effects" be defined, and that the rule designate who will determine whether an action has caused adverse effects. Valero and TIP recommended that the text of this subparagraph be modified to read, "any action or inaction that has resulted in pollutants released at levels or volumes that have caused significant adverse effects on human health, safety, or the environment." Valero and TIP argued that the rule as proposed is too broad, and would encompass too many violations which could arguably have an "adverse effect." Valero and TIP added that, at a minimum, the preamble should provide substantial discussion of what the commission considers an "adverse impact," which would prove useful to both the regulated community and the field investigators. TXU supports the comments made by AECT. ATINGP also requested clarification regarding what types of actions or inactions are contemplated by this provision, and what standard "sufficient to cause an adverse effect" references to. ATINGP stated that as it understands from discussions with commission staff, the provision is intended to correspond with "major violation" as it is described in the penalty policy. The commenter suggested that if this is the case, the rule could be modified to state that "a major violation for purposes of compliance history ranking is 'major violation as defined in the TNRCC's Penalty Policy.'" ATINGP asserted that this would serve two purposes: 1) the regulated community would "have clear notice of the body of law and policy to which the TNRCC will refer in making decisions on which violations are major for compliance history program"; and 2) as the penalty policy is modified, there would not be the need for additional rulemaking.

The commission disagrees that the term "safety" in §60.2(c)(1)(C) should be removed. THSC, Chapter 361, as well as TWC, Chapter 26, specifically define pollution to address "public health, *safety*, or welfare" (Emphasis added). In the Texas Clean Air Act (TCAA), §382.026, authorizes the commission to issue an order under an air emergency under TWC, §5.514. TWC, §5.514, provides that if the commission finds that a general condition of air pollution exists that creates an emergency requiring immediate action to protect human health or *safety*, the commission, with the concurrence of the governor, may issue an emergency order (Emphasis added). Finally, under THSC, §401.001, it is the state's responsibility to protect public *safety* and the environment (Emphasis added). "Safety" is referred to in these statutes in the context of protecting the public, not regulating safety per se. The commission is not extending its authority with the use of the term "safety" in this adopted subparagraph. No change has been made in response to these comments.

The commission modified the language in proposed §60.2(c)(1)(D), adopted as §60.2(c)(1)(C), in response to comments to clarify that this subparagraph describes only unauthorized releases, emissions, or discharges of pollutants. With this clarification, the commission further responds that the rule language concerning "adverse effects" is not overly broad and declines to modify language to include "significant" in this provision.

Examples of major violations under this subparagraph are: a discharge of poorly treated wastewater which caused an immediate fish kill; a large emission of ammonia gas caused by an operator inappropriately opening a valve, causing plant neighbors to experience burning nostrils and tearing eyes; an unauthorized discharge of perchloroethylene to a major aquifer, making that part of the aquifer unusable; and an authorized discharge of material that has high total dissolved solids to an aquifer with drinkable

water which, as a result of that discharge, can now only be used for certain livestock watering and limited irrigation.

Other examples of major violations under this subparagraph are: a noncompliant discharge of poorly treated effluent that contains pollutants at a level that over time would deplete certain aquatic population, thereby depriving the fish community of a food resource; or a short-term noncompliant discharge of a pollutant at levels that scientific literature indicates is harmful, yet the buffering capacity of that particular water body at that specific location assimilates the pollutant without the harmful effects occurring. Another example includes a noncompliant emission of an air pollutant at a concentration and volume sufficient to cause chemical burns on the skin; however, due to high winds, the pollutant is dissipated prior to encountering plant neighbors.

Adverse effects will be evaluated based on a case-by-case analysis of the unauthorized release, emission, or discharge. The commission will utilize peer-reviewed scientific literature, as well as applicable standards, such as 30 TAC Chapter 307, relating to Texas Surface Water Quality Standards, to evaluate the harm the pollutant may cause.

ATINGP commented regarding proposed §60.2(c)(1)(D), requesting that the commission "consider a rural area exemption to the second clause of" subparagraph (D), as this clause "provides that a major violation need not actually cause an adverse effect." ATINGP asserted that a "release from a facility located in a rural area with no nearby receptors should be weighted differently than a release from a facility in the middle of a populated area that actually causes significant harm." As such, ATINGP requested that "a release in quantity sufficient to cause a significant adverse effect... with no human habitat within one-half mile from the property line be considered a moderate violation instead of a major violation."

The commission disagrees with this recommendation because it is charged with the protection of human health, safety, and the environment, and an exemption as proposed by the commenter would not be protective of environmental receptors. As such, no change has been made in response to this comment.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(c)(1)(D). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF recommended that the text of this subparagraph be modified from "...or that has resulted in pollutants released at levels..." to "...or that has resulted in the unauthorized release of pollutants at levels..." The commenters asserted that this modification should be made to clarify that only unauthorized releases would be considered a major violation. By way of example, the commenters stated that rules and/or permits often allow sites to discharge water containing pollutants. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission agrees that the rule should be specific to unauthorized releases, and has modified the rule accordingly.

Onyx commented regarding proposed §60.2(c)(1)(D). Onyx stated that it is a commercial hazardous waste treatment and storage facility, for which the majority of wastes handled are not "identified, packaged, or transported" to its sites by its own personnel. As such, Onyx stated that it does not believe that releases that occur at its facilities "due to inaccurate profiling of wastes" by the generator, the shipment of wastes by the generator "that do not meet approved profiles, or releases from containers not packaged by Onyx" should be considered as a factor in Onyx's compliance history classification, provided Onyx "immediately initiates efforts to control and remediate the release."

The circumstances described in this comment constitute violations under current rules. Further, TWC, §26.121, provides that it is a violation to "cause, suffer, allow, or permit the discharge of any waste or the performance of any activity" in violation of Chapter 26 or any commission rule. TWC, §26.121, also provides that no person may "commit any other act or engage in any other activity which in itself or in conjunction with any other... activity... will cause pollution of any of the water in the state...." To the extent the circumstances described in this comment are subject to this prohibition, they constitute a violation and may be subject to enforcement. To the extent that they are mitigated by immediate control and remediation by the facility in question, those extenuating circumstances can be taken into account in case-by-case enforcement-related decisions. No changes have been made in response to this comment.

Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c)(1)(D), stating that this subparagraph should be more clearly defined to reflect that incidents that are not under the regulatory authority of the commission would not be included in this compliance history program. As such, the commenters recommended that the proposed text be modified to read, "(D) any action or inaction that is also subject to the regulatory authority of the TNRCC that has caused adverse effects...."

The commission does not agree that the commenters' suggested change is necessary. Section 60.1 specified that this rule is applicable to authorizations requiring approval or disapproval by the agency. Further, the commission modified the subparagraph to designate as a major violation an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment. Thus, should EPA issue an NOV for an unauthorized emission, that violation would be within the jurisdiction of the commission. Alternatively, should EPA issue an NOV related to an effluent violation covered by a TPDES permit, that unauthorized discharge is also under commission jurisdiction.

T&K commented regarding proposed §60.2(c)(1)(D), stating that it supports this provision, adding it believes this is the only provision consistent with the commission's stated rationale in the proposal preamble.

The commission appreciates the positive comment in support of the rule, and notes that the subparagraph has been restructured and clarified to reflect that the subparagraph addresses only unauthorized releases, emissions, or discharges of pollutants.

§60.2(c)(1)(E) (proposed as §60.2(c)(1)(F))

AquaSource, V&E, WM, TXI, T&K, ExxonMobil, Allied, BFI, TxSWANA, and NSWMA commented about proposed §60.2(c)(1)(F) concerning the assessment of all criminal violations as "major violations" under this subparagraph, which is associated with proposed §60.3(a)(7)(A) ("Repeat violator"). The commenters suggested that felonies should be considered as major violations, but misdemeanors should be considered moderate violations.

The commission has determined that criminal convictions should be classified as "major violations" when the prosecutor must prove a mens rea or intent element to support the underlying

criminal violation, but should be classified as "moderate violations" when the conviction is based on a strict liability statute. Many environmental crimes are not classified as misdemeanors or felonies. The commission has determined that any criminal violation where the prosecutor is required to prove a culpable mental state is of such a serious nature that the violation should be classified as a major violation for the purpose of this rule. The revised rule language, as adopted at §60.2(c)(1)(E), states "any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction." Additionally, adopted §60.2(c)(2)(F) states "any violation included in a criminal conviction, for a strict liability offense, in which the statute dispenses with any intent element needed to be proven to secure the conviction," and adopted §60.3(a)(6)(A), proposed as §60.3(a)(7)(A), states, "a criminal conviction classified as major under §60.2(c)(1)(F) of this title."

Proposed §60.2(c)(1)(G)

Fort Worth COC, C&H, Reliant, AECT, TXI, T&K, H&W, TMRA, Brown McCarroll, 7-Eleven, Garland, San Antonio, GEUS, SMEC, Allied, BFI, TxSWANA, and NSWMA all provided similar comments regarding proposed §60.2(c)(1)(G), stating that the executive director should not have the open-ended discretion to classify a violation as major. Several commenters recommended that this subparagraph be deleted. TXOGA endorsed the comments submitted by Brown McCarroll.

The commission responds that this subparagraph has been deleted in response to these comments as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

AquaSource and V&E commented regarding proposed §60.2(c)(1)(G). AquaSource recommended that the commission should make the decision as to whether a violation is similar in character or impact to be a major violation, rather than the executive director, and stated that the executive director does not have "judicatory powers" to make this decision. On the other hand, V&E stated that proposed §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as "similar in character or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph.

The commission responds that this subparagraph has been deleted as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)

PIC, Valero, TIP, and one individual commented regarding proposed §60.2(c)(2). PIC disagreed "with the rule's classification of the following violations as moderate: A) complete failure to monitor, analyze, or test a release, emission, or discharge; and B) complete failure to maintain records. Such violations demonstrate a blatant disregard for regulatory processes and authority and seriously call into question the competence of the responsible owners and operators. Therefore, PIC submits that these are 'major' violations. Furthermore, the classification of these violations as 'moderate' potentially contradicts §60.2(c)(1)(D). These violations could be 'major under that provision because a complete failure to monitor or maintain records could constitute 'inaction' that contributes to adverse effects on human health or the environment." One individual expressed similar concerns, stating that complete or substantial failure to monitor should be a major violation, because without proper monitoring, it cannot be determined whether the major violations listed in proposed §60.2(c)(1)(D) have occurred. Valero and TIP stated that the phrase "complete or substantial failure" should be more clearly defined in proposed subparagraphs (A), (B), and (E) of this paragraph, or within the preamble.

The commission responds that it disagrees with the comment related to classifying the violations in proposed §60.2(c)(2)(A) and (B) as major violations. As discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, the commission has generally patterned these classifications on the commission's penalty policy. The commission does not dispute the importance of proposed subparagraphs (A) and (B) in the regulatory process. However, the commission has determined that it is appropriate to distinguish these violations from those categorized as major. The adopted rule classifies monitoring or testing that is mostly adequate as minor, because in this case there would be a substantial amount of information with which to evaluate a facility. However, where there has been a complete or substantial failure to monitor or test, then the violations are classified as moderate. This methodology is similar to the methodology used in the commission's penalty policy. The use of similar methodology is important for consistency and ease of application. The commission will evaluate releases, emissions, and discharges separately from the requirements to monitor or maintain records. Regarding the phrase "complete or substantial failure," the commission disagrees that proposed subparagraphs (A), (B), and (E) should be more clearly defined. The commission responds that these are the types of assessments that commission staff routinely make, and in context with §60.2(c)(2) such assessments are readily understood in accordance with the plain meaning of the words. No changes have been made in response to these comments. The commission did, however, change the language from "moderate types of violations" to "moderate violations."

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(2), suggesting the addition of new subparagraph (G) which would read, "any other violation included in a criminal conviction." V&E, Allied, BFI, TxSWANA, and NSWMA asserted that the suggested change would recognize that criminal conduct varies widely and convictions can result from a range of relatively minor violations to a much greater deviation of the law. WM recommended that the commission distinguish between misdemeanor and felony counts. V&E further asserted that its suggested changes/additions to proposed §60.2(c)(1)(F) and (2)(G), and (f)(1)(G) and (H) recognize that "many environmental crimes are not classified as misdemeanors or felonies."

The commission agrees that many environmental crimes are not classified as misdemeanors or felonies, and has therefore determined that it is appropriate to distinguish between those criminal convictions that require the prosecutor to prove a culpable mental state or a level of intent from those criminal convictions where the statute plainly dispenses with any intent element. The commission has determined that any criminal violation where the prosecutor is required to prove a culpable mental state is of such a serious nature that the violation should be classified as a major violation for the purpose of this rule. The commission has revised the rule as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(A)

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, T&K, TDA, and TXOGA commented regarding proposed §60.2(c)(2)(A). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF recommended that the text of this subparagraph be modified from "Complete or substantial failure to monitor..." to "Complete or substantial and unexcused failure to monitor...." The commenters asserted that this modification should be made to clarify that only unauthorized releases would be considered moderate. By way of example, the commenters stated that commission rules allow certain discharges to occur without sampling under certain conditions. Similarly, T&K requested clarification to the effect that this provision applies to the failure to undertake such activities which are "required by rule or permit for which the agency issues" an NOV, and does not apply to "mechanical breakdowns or other data failures of continuous opacity monitoring systems (COMs) and/or continuous emissions monitoring systems (CEMs) that are reported by the business entity." Further, T&K requested clarification regarding what constitutes a "test." TXOGA stated that this subparagraph should be modified to add "as required" after "test," so as to reflect that this is not intended to establish new requirements. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that §60.2(c)(2)(A) has been clarified in response to comments as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule lists "monitor, analyze, or test" to include all terms typically utilized to indicate evaluation of the quality or characteristics of a release, emission, or discharge. The rule is not intended to impose new requirements for monitoring, analyzing, and testing. Additionally, the commission notes that if the failure is truly excused, enforcement would not result.

§60.2(c)(2)(B)

T&K, TXOGA, and one individual commented regarding proposed §60.2(c)(2)(B). The individual stated that complete or substantial failure to keep records should be a major violation, because without proper recordkeeping, it cannot be determined whether the major violations listed in proposed §60.2(c)(1)(D) have occurred. T&K requested clarification regarding the scope of this provision, asking whether it is "a failure to have any records for a program area, ...; a failure to have any records in one aspect of a program area; a failure to maintain records required by all program areas; or even a failure to have a single record such as one daily production record." TXOGA stated that this subparagraph should be modified to add "as required" at the end of the sentence, so as to reflect that this is not intended to establish new requirements. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees that adopted §60.2(c)(2)(B) should be a major violation. While a failure to maintain records is a significant violation and could make it difficult to determine if one of the violations designated as "major" has occurred, the violation reflects, at most, potential for a serious environmental consequence. The subparagraph has been modified to clarify that it describes a failure to comply with a specific rule or permit, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the phrase "as required by commission rule or permit" has been added to the text to reflect that this rule is not intended to impose new requirements.

§60.2(c)(2)(C)

T&K and 7-Eleven commented regarding proposed §60.2(c)(2)(C). T&K asked whether this provision is "intended to include a short lapse in certification." 7-Eleven recommended that the text of this subparagraph be modified "to clarify that 'having' an inadequately licensed operator is not a violation of law; i.e., only 'use' of such an operator constitutes a moderate violation."

The commission responds that §60.2(c)(2)(C) simply describes a violation type and is not specific to the length of time that a violation occurs. This subparagraph has been reworded for clarity as described previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(D)

CPS, Valero, TIP, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(c)(2)(D). CPS objected to the designation of "any release, emission or discharge that is not classified as a major source" as a moderate violation, and recommended that "emissions that are properly reported as upset, maintenance, start-up or shutdown events or deviations under Title V be exempted." CPS stated that categorizing releases that occur under certain circumstances as "criteria for poor compliance" unjustly penalizes persons who properly maintain their equipment, and added that properly reported releases should not be held against a person's good compliance history. Valero and TIP stated that the language in this subparagraph should be modified to read, "any unauthorized release, emission, or discharge that is not classified as a major or minor violation." Garland, San Antonio, GEUS, and SMEC asserted that the text should be modified to read "any reportable release," because as proposed, the rule would include insignificant releases which are not violations under state or federal law.

The commission responds that it has revised the rule by adding the word "unauthorized" in response to comments as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule language specifies that a release must be sufficient to cause adverse effects on human health, safety, or the environment.

§60.2(c)(2)(E)

CPS commented regarding proposed §60.2(c)(2)(E). CPS objected to the proposed language, asserting that a person would "be held accountable for inspections carried out by the TNRCC regional office," which the person has no control over. CPS added that the language in the proposal preamble which stated "...generally the more complex a regulated program, the more frequent the agency's investigation rotation schedule," doesn't take into account the differences in size of, and number of investigators in, each TNRCC Regional Office.

The commission responds that this subparagraph concerns inspections that the person is required to perform under commission rules or under a permit provision. The language has been clarified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(2)(F)

V&E, TMRA, 7-Eleven, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(2)(F). V&E, TMRA, Allied, BFI, TxSWANA, and NSWMA stated that §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as "similar in character

or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph. 7-Eleven recommended that the language of this subparagraph be modified to read, "Any otherwise major or minor violation of similar character or impact determined by the Executive Director to be a moderate violation," asserting that this change would clarify that "it is within the Executive Director's authority to revise downward the point value of a major violation, or to revise upward that point value of a minor violation."

The commission responds that this subparagraph has been deleted from the rule in response to comments, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(c)(3)

Valero and TIP commented regarding proposed §60.2(c)(3), stating that the phrase "those violations that indicate that most, but not all..." should be more clearly defined in proposed subparagraphs (A) - (D) of this paragraph, or within the preamble.

The commission disagrees that proposed subparagraphs (A) - (C) should be more clearly defined. These are assessments that commission staff routinely make and in context with §60.2(c)(2) are readily understood in accordance with the plain meaning. Proposed §60.2(c)(3)(D) was deleted and replaced with operational and maintenance language as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission modified §60.2(c)(3) by changing "minor types of violations" to "minor violations." The commission has also deleted the phrase "those violations that indicate that" from proposed subparagraphs (A), (B), and (C).

ATINGP commented regarding proposed §60.2(c)(3). ATINGP asserted that because there is no category of self-reported violations, there is no incentive to self-report. ATINGP stated that it believes that all self-reported violations should be considered minor, but recommended the following be added as an additional subparagraph designating certain violations as minor: "non-compliance with a permit condition or other applicable requirement occurs during the compliance period due to weather conditions or other factors and the entity self-reports these violations."

The commission agrees that self-reported violations not otherwise required to be reported should be treated in a positive manner. Therefore, the commission has adopted language in §60.2(e)(1)(K) that provides positive points for violations self-reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, where the site was granted immunity from administrative or civil penalty for those violations. Additionally, the commission adopted §60.2(e)(3)(A)(iv) as a mitigating factor. This factor includes voluntarily reporting a violation to the executive director that is not otherwise required to be reported, and that is not reported under the Audit Privilege Act, or that is reported under the Audit Privilege Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency. No other changes have been made in response to this comment.

§60.2(c)(3)(A)

One individual commented regarding proposed §60.2(c)(3)(A), stating that partial or inadequate monitoring or testing should be a moderate violation, because it could substantially impair the ability to evaluate a facility, and as such should not be considered minor.

The commission disagrees with this comment. The commission believes that the extent of the deficiency should be a consideration in determining whether a violation is moderate or minor. The adopted rule classifies monitoring or testing that is completely or substantially deficient as moderate, because it could substantially impair the ability to evaluate a facility. This methodology is similar to the commission's penalty policy. The commission believes this approach is important for consistency and ease of application.

§60.2(c)(3)(B)

One individual commented regarding proposed §60.2(c)(3)(B), stating that partial or inadequate monitoring, testing, or record-keeping should be a moderate violation, because it could substantially impair the ability to evaluate a facility, and as such should not be considered minor.

The commission disagrees with this comment. The extent of the deficiency should be a consideration in determining whether a violation is moderate or minor. The adopted rule classifies monitoring or testing that is mostly adequate as minor, because in this case there would be a substantial amount of information with which to evaluate a facility. This methodology is similar to the commission's penalty policy. This approach is important for consistency and ease of application.

§60.2(c)(3)(E)

V&E, TMRA, 7-Eleven, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(c)(3)(E). V&E stated that proposed §60.2(c)(1)(G), (2)(F), and (3)(E) should be deleted as the phrase "similar in character or impact" is too vague. In the alternative, V&E suggested adding some certainty by inserting "significant human health or environmental" prior to the word "impact" in each subparagraph. TMRA, Allied, BFI, TxSWANA, and NSWMA, having also recommended the deletion of proposed §60.2(c)(1)(G) and (2)(F), suggested that subsection (c)(3)(E) be modified to read: "any other violation not categorized as a 'major' or a 'moderate.'" Allied, BFI, TxSWANA, and NSWMA further included "under this section" at the end of the proposed language. Allied, BFI, TxSWANA, and NSWMA TMRA, Allied, BFI, TxSWANA, and NSWMA asserted that it is appropriate that minor serve as the default classification. 7-Eleven recommended that the language of subparagraph (E) be modified to read, "Any otherwise major or moderate violation of similar character or impact determined by the Executive Director to be a minor violation," asserting that this change would clarify that "it is within the Executive Director's authority to revise downward the point value of either a major violation or a moderate violation."

The commission responds that proposed §60.2(c)(3)(E) has been deleted from the adopted rule, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(d)

The commission adopts new §60.2(d), concerning repeat violator, to address the requirements of TWC, §5.754(c)(2), which states that the commission, in classifying a person's compliance history, shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. The commission may classify

a person as a "repeat violator" at a site when, on multiple, separate occasions, a major violation(s) as described in §60.2(c)(1) occurs during the compliance period based upon the criteria in adopted §60.2(d)(1). Each criterion has point values that will be assigned to a site based upon the specifics applicable to the site. All the assigned points will be summed to get a total, called total criteria points. The total criteria points will be compared with the ranges in §60.2(d)(1)(A) - (C) to determine whether the site is a repeat violator if the site has multiple major violations. Specifically, a person is a repeat violator at a site when: A) the site has had a major violation(s) documented on at least two occasions and has total criteria points ranging from 0 to 8; B) the site has had a major violation(s) documented on at least three occasions and has total criteria points ranging from 9 to 24; or C) the site has had a major violation(s) documented on at least four occasions and has total criteria points greater than 24. For example, if 30 TAC §101.4, is cited for an air emission that caused a nuisance and caused respiratory distress in neighbors four years ago, and another similar release occurs this year and the same rule is cited in an NOV, order, or judgment, and the site has seven total criteria points as determined in adopted §60.2(d)(2) - (5), then the person is a repeat violator at that site. If, on the other hand, the site has 11 total criteria points, and there were no other major violations at the site during the compliance period, the person is not considered a repeat violator at the site. It is also important to note that it is not necessary for the major violations to be "same or similar." Because designation as a repeat violator at a site is limited to repeats of major violations only for purposes of this rule, and because the criteria for designation as a repeat violator is so specific, the commission has determined that it is appropriate to look at any major violation at the site, rather than limiting it to only "same or similar" major violations. Additionally, the commission has added language to the adopted rule to reflect that the major violations must be documented on separate occasions in order to count towards repeat violator designation.

Finally, the commission has adopted §60.2(d)(6) which states that the executive director shall designate a person as a repeat violator unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation. The commission adopted this provision because it is concerned with the potential for unintended consequences resulting from being designated as a repeat violator. The commission is particularly concerned that violations that occurred prior to the effective date of this rule could result in a person being designated as a repeat violator at a site, without any ability to consider the specific circumstances surrounding the violations. The complexity criteria, which are considered in determining when a person is a repeat violator at a site, may not apply at all to a large class of entities including small towns, utilities, small businesses, and agricultural facilities. The commission has determined that this exception is appropriate because some of the more punitive aspects of the rule apply when the repeat violator designation is made. However, the commission expects the executive director to be stringent when considering a repeat violator exemption.

The ranges in §60.2(d)(1) were determined by evaluating the typical points that a person would have at a simple site and a complicated site. For example, a person that has at least three of the types of permits listed in §60.2(d)(1)(A), two sites in Texas, 600 or more Facility Identification Numbers (FINs), five to ten external outfalls and 20 to 50 active hazardous waste units is typical of the most complicated industrial sites in the state. In contrast, the commission believes that a typical simple site: would not have any permits listed in §60.2(d)(1)(A), but may have permits listed in §60.2(d)(1)(B) or (C); would own or operate one site in the state; would have less than 44 FINs; would not have permitted external outfalls because it would be connected to another person's collection system; and would have fewer than ten active hazardous waste management units. These descriptions are based on analyses of reports from commission databases showing the number of people owning multiple sites, the number of people owning multiple hazardous waste management units, the number of people owning sites with multiple FINs, and the number people with multiple external outfalls.

TWC, §5.754(f), requires that the methods established for assessing compliance histories "shall specify the circumstances in which the commission may revoke the permit of a repeat violator and shall establish enhanced administrative penalties for repeat violators." Because the statute requires that consideration be given to the revocation of a permit of a repeat violator, the commission proposed to limit repeat violators to only persons who repeat those violations categorized as "major" as revocation of a permit based on repeat violations is an extreme measure which should be limited to cases of significant violations. Furthermore, the number and complexity of each site owned or operated by the person was proposed to be addressed through the consideration of a person's compliance history. The commission invited comments on the following: 1) how to specifically consider the number and complexity of sites with respect to permit revocations and enhanced penalties for repeat violators; 2) how to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of sites in the definition of "repeat violators" itself; and 3) the relationship between TWC, §5.754(c)(2), relating to criteria for classifying a repeat violator and §5.754(f), relating to permit revocation of a repeat violator. The commission received several comments in response to the commission solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Additionally, the commission is required by TWC, §7.053, Factors to be Considered in Determination of Penalty Amount, to consider, "In determining the amount of an administrative penalty ... with respect to the alleged violator ... the history and extent of previous violations...." Adopted new §60.3(c)(2) reflects this requirement by stating that the commission shall consider compliance history classification when assessing an administrative penalty. Compliance history incorporates major, moderate, and minor violations. The commission will utilize the same definition of repeat violator in the enforcement process as adopted in §60.2(d). TWC, §5.754(f), requires enhanced administrative penalties for repeat violators, and that requirement is adopted in §60.3(c)(3). Furthermore, the number and complexity of sites owned or operated by the person is addressed through the criteria utilized to determine whether, for purposes of this chapter, a person is a repeat violator.

The commission adopts new §60.2(d)(2), concerning complexity points, to address the requirements of TWC, §5.754(c)(2), which states that the commission, in classifying a person's compliance history, shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. The commission invited comments as to how to specifically consider the complexity of sites. The commission received several comments in response to the commission solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. In adopted §60.2(d)(2), every site will be assigned complexity points based upon its types of permits. Specifically, in adopted §60.2(d)(2)(A), four points are assigned for each permit type listed in clauses (i) - (vi) of this subparagraph issued to a person at a site: Radioactive Waste Disposal; Hazardous or Industrial Non-Hazardous Storage Processing or Disposal; Municipal Solid Waste Type I; Prevention of Significant Deterioration; Phase I--Municipal Separate Storm Sewer System; and TPDES or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major. In adopted §60.2(d)(2)(B), three points are assigned for each permit type listed in clauses (i) - (v) of this subparagraph issued to a person at a site: Underground Injection Control Class I/III; Municipal Solid Waste Type I AE; Municipal Solid Waste Type IV, V, or VI; Municipal Solid Waste Tire Registration; and TPDES or NPDES Industrial or Municipal Minor. In adopted §60.2(d)(2)(C), two points are assigned for each permit type listed in clauses (i) and (ii) of this subparagraph issued to a person at a site or utilized by a person at a site: New source review individual permit or permit by rule requiring submission of a PI-7 under 30 TAC Chapter 106; and any other individual site-specific water quality permits not referenced in subparagraphs (A) or (B) of this paragraph or any water quality general permit. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

The commission adopts new §60.2(d)(3), concerning number of site points, to further address the requirements of TWC, §5.754(c)(2), regarding consideration of the number of sites owned by a person in making repeat violator designations. This paragraph, as adopted, states that the following point values are assigned based on the number of sites in Texas owned or operated by a person: one point when a person owns or operates one site only; two points when a person owns or operates two sites only; three points when a person owns or operates three sites only; four points when a person owns or operates four sites only; five points when a person owns or operates five sites only; six points when a person owns or operates six to ten sites; seven points when a person owns or operates 11 to 100 sites; and eight points when a person owns or operates over 100 sites. This will help to effectively balance the repeat violator designation between those persons owning or operating a large number of sites, and those owning or operating fewer sites.

As a result of comments received, the commission has determined that it is also appropriate to take into account the size of a site and the site's location in making a repeat violator designation. As such, the commission adopts §60.2(d)(4), concerning size. This adopted paragraph states that every site shall be assigned points based upon size as determined by the number of FINs, Water Quality external outfalls, and Active Hazardous Waste Management Units (AHWMUs) at a site. Specifically, adopted §60.2(d)(4)(A), regarding FINs, states: four points are assigned for sites with 600 or more FINs; three points are assigned for sites with at least 110, but fewer than 600, FINs; two points are assigned for sites with at least 44, but fewer than 110, FINs; and one point is assigned for sites with at least one but fewer than 44 FINs. Adopted §60.2(d)(4)(B), regarding Water Quality external outfalls, states: four points are assigned for a site with ten or more external outfalls; three points are assigned for a site with at least five, but fewer than ten, external outfalls; two points are assigned for sites with at least two, but fewer than five, external outfalls; and one point is assigned for sites with one external outfall. Adopted §60.2(d)(4)(C), regarding AHWMUs, states: four points are assigned for sites with 50 or more AHWMUs; three points are assigned for sites with at least 20, but fewer than 50, AHWMUs; two points are assigned for sites with at least ten, but fewer than 20, AHWMUs; and one point is assigned for sites with at least one but fewer than ten AHWMUs.

With regard to the location of a site, the commission adopts §60.2(d)(5), concerning nonattainment area points, which reflects that a site located in a nonattainment area shall be assigned one point. This provision takes into account the fact that regulations are generally more stringent and complex for sites located in nonattainment areas.

The commission has adopted §60.2(d)(6) which states that the executive director shall designate a person as a repeat violator unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation. This provision provides that, when justification exists, the executive director may exempt a site from the repeat violator designation.

The adopted rule specifies the criteria to be utilized to determine repeat violator status in adopted paragraphs (2) - (5). As proposed, §60.2(e) addressed site complexity, and was based on a site's primary Standard Industrial Classification (SIC) code. Because the commission agrees with commenters that this approach did not adequately reflect the complexity of sites or reflect the requirements of the statute, proposed subsection (e) has been deleted, and replaced with adopted §60.2(d)(2), which now addresses the assignment of points to a site based upon complexity. As adopted, complexity is based upon the number and types of permits issued to a person at a site. The commission recognizes that there are many different ways to deal with complexity and appreciates the suggestions provided by commenters. The commission has determined, based on examples provided by commenters, that the number and types of permits issued to a site are a better determinant of complexity because they more accurately reflect the level of regulation and thus, the comparative number of requirements that must be met, and has, therefore, modified the rule accordingly.

As an example, Company X operates under a hazardous waste permit, a TPDES major permit, a water quality general permit, a prevention of significant deterioration (PSD) permit, and three UIC Class I permits at a site. The points assigned to this person at this site would be four points for the hazardous waste permit; four points for the PSD permit; four points for the TPDES permit; three points total for the UIC permits; and two points for the general storm water permit. In another example, Company Y is a small quantity generator of hazardous waste, operates under a storm water general permit, and three permits by rules related to sources of air emissions. The number of points assigned to this person at this site would be two points for the new source review permits (i.e., the three permits by rule); and two points for the storm water general permit. In another example, City A operates under a Municipal Solid Waste (MSW) Type I permit at a site that also has a UST system. This city would be assigned four points for the MSW permit, and no additional points are assigned for the UST system, because those systems are not authorized by permits. City K operates under a TPDES Municipal permit at a specific site. City K would be assigned three points for the TPDES permit. City M has a Phase I Municipal Separate Storm Sewer System permit. In this example, the site is the city, and the complexity is based only on this permit, as is the compliance history. Four points would be assigned for this site.

Dairy J has 300 animals, which does not require specific permit authorization. This site is not assigned any points because it does not operate under an authorization specified in adopted §60.2(d)(2)(A) - (D).

In addition to the complexity of a site, the commission has deleted proposed §60.2(e)(2) and instead adopted paragraph (3) concerning the number of sites. Again, this modification to the rule has been made in response to comments. The modification to take this criteria out of the "complexity factor" and move it in the rule so that it has direct bearing on the repeat violator designation has been made to address the statutory requirement to take into account the number of sites when considering whether a person is a repeat violator. Additionally, it has been modified from a single determining number of sites (25, as proposed), to a range of sites owned in the State of Texas. The commission determined that this modification was appropriate because it more adequately reflects the range of business ownership in Texas. The commission utilized reports from its air accounts database and petroleum storage tank database to evaluate the general number of people who own multiple sites in Texas, and make the determinations regarding where the breaks in number of sites owned should occur. The commission did not include other suggestions made by commenters because the suggestions did not accurately reflect the full range of business ownership in Texas.

The commission, in response to comments received, has also adopted §60.2(d)(4), which takes into account the size of a site as a criteria for determining repeat violator status. Specifically, the adopted language states that every site shall be assigned points based upon size. The first criteria under adopted subparagraph (A) is based upon FINs. The commission has determined that this is appropriate because FINs are reflective of the number of emission points at a site and thus, are an additional indicator that complements the complexity of that site. The commission based the numbers on an evaluation of data in the air database looking at distinctive clusters. The second criteria, adopted under subparagraph (B), is based upon Water Quality external outfalls. The commission has determined that this is appropriate because it is also an additional indicator that complements the complexity of the site. The commission based the numbers on an evaluation of the water quality database looking for distinctive clusters. The third criteria, adopted under subparagraph (C), is based upon AHWMUs. The commission has determined that this is appropriate because it also complements the complexity of the site. The commission evaluated specific groupings utilizing its hazardous waste database. The commission did not include other suggestions made by commenters because they included items not tracked by the agency or not under the regulatory jurisdiction of the agency.

Finally, with regard to repeat violators and in response to comments received, the commission has adopted §60.2(d)(5) concerning nonattainment area points, which reflects that if a site is located in a nonattainment area, it shall be assigned one point. The commission has determined that this is appropriate because generally, sites located within a nonattainment area are subject to more stringent environmental requirements.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(d). TCE, LCVEF, DAR, SEED Coalition, TCONR, PC, and 477 individuals stated that a person designated as a repeat violator should automatically be classified as a poor performer. TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, and 478 individuals further stated that the designation of a repeat violator should not be limited to a repeat of the same regulation. TCONR and ACT stated that the intent of HB 2912 is that "a repeat violator is person or entity who repeatedly commits violations of environmental laws, rules, permits and orders, regardless of the type of violation committed." Additionally, ACT asserted that "defining a 'repeat' violator for overall compliance performance purposes is different than enhancing penalties for a specific violation that has occurred more than once at a facility. TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission responds that it agrees with the commenters' suggestion that a repeat violator is a person who repeatedly commits violations. As such, the adopted rule states that a person is a repeat violator at a site when, on multiple, separate occasions, a major violation(s) occurs during the compliance period based upon the criteria in the adopted paragraph.

TCC expressed concern, with regard to proposed §60.2(d), that the concept of a repeat violator as referenced in TWC, §5.754, was not intended to reflect what is currently included in the commission's penalty policy, adding that because the designation of repeat violator has such significant ramifications, it should not be an automatic process. TCC asserted that the determination of repeat violator should be made at the highest levels in the agency and should not be based on any simple numeric standard. On another note, TCC expressed concern that "the agency is attempting to accomplish the ranking of facilities into categories using a data base that was created for a completely different purpose," asserting that by limiting the development of compliance history scores to only that data contained in Consolidated Compliance and Enforcement Data System (CCEDS), comparative judgments cannot be made. TCC asserted that CCEDS was developed to generate investigation reports, not to compare different businesses, and went on to say that to use CCEDS for compliance histories is to "both fail to recognize the purpose for which CCEDS was created and to implement the statute in an inequitable manner." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

The commission responds that §60.2(d), as adopted, has been modified in response to comments. The adopted rule does maintain a point-driven automatic determination of repeat violator. Due to the number of persons that must be evaluated by the agency, it is not practical for the highest levels in the agency to be involved in each classification of a repeat violator. The commission does not agree that the database to be utilized for compliance histories is inappropriate. This database does contain violations that are components of compliance history, from NOVs, audits, orders, and court judgments. Additionally, it does contain other relevant information that will be utilized in the repeat violator assessment. However, the commission has determined that it is appropriate to consider the circumstances surrounding the violations and the conditions leading to the violations. As such, the commission has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

PIC commented regarding proposed §60.2(d), stating that it is supportive of relating the complexity of the site to the number of violations required to define the site as a "repeat violator." PIC supported considering complexity only in the context of §60.2(d),

and not as a divisor in the entire site rating formula. Additionally, PIC disagreed with the rule's requirement that the same major violation needs to occur repeatedly in order to make a "repeat violator" finding, asserting that "if there are multiple major violations occurring during the compliance period, regardless of whether the same exact violations are documented, this is a valid basis to make a 'repeat violator' finding." As such, PIC proposed "that the following be classified as repeat violators: highly complex sites (with a complex factor of 5 as determined under §60.2(e)(1)) with 4 or more major violations during the compliance period; moderately complex sites (with a complexity factor of 3 as determined under §60.2(e)(1)) with 3 or more major violations during the compliance period; any other site with 2 or more major violations during the compliance period."

The commission appreciates the positive comment in support of the rule. Additionally, the commission responds that this subsection of the rule has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. In particular, as adopted, complexity is only considered with regard to designation as a repeat violator, and has been removed as a divisor in the site rating formula. Additionally, as adopted, repeat violator designation is not limited to the repeat of the same or similar major violation during the compliance period; rather, it has been modified to include, at a site, the occurrence of two or more, as applicable, of any of the violations designated as "major" under adopted §60.2(c)(1). And finally, the repeat violator designation has been modified similar to the commenter's suggestion, in that the number of occurrences of a major violation required at a site to invoke the repeat violator designation is dependant upon the total criteria points for that site. The total criteria points are based upon the complexity of the site, the number of sites owned or operated by the same person in the State of Texas, the size of the site, and whether the site is located in a nonattainment area.

Reliant, AECT, ExxonMobil, TCC, Brown McCarroll, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(d). Reliant, TXI, ExxonMobil, and Brown McCarroll commented that the definition of repeat violator as proposed is not consistent with TWC, §5.754(c)(2), because it does not consider either the number or complexity of sites owned or operated by the same person. ExxonMobil also stated that "consideration of such factors in the overall formula denominator is not the same." AECT made a similar comment, stating that consideration must be given to the complexity of sites in designating a repeat violator. Brown McCarroll also asserted that the definition should provide for situations in which subsequent violations may be excused by a compliance agreement between the regulated entity and the executive director. TXOGA endorsed the comments submitted by Brown McCarroll. TXI stated that the following must be added to the subsection: "In classifying repeat violators, the Commission shall give consideration to the number and complexity of facilities owned or operated by the person." Additionally, Reliant stated that the rule should take into account that the more complex a site is, the more opportunity there is for "errors or minor deviations." As such, Reliant asserted that the threshold for determining more complex sites to be repeat violators should be higher than for less complex sites. ExxonMobil and TCC provided similar comments, stating that the language should be restricted to the same violation from the same point source, and the number of recurrences to trigger repeat violator status should be increased as the complexity increases. AECT commented that the commission must consider both "the number of environmental regulatory requirements that apply to the site and how easy it would be for the TNRCC to identify an exceedance of any regulatory requirements." AECT asserted that the rule should consider the number of continuous emissions monitoring system (CEMS) at a site in determining a repeat violator, because exceedances of environmental requirements is much easier at a site with a CEMS than at a site without a CEMS. AECT also stated that, as it understands it, "if CEMS data show that the emissions of an air pollutant exceeded an applicable limit more than once during the quarter or semi-annual CEMS reporting period, such exceedances will only count as one violation relative to determining if the site will be a 'repeat violator.' AECT strongly agrees with such position and requests that it be clearly stated in the rules and/or preamble language." TXU supported the comments made by AECT. Similarly, TXI proposed that the following be added to the subsection: "For purposes of this subsection, CEMS data may not be considered as documentation of major violations." Garland, San Antonio, GEUS, and SMEC expressed similar concerns regarding the likelihood of sites with CEMS or other sophisticated monitoring equipment in place being designated as a repeat violator, adding that it is not fair, a violation of equal protection statutes, and could result in "the misleading perception that many complex facilities in Texas are recalcitrant repeat violators." Additionally, Garland, San Antonio, GEUS, and SMEC suggested that the rule be modified to reflect that there must be a violation of the same specific regulation to be designated as a repeat, as opposed to a repeat of a violation listed in §60.2(c)(1).

The commission responds that this subsection of the rule has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the commission is providing some examples of the classification calculations at the end of the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The rule has not been modified with regard to monitoring frequency. A person with CEMS reports monitoring information on a quarterly basis and those reports are usually reviewed upon receipt by the agency. If the monitoring data indicates violations of emission limits during the quarterly period, a resulting NOV would reference the emission violation one time, regardless of the specific number of occurrences documented in the data. The emission violation in the NOV would be assessed for a major or moderate classification. A determination would be made based on overall average of the violations. Based on this averaging, the commission does not expect occasional exceedances to result in classification as a major violation.

7-Eleven and TMRA commented regarding proposed §60.2(d). 7-Eleven objected to using NOVs in determining whether a person is a repeat violator. Additionally, 7-Eleven suggested that violations under a previous owner should not be included when determining whether a person is a repeat violator. Furthermore, 7-Eleven asserted that the rule as proposed would "radically modify existing contractual relationships," stating that it is "modification of existing laws which are deigned {*sic*} to allow buyers to elect to merge or not merge with a seller. This is a fundamentally unfair modification of contracts which were entered into in the past five years and which are now modified by these regulations to impose additional liabilities on buyers. Looking forward, these provisions would mandate that all future buyers assume a significant new category of liability from sellers. 7-Eleven

also asserted that the "rule formulation would make small operator compliance financially more difficult and may even cause low-performing sites to be abandoned. It is foreseeable that an automatic transfer of negative compliance history would absolutely decrease property values at such sites, leading to less collateral value, decreased credit worthiness and an inability to finance the maintenance or upgrade of legally required capital equipment." TMRA recommended that a person should not be punished as a repeat violator if part of the compliance history belongs to a previous owner.

The commission disagrees with these comments. TWC, §5.753, specifically requires the commission to include NOVs as a component of compliance history. Under TWC, §5.754(c)(1), the commission must "determine whether a violation of an applicable legal requirement is of major, moderate, or minor significance" in classifying a person's compliance history. These sections provide the basis for categorizing violations in NOVs as major, moderate, or minor. The commission recognizes that violations in NOVs are unadjudicated and do not have final commission approval. The rule reflects this fact by giving a lesser weight to violations listed in NOVs than those contained in commission orders. Furthermore, violations listed in NOVs will not be included in an entity's compliance history if the commission determines that the violation is without merit. The Field Operations Division has established standard operating procedures for contesting the merit of an NOV. Any violation contained in an NOV that is administratively determined to be without merit will not be included in the compliance history. Furthermore, in adopting §60.1, the commission was clear that all violations at a site apply to compliance history, even if the site changes ownership during the compliance period. The commission has adopted §60.2(e)(3)(A)(iii) and (B) to mitigate compliance history of a poor performing site purchased by an average or high performer, if appropriate. The commission disagrees, in part, with TMRA's comment concerning repeat violator status transferring to a purchaser of a site. Throughout this rule, the compliance history is tied to a "site." With the transfer of a site from one owner to another, the compliance history related to that site also transfers to the new owner. To counter this effect and to encourage transfers of sites to better performing entities, the rule provides the executive director with the authority to consider this transfer and whether it is appropriate to reclassify the site based on the transfer. In other decisions related to a repeat violator designation, the executive director and the commission would also be able to consider the circumstances underlying the transfer before making a decision affecting the site. However, the commission has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

TAB, BP, TXOGA, TCC, V&E, AECT, and ATINGP commented regarding proposed §60.2(d). ATINGP, TCC, and TAB stated that this provision in the proposed rule is inconsistent with the statute, which states that the commission shall establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person. Rather, TCC stated that the designation should follow a determination based on the established criteria as specified in the statute. TCC suggested that this process be similar to that provided for "excessive emissions events." Specifically, TCC recommended the following criteria: 1) number of violations of an identical or similar nature on the same equipment or unit, same pollutant, same cause, etc. (where appropriate); 2) size, number, and complexity of the facilities; and 3) willingness and speed with which the violations are corrected. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. ATINGP submitted similar comments. TXOGA asserted that the word "site" should be replaced with the word "facility" to be consistent with legislative mandate. TXOGA stated, "In no instance does the legislative language broaden the 'repeat violator' term by linking it with separate events at a 'site' as TNRCC is attempting to do," referencing the language at TWC, §5.754(c)(2), which references "the complexity of facilities." Additionally, TXOGA stated that the preamble should clearly explain "that the 'repeat violator' term is linked to events at the same facility for same causes, same pollutant, etc.," adding, "It is simply illogical to claim that events at different pieces of equipment are 'repeat' if the nature of those events is substantially different." OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA. BP stated that it is concerned that the proposal is biased against large, complex operators, and asserted that the "significance of the violation and evidence that the person consistently disregards the regulatory process by failing to make timely and substantial attempts to correct the violations must be considered before making a determination." Finally, BP asserted that such a determination should only be made after discussing the situation with the regulated entity, and after review and approval "at the highest levels within the agency." V&E commented that while it supports identifying a repeat violator as "a person...at a site," the rule should clarify whether the same major violation "must occur at the same location at the site, to the same unit." V&E commented that to interpret the proposal to mean the same major violation occurring anywhere at the site seems unfair for a large and complex facility, as, when "coupled with the breadth of a major violation" most, if not all large facilities would be repeat violators. Similarly, AECT requested that a major violation must have occurred at the same facility, unit, or piece of equipment in order to cause a site to be designated as a repeat violator. V&E suggested that the rule be modified so that a site with a complexity factor of five is not held to the same standard for purposes of being designated a repeat violator as a site with a complexity factor of three or one. Similarly, AECT requested that the threshold for being designated as a repeat violator should be higher for sites with a higher complexity factor as provided in proposed §60.2(e)(1) than for sites with a lower complexity factor. TXU supported the comments made by AECT.

The commission responds that this section has been modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission does not agree that a repeat violator term should be linked to events only at the same facility, for the same cause, for the same pollutant because adopted §60.2(c)(1) now contains violations that are serious or critical to human health, safety, and the environment, and the commission believes that repeated major events such as those contained in that paragraph should be considered in the repeat violator assessment. TWC, §5.754, requires the agency to consider the number and complexity of facilities owned and operated by the person, and consider the significance of the violation. This direction supports looking at all units, facilities, and pieces of equipment in making this determination. The word "site" was chosen for this rule so as not to confuse anyone regarding how different programs utilize the term "facility." The commission disagrees that this is inconsistent with the statutory mandate.

Regarding proposed §60.2(d), C&H stated that violations should only be classified as repeat when they are designated as "major" violations, and occur within two years of each other at the same site owned or operated by the same person. C&H also stated that being categorized as a repeat violator should not result in automatic permit revocation, and stated that the word "shall" should be replaced with "may" in rule language pertaining to permit revocation. Additionally, C&H stated that a site's complexity, and the length of time which has passed between the violations should be taken into account when determining what constitutes a repeat violator.

The commission agrees that only major violations should count toward the repeat violator classification; however, it does not agree with the suggested two-year period at the same site owned or operated by the same person. The commission, in §60.1, specifically adopted a five-year compliance period and believes that this entire period should be evaluated for major violations. Additionally, §60.1 states that the entire history of the site should be captured in the compliance period, even if the site changed ownership. The commission has revised proposed §60.3(a)(7), adopted as §60.3(a)(6), relating to permit revocation. The revocation is permissive as opposed to mandatory. The commission is taking into account the site's complexity, under this adopted rule, but disagrees that the length of time between occurrences of major violations should be taken into account. However, the commission notes that it has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

Valero, T&K, Chaparral, and TIP commented regarding proposed §60.2(d). Valero and TIP commented that increasing the number of violations necessary to become a repeat violator based on the size and complexity of the site is one possible way to address size and complexity in relation to repeat violator determinations. Valero also requested that the language in this subsection be modified to read: "A person shall be considered a repeat violator at a site when the same major violation is documented in final enforcement orders, court judgments, or consent decrees more than once within the compliance period at the same equipment." TIP made a similar comment. And, TIP also asserted that a person should not be considered a repeat violator for two separate violations, one included in a 1660 order, and one included in a findings order, stating that the Findings Order Criteria is intended to encompass more serious violations. T&K and Chaparral provided very similar comments. Additionally, T&K and Chaparral stated that, by limiting the definition of repeat violator to the same major violation at the same emission unit, waste unit, etc., complexity and number of facilities is "sufficiently taken into account." Finally, T&K and Chaparral both asserted that the commission should republish its revised definition of repeat violator to provide adequate notice.

The commission responds that §60.2(d) has been modified in response to comments received. The commission disagrees that it should use only major violations documented in final orders, court judgments, or consent decrees, and as such, the rule as adopted still contemplates the use of NOVs. However, practically speaking, the discovery of a violation classified as major will, except for small businesses operating without a permit, result in an enforcement action, and thus a documented violation will be in an enforcement order or court judgment. As previously discussed in this preamble, the commission disagrees with the limitation of only using the same major violation at the same emission unit, waste unit, etc. The commission believes that the criteria used in adopted §60.2(d) sufficiently addresses size, complexity, and number of facilities. The definition of repeat violator has been changed in response to specific comments on the proposed rule by affected persons. The commission specifically requested comments on this issue as the basis for determining whether to revise the commission's approach on the issue. As a result, the rule, as proposed, provided adequate notice that the commission would consider comments and the definitions might change. Therefore, the commission does not agree that republishing is necessary.

ATINGP, TIP, and Huntsman commented regarding proposed §60.2(d). ATINGP stated that "'repeat' connotes more than two times in a five year period," and that the repercussions are too high for only two violations to constitute a repeat violator. Additionally, ATINGP stated that only violations in an "enforcement order of the agency or another appropriate tribunal that reflect a release that caused a significant adverse impact to human health, safety and the environment should be taken into account." Furthermore, ATINGP recommended that the rule be clarified to reflect "that in a situation where a violation of a rule, statute or other applicable requirement is cited, that citation will be counted only once, even if more than one count is recorded under it." TIP asserted that the "definition of repeat violator should limit all repeat violator impacts to the site in question," adding that certain language in the preamble and proposed rule would seem to suggest otherwise. TIP also expressed concern with the term "same major violation" in the definition of repeat violator, specifically based on its concerns with the proposed language in §60.2(c)(1)(A) regarding HPV/SNC criteria not necessarily having an impact on human health. Finally, with regard to the issue of repeat violator, TIP stated that the commission should clarify that "same major violation" means that the violations must be discovered by the agency during different and unrelated investigations, and that they must be communicated to the person by two separate NOVs, stating that as the definition is proposed, a single NOV with two separate violations of the same citation over two different periods of time, and/or for two different pieces of equipment, could constitute "repeat violator" status. Huntsman provided a similar comment, suggesting that, "at a minimum, a repeat violation must implicate the same regulation as a previous violation, must be discovered in a separate and unrelated review or inspection and must be documented in a separate NOV or agreed order. The rule should specifically prohibit 'splitting' violations discovered during a single inspection or review into two or more NOVs or agreed orders." TIP commented that, due to the drastic nature of permit revocation, it should be limited to only poor performing sites that are also classified as a "repeat violator," and even then, only when additional factors are met, such as "a consistent disregard for the regulatory process."

The commission responds that §60.2(d) has been modified in response to comments received, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that only violations involving a release that causes a significant impact to human health, safety and the environment should be taken into account. Adopted §60.2(c)(1) now contains violations that are serious or critical to human health, safety, and the environment, and the commission believes that repeated major events such as those contained in that paragraph should be considered in the repeat violator assessment. The commission does

agree with ATINGP as to how a violation is cited in a compliance history. For example, if the commission documents an exceedance of a permitted effluent limit, the violation would include a citation of the specific permit condition in addition to 30 TAC §305.125(1) and TWC, §26.121. These citations will be evaluated as one violation, even though there are three appropriate citations. Another example might include a violation of a rule requiring an inspection of valves for leakage. If the investigator discovered ten out of 250 valves were not inspected, the citation for compliance history would include the specific rule citation, any permit condition, and THSC, §382.085(b). This group of citations would appear once as opposed to ten times for purposes of compliance history.

The commission agrees that the definition of repeat violator applies to the one site in question. The commission modified the definition of repeat violator which no longer requires the repeat of the same major violation because the definition of major violation has significantly changed. The commission agrees that major violations must be documented on different occasions, because the term "repeat" is defined in *Merriam Webster's Collegiate Dictionary, Tenth Edition*, as to make, do, or perform again. But, these violations do not necessarily have to be communicated by separate NOVs or other enforcement actions. Additionally, the definition of repeat violator contemplates a review of violations site by site, not by specific pieces of equipment. The commission's Field Operations Division includes all violations discovered during an investigation in one NOV, or if appropriate, one order. The commission does not anticipate a change to this procedure, and has not modified the rule in response to this comment. The commission has modified adopted §60.3(a)(6), proposed as §60.3(a)(7), to specify that the circumstance under which a repeat violator's permit may be revoked is when that violator is classified as a poor performer or for cause, including subparagraphs (A) - (D), as originally proposed.

NTMWD commented regarding proposed §60.2(d). NTMWD expressed concern regarding the definition of repeat violator, stating that HB 2912 focuses on a "person" rather than the acts of prior owners and/or operators as a site. NTMWD stated that as proposed, regional entities could be identified as repeat violators at sites based on the actions or inactions of the previous owner and/or operator, thereby punishing entities for the actions of others. NTMWD added that the punishment is especially severe when the significant point values and administrative penalty enhancements associated with designation as a repeat violator are taken into consideration. Therefore, NTMWD recommended that the language of the subsection be changed to read, "at the same site for the same person."

The commission appreciates the impact that the classification of repeat violator will have on a site. The commission has determined that a site should retain its entire compliance history as contemplated by §60.1, and thus, the commission has retained all the history for the compliance period, no matter how many owners. The commission has addressed the commenter's concern in adopted §60.2(e)(3) whereby the executive director may reclassify a poor performer site if acquired by a new owner or if operated by a new operator including if the acquisition is for purposes of regionalization. If the executive director utilizes mitigation factors to reclassify a site, then the *consequences* of the repeat violations on classification do not exist because they only apply to a repeat violator that is also a poor performer. Further, penalty enhancements would only result in the situation where (an) additional violation(s) occurs subsequent to the designation as a repeat violator, and the violation(s) warrants formal enforcement action. Finally, the commission has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation.

Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(d). Allied, BFI, TxSWANA, and NSWMA commented that a new owner should not acquire the history of the previous owner(s). The commenters suggested that the commission should classify a site for only that period of time a person owns the site or have a three-year moratorium for a site purchased by another person. Additionally, Allied, BFI, TxSWANA, and NSWMA expressed concern with the use of the word "documented" in the text of this proposed subsection, stating that it is necessary to clarify that conceptually, this is "tied to agency-documentation via the components listed in 30 TAC §60.1(c)(1), (2), and (7)," rather than the submission of self-reported data. Allied, BFI, TxSWANA, and NSWMA added that they understand that self-reported data could lead to repeat violator status, but requested clarification that a violation would not be considered "documented" unless it has been set out in one of the official compliance history components. As such, they requested the addition of the phrase "in a component listed in §60.1(c)(1), (2) or (7) of this title" after the word "documented" in this subsection.

The commission appreciates the impact that the classification of repeat violator will have on a site. The commission has determined that a site should retain its entire compliance history as contemplated by §60.1, and thus, the commission has retained all the history for the compliance period, no matter how many owners. The commission has addressed the commenters's concern in adopted §60.2(e)(3) whereby the executive director may reclassify a poor performer site if acquired by a new owner or if operated by a new operator. Additionally, the commission has modified §60.2(d)(1) to say "a person may be classified as a repeat violator..." and has adopted §60.2(d)(6) which provides that the executive director shall designate a person as a repeat violator unless the executive director determines circumstances do not warrant the designation. With regard to use of the word "documented" in §60.2(c), the commission is referring to any documented violation, whether that documentation be from the agency or its agents or by the submission of self-reported data. The commission disagrees that any change to this language is necessary.

C&H and TCAP commented regarding proposed §60.2(d). C&H stated that the rule should clarify that the designation of a person as a repeat violator is not an independent classification from poor, average, and high, but rather is a label to be used in making compliance history-related decisions. Additionally, C&H commented that the repeat violator designation should not be included on the agency's website along with the person's compliance history classification. TCAP expressed concern that sites with average or high performance classifications "that are in the process of taking corrective actions to improve performance, could be designated as a 'repeat violator,'" and that the label "repeat violator" will generate an "automatic negative association by the public even if this association is unwarranted." As such, TCAP asked that the commission "be sensitive in the way you present information to the public."

The commission does not intend to publish a separate list of repeat violators on the agency website.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(d). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF requested clarification that a person could not be designated as a repeat violator as a result of a single investigation. The commenters added that this approach would appear to be inconsistent with the legislative intent addressing "'unacceptable' compliance history," quoting the language at TWC, §5.754(i), which references a "recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations." The commenters went on to state that the statutory language regarding "timely and substantial attempt to correct" a violation means that a "person should not be penalized as a 'repeat violator' merely because a violation has not been entirely corrected at the time of a second inspection." The commenters also stated that the final rule should make it clear that the "computation of the site rating is not tied to the Commission's penalty matrix" which sometimes involves the assessment of monetary penalties for each day a violation occurs. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission responds that repeat violator is referenced in TWC, §5.754(c) and (f), relating to classification of a person's compliance history and the circumstances under which the commission may revoke a permit. TWC, §5.754(i) sets forth the circumstances in which the commission shall deny a permit application. Conduct that meets the "repeat violator" definition may or may not meet the threshold of an "unacceptable compliance history." The commission agrees that more than one investigation would be required prior to classifying a person as a repeat violator. However, the commission does not agree that a person should not be classified as a repeat violator where a violation has not been entirely corrected at the time of a second investigation. If that second investigation is conducted when the entity is not operating under an approved compliance schedule, whether in an NOV, order, or court judgment, and the violation still exists, then it is appropriate to utilize that investigation toward consideration of repeat violator status.

Fort Worth commented regarding proposed §60.2(d). For the same reasons stated under the discussion of Fort Worth's recommendation for modification to the definition of site in proposed §60.2(a), Fort Worth asserted that it would be unfair and unreasonable to designate a city as a repeat violator for an SSO event, assuming that an SSO would be considered a major violation, unless the events occurred at the same street address or location during the compliance period.

The commission disagrees that a violation for an SSO should occur at the same street address or location in order to be considered a repeat violation. However, unauthorized releases during SSO events may not always be assessed as major violations based upon the specific circumstances surrounding each release. No changes have been made in response to this comment.

Proposed §60.2(e)

Extensive comments were received relating to proposed §60.2(e). While the comments varied in their perspectives, in response to many of the comments the commission has deleted this proposed subsection, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and has instead adopted new §60.2(d) Many of the comments received on proposed §60.2(e) generally are summarized and grouped here, and a consolidated response is provided at the conclusion of those comments.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 478 individuals commented regarding proposed §60.2(e). The commenters stated that facilities should be compared to like facilities, based upon complexity and scale (i.e., refineries to refineries, concentrated animal feeding operations (CAFOs) to CAFOs, etc.). TCONR further stated that the presumably unintended result of the rule as proposed would be to create a compliance history program that is more strict for some types of sites than for others. ACT commented that HB 2912 directs the commission to consider two things in classifying a person's compliance history: whether the violations are of major, moderate, or minor significance; and whether the person is a repeat violator. Furthermore, ACT stated that HB 2912 provides that "complexity and number of facilities" is only to be taken into consideration in "establishing criteria for classifying a repeat violator." As such, ACT asserted that "the complexity factor should be used for persons or entities, not sites, and it can be used only for evaluating repeat violators." TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. In adopted §60.2(d), relating to repeat violator, the commission does compare sites based upon similarities as points are given based upon complexity, number of sites owned, size, and location in a nonattainment area. Generally, small and less complex sites will be compared equally for the number of major violations in their compliance period. Similarly, larger or more complex sites will be compared equally for the number of major violations in their compliance period. And finally, the most complex and largest sites will be compared against the same standard. It is in this manner that the commission believes that "like facilities" are compared, even though their primary business functions may be different. Additionally, the commission notes that, as adopted, the complexity factor has been limited to consideration for purposes of repeat violator designation, and is no longer included as a divisor in the site rating formula.

TXI, T&K, Chaparral, and AeA commented regarding proposed §60.2(e). TXI stated that it does not agree with the use of a standard formula for determining compliance history classification, and as such, does not agree with the concept of a complexity factor. However, TXI stated that it does believe that a site's complexity and the number of regulatory programs to which the site is subject should be taken into account in classifying compliance history, but believes this can be accomplished without the use of a formula. However, TXI and AeA added that if the commission decides to maintain a formula, with a complexity factor, they recommend including standards for complexity based on the number of programs to which a site is subject. T&K and Chaparral made a similar suggestion. Finally, TXI stated that if the commission does not adopt the suggested approach, it recommends the addition of lightweight aggregate plants to the list of SIC codes with a complexity of five. Similarly, T&K and Chaparral recommended that primary steel mills; lime plants; and radioactive, hazardous, and municipal waste facilities be added to the complexity factor five, and T&K further included electric power plants. T&K and Chaparral also recommended using four-digit

SIC codes rather than the 2-digit SIC major group as proposed. Additionally, T&K and Chaparral asserted that there must be included in the rule a method of challenging the complexity factor, whatever method is ultimately adopted, "to ensure that the assigned complexity is rational and justified, taking into consideration the regulatory burden on any specific facility."

UT commented regarding proposed §60.2(e). UT stated that while it appreciates the desire for a simple and easily automated system for determining complexity, it believes the proposed method does not achieve the legislative mandate. UT asserted that the following should be included in the determination: size; number of employees; and the number, scope, and complexity of applicable air, water, waste, and community right-to-know regulatory requirements. As such, UT recommended three things: 1) restructure subsection (e) "to illustrate types of industries or sites that have the full range of circumstances to satisfy the complexity criteria for each ranking;" 2) create a system by which the executive director can look at site-specific circumstances to "make a reasoned decision on the complexity factor of a site" when a regulated entity requests such a determination, rather than automatically defaulting to a complexity value of "1"; and 3) whatever methodology is utilized, university campuses should have a complexity value of 5. UT stated that university campuses can be very complex, in that they "may operate a power plant, operate wastewater facilities, own and operate underground storage tanks (UST) and have significant regulatory responsibilities under RCRA because of the numerous research labs and facilities."

TIP commented, regarding proposed §60.2(e), that relying on a single medium to determine complexity in a multi-media setting ignores the legislative mandate regarding the consideration of complexity. TIP recommended as a possible alternative a system that applies three separate complexity ranges based on the number of outfall parameters, Title V applicable requirements, and compliance obligations under Resource Conservation and Recovery Act (RCRA) permits. Alternatively, TIP recommended the approach of increasing the number of existing complexity factors to take waste, water, and other programs into account. TIP also expressed concerns with the "general grouping of industry sectors" in the proposal, asserting that "the electric utility industry appears to have been completely ignored," as were the waste management industry, the wholesale goods sector (including bulk terminals and stations), and the retail trade sector (including service stations). Furthermore, TIP asserted that certain complex industries such as semiconductor manufacturing and metal refining and processing "should be elevated to a higher complexity factor." TIP also commented that the addition of new industry sectors into certain complexity groups in the future will require additional rulemaking, "whereas a program based on compliance agreements automatically adjusts to changing circumstances." TIP also commented regarding the size of a site, stating that size is a more important component of complexity than allowed for in the proposal. TIP asserted first that the number of sites owned or operated by a person "substantially impacts compliance" in that there must be coordination of policies regarding compliance, EMSs, and enforcement. Additionally, TIP stated that "the proposal appears to envision a company-wide compliance history that would be reviewed in addition to a site's specific compliance history and classification." And, TIP asserted that the 25-site threshold is too high, and fails to take into account the size of a specific site. As such, TIP recommended that the rule be modified to lower the threshold for number of sites, and add additional factors to include the number of employees, and suggested that a tiered approach would be a better way of addressing this component.

ExxonMobil commented regarding proposed §60.2(e), asserting that by making the complexity factor a specific list in the rule rather than providing a method of determining complexity, "the agency will have to go through rule revision procedures each time an addendum to the list is needed." Additionally, ExxonMobil asserted that the following should be added at the following complexity levels: power plants at 5; waste management (reclamation, treatment, and disposal) at 5; wholesale goods--nondurable at 5; and retail trade--gasoline service station at least at 3. ExxonMobil also stated both complexity and size were supposed to have been taken into account, and as such, recommended an expanded complexity matrix, "with a secondary parameter to differentiate facilities within a like classification based upon size."

Regarding proposed §60.2(e), ATINGP suggested that, in addition to the SIC major group, the rule take into account the following factors by adjusting the complexity factor upward for each of the following that apply: the number of emission points at a site; the number of applicable requirements that a facility is subject to at a site; the number of employees necessary to adequately operate the site exceeds 50 and for each additional 100 employees the complexity factor shall increase by 0.5; and an evaluation of the site and federal regulations, assigning a complexity weight or value to those requirements. ATINGP asserted that this would account for large, complex operations with more opportunities for violations than for smaller operations with fewer such opportunities. Finally, ATINGP suggested that the commission "establish the standards by which complexity will be evaluated in the rule and, if necessary, develop a guidance document post-rulemaking to complete the evaluation."

7-Eleven commented regarding proposed §60.2(e). 7-Eleven first stated that the rule "should recognize that *numerosity* of facilities creates significant challenges for maintaining regulatory compliance." Additionally, 7-Eleven asserted that the complexity factors "should not be rigidly pre-selected." 7-Eleven proposed that, in addition to certain industries being categorized as complex, there should be another mechanism for designating other facilities as complex, such as: state objective criteria which, if met, would add complexity points to the compliance history formula denominator; allow facilities with multiple SIC codes to receive complexity points where components of facility processes either meet objective complexity criteria or are included within designated complex SIC codes; and provide an explicit mechanism for such relevant complexity information to be submitted and included in the analysis and calculation of site compliance history classification.

TCCI and TCAP commented regarding proposed §60.2(e). TCCI expressed concerns that the complexity factor in proposed §60.2(e) and (f)(1)(J) will have an adverse effect on small businesses. While stating that it does not know how to solve this issue, TCCI stated that it "appears that a small polluter could be perceived as a worse company than a large company that pollutes," and is concerned with the inequities. Similarly, TCAP stated that it is concerned that the complexity factor allowing for a reduction of the compliance history score for a site designated as complex "may create inequities between large and small entities," and hopes that the rule will be written so as not to "set up implicit discrimination against entities who pollute less."

Fort Worth COC commented, regarding proposed §60.2(e), "The proposed rules should take into account that there could be industries that warrant a higher complexity than 1."

The commission responds that the proposed subsection has been deleted, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. As adopted, the rule takes into account a greater range of sites owned or operated. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

In addition, the formula, as adopted, is intended to treat small and large entities equally. For instance, §60.2(e)(1)(L) has been adopted as part of significant revisions to the formula for determining a site rating. This provision utilizes the number of investigations conducted during the compliance period, plus one, as a divisor in the formula, regardless of whether violations were documented during the investigation. The addition of one also provides cushioning for those sites which may not be investigated frequently.

Proposed §60.2(e)(1)

Extensive comments were received relating to proposed §60.2(e). While the comments varied in their perspectives, in response to many of the comments the commission has deleted this proposed subsection, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and has instead adopted new §60.2(d). The comments received on proposed §60.2(e)(1) are summarized and grouped here, and consolidated responses are provided at the conclusion of those comments.

Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(e)(1). The commenters stated that the complexity formula needs to be revised, adding that as proposed it does not adequately reflect the complexity of a site. The commenters asserted that other factors which could be utilized include: "number of employees operating the plant, the skill and training of employees, the types and volumes of materials handled, the physical size of equipment used in the operation, maintenance requirements, hours of operation, monitoring requirements, discharge rates, etc." Furthermore, the commenters asserted that there should be a system for allowing industry to participate in the assigning of complexity factors; recommended that instead of three categories of complexity there should be five; asserted that electric power generation facilities, municipal solid waste landfills, and wastewater treatments plants should be reclassified at higher levels; and recommended that the complexity of municipal operations should be recognized.

Huntsman commented regarding proposed §60.2(e)(1). Huntsman stated, "A complexity factor of 5 has been adopted that includes most of the major industrial groupings in Texas." Specifically, Huntsman suggested that the complexity factor for the high end of the scale should be expressed as a range, perhaps from five to 30, and that in addition to the SIC code, other elements of complexity should be considered to increase the complexity factor. Huntsman asserted that the following could be utilized for this purpose: the number of emission points and other regulated sources at the site; the number of permits held at the site; the number of special conditions in each permit held by the site; the number of state and federal programs which apply to operations at the site (i.e., new source performance standards (NSPS), national emission standards for Hazardous Air Pollutants (NESHAPS), RCRA, etc.); the number of mandatory annual reports required from the site; the number of hazardous waste manifests generated by the site; the number of compliance and analytical tests which must be performed at the site each year; the location of the site in a designated nonattainment area; the number of employees at the site; and the classification of the site as a "major source" under an applicable statute or inspection protocol.

C&H and SGVA commented regarding proposed §60.2(e)(1). C&H stated that there should be flexibility in the rule to allow the assignment of a complexity factor of 5 or 3 even if the industry is not specified in the rule, as there could be industries the agency has failed to assess but would warrant a higher complexity factor than 1. SGVA made a similar comment, stating that the rule should provide a mechanism for industries to change their complexity factor, using §60.2(e)(1) as a guideline. C&H also commented that the use of the complexity factor in the compliance calculation creates a disparity for smaller businesses, similar to its comment regarding §60.2(b).

AquaSource, SGVA, Reliant, AECT, CPS, Onyx, Fort Worth, and TXU commented regarding proposed §60.2(e)(1). AquaSource recommended that domestic wastewater operation have a complexity factor of 3. As an example, AquaSource stated that there is often influent from many different sources (domestic and industrial), and the operator may not know when a source may "inject improper material." Fort Worth also asserted that large municipal publicly owned treatment works (POTWs) should have a complexity factor of 5, because a large POTW is as complex as other industry types given a complexity factor of 5, and is more complex than some of the industries given a complexity factor of 3. Similarly, SGVA stated that it believes that fiberglass manufacturers, SIC 3229, should have a complexity factor of 5. SGVA stated as justification for this that the first part of the glass melting process is not less complex than cement kilns and cement manufacturing processes, which are given a complexity factor of 5 in the proposed rule. Additionally, SGVA asserted that the second part of its manufacturing process is no less complex than the processes associated with chemical and allied products, which also are given a complexity factor of 5 in the proposed rule. Reliant stated that it believes the assignment of a complexity factor of 1 to electric power plants is an oversight, and that they should have a complexity factor of 5. Reliant and AECT stated that they believe the determination should be based on how heavily sites are regulated. TXU also stated that electric generating facilities should have a complexity factor of 5. For similar reasons, CPS also recommended that electronic generating facilities and their associated handling equipment should be rated at the highest complexity factor of 5. Onyx similarly asserted that permitted hazardous waste incineration facilities, based upon the nature of

these operations and the number of regulations governing them, should be given a complexity factor of 5. TXU supported the comments made by AECT.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(e)(1). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that CAFOs are highly regulated and should have a complexity factor of 5. The commenters listed the various programs under which CAFOs are regulated, including: TPDES permitting, air emissions, often-times fuel operations, pollution prevention plans, and numerous recordkeeping requirements. Additionally, the commenters stated that on the basis of the number of emission, discharge, or land application points associated with a typical site, CAFOs are highly complex, as most sites include a number of pens or barns, multiple retention lagoons, and one or more on-site land application area. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

V&E commented regarding proposed §60.2(e)(1), stating that it appreciates the "recognition" of chemical and petrochemical plants, and petroleum refineries as highly complex, but does not think the proposal goes far enough to reflect the true complexity of regulated entities. V&E, therefore, recommended the addition of a fourth complexity category for refineries and chemical operations based on the "number of regulated units, types of processes (i.e. batch or continuous), number of specific products produced, or other criteria indicative of site complexity."

Regarding proposed §60.2(e)(1), MMM stated that its sites' SIC codes are: 1422, 1423, and 1429 (Crushing Plants/Rock Quarries); 1442 (Sand Plants); 2951 (Hot Mix Asphalt Plants); 3273 (Ready-Mix Concrete); 5032 (Material Distribution Yards); and 4231 (Trucking). MMM asked which complexity factor it will fall under, and further asked whether each SIC will have its own classification.

OxyChem and Oxy Permian commented regarding proposed §60.2(e)(1). OxyChem and Oxy Permian stated that the complexity rankings provided for in the proposed rule, based on SIC codes, may not take all aspects of the site into account. OxyChem and Oxy Permian suggested the following five criteria: 1) is the site located in a nonattainment area; 2) is the site a major source; 3) is the site a Risk Management Plan (RMP) site; 4) is the facility a large quantity generator of hazardous waste, or does the site have a RCRA hazardous waste management permit; and 5) does the site have a TPDES industrial wastewater discharge permit. Specifically, the commenters recommended that, for each of the aforementioned that apply, the baseline complexity factor be increased by a value of 1. OxyChem and Oxy Permian further noted that it would be possible for a site not to trigger any of the aforementioned criteria, and as such recommend a baseline complexity factor of 1.

Valero, TIP, BP, TXOGA, and TCC commented regarding proposed §60.2(e)(1). TCC asserted that the proposed rule does not capture the elements of complexity, suggesting that ranges be utilized in establishing complexity. TCC stated that it appreciates the proposal's attempt to include complexity in the overall compliance history determinations and believes that it is an appropriate factor. Valero and TIP stated that basing the complexity on SIC codes fails to capture many compliance obligations, including things such as the "number of permit conditions and parameters, the frequency of monitoring, the number of emission points (both EPNs and the number of fugitive components), and other significant factors" which can vary greatly between industries as well as within industries. Valero, TIP, BP, TXOGA, and TCC made reference to the American Petroleum Institute (API)/American Chemistry Council (ACC) Compliance Rate Denominator Study, which Valero asserted "developed compliance obligation estimates for model small, medium, and large facilities in chemical manufacturing and petroleum refining and for industry as a whole." According to Valero, TIP, BP, TXOGA, and TCC, the study suggests that a general correlation exists between compliance obligations and facility size. Valero added that it believes that the complexity of large petroleum refineries/petrochemical plants is at least two orders of magnitude higher than the simpler sites, and if the commission intends to keep the rule simple, the complexity factors should be changed to 100, 10, and 1. BP, TXOGA, and TCC suggested that the number of emission point numbers (EPNs), number of wastewater discharge outfalls, number of elements in the notice of registration, and/or the number of solid waste management units might more appropriately be used to address complexity, and BP added, as might "the number of Title V requirements for a site, the age of the facility, and the location of the facility (in an attainment versus nonattainment area)." TXOGA added that whether the site is located in a nonattainment area should be considered as well. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

TMRA commented regarding proposed §60.2(e)(1). TMRA stated that it is not opposed to a default list, but is specifically interested in the recognition of "mining" as an industry warranting a complexity factor of 5, "and in no instance less than 3." Additionally, TMRA suggested that certain objective criteria should be added to the rule in order to add certain industry groups or sub-groups to one of the two higher complexity groups. Specifically, TMRA recommended the addition of the following criteria to either the rule or the preamble: "A complexity factor of 5 should be assigned to sites larger than 10,000 acres and/or which operate under permits in three or more distinct TNRCC program areas (e.g. air, solid waste, water quality, water rights, etc...)"; and "A complexity factor of 3 should be assigned to sites larger than 1,000 acres and/or which operate under permits in two or more distinct TNRCC program areas." TMRA asserted that the larger a facility is, the harder it is to manage environmental compliance at the site, and the higher the risk of violations, and stated that the commission recognized this as a factor during the March 27, 2002 agenda when the rule was approved for proposal. Finally, TMRA stated that it does not support a "case-specific approach based on a list of objective criteria, such as size, number of permit/regulated units, etc., with associated complexity points added to the denominator of the classification formula" as it asserts this would create too much administrative burden on the agency and would likely result in inconsistency.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a

nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

TDA commented, regarding proposed §60.2(e)(1), "The assignment of complexity factors for different industries is questionable when all industries (regardless of such factor) will be evaluated based on the same matrix to determine high, average or below performers." TDA suggested that a better approach might be to utilize a separate (high, average, or poor) matrix for each of the three complexity levels. TDA further asserted that it seems inconsistent to compare the compliance histories of two totally different industries when one industry has a significantly higher opportunity to accrue violations based on its complexity than the other industry. Additionally, TDA stated that the complexity level for CAFOs "appears far too low," asserting that it must have been arbitrarily assigned as "the industry is subject to numerous record keeping, reporting and permitting requirements."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that the rule should evaluate different industries separately. The adopted rule does allow for a consistent evaluation of compliance history while taking into account the opportunity level to accrue violations. No changes have been made in response to this comment.

FWAF, MMC, OCIW, and SSCC commented regarding proposed §60.2(e)(1). FWAF, MMC, OCIW, and SSCC proposed that the rules take into account the age of a facility, specifically suggesting that the complexity factor be increased by 1 if the site is 15 years or older. FWAF and SSCC based this proposal on advances in technology, meaning that new facilities are better equipped to comply with lower emission and discharge limits.

The commission disagrees with this comment. All regulated entities have an obligation to comply with the law no matter what level of regulatory burden they carry. However, in response to other comments received, the commission has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Proposed §60.2(e)(1)(A)

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(e)(1)(A). V&E suggested the addition of "(x) wholesale trade--nondurable goods;" and V&E, WM, Allied, BFI, TxSWANA, and NSWMA all suggested the addition of "(xi) waste management and remediation services." V&E stated that the rule does not take into account the complexity of these two industry types. Allied, BFI, TxSWANA, and NSWMA stated that they believe if the proposal is changed to move away from a strict categorization approach to a more objective approach, then the number of commission program areas that must issue authorizations or be involved with reviewing a given operation should come into play when considering complexity of a site, as should the size of the site.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. Three other criteria will also be utilized in determining a repeat violator designation. They include the size of the site (based upon FINs, number of external outfalls, and the number of AHWMUs), whether the site is located in a nonattainment area, and the total number of sites owned or operated by the person in the State of Texas. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

Proposed §60.2(e)(1)(B)(v)

FWAF, MMC, OCIW, SSCC, and LSS commented regarding proposed §60.2(e)(1)(B)(v). FWAF, MMC, OCIW, and SSCC proposed that primary metal and secondary metal refining and processing industries have a complexity factor of 5, stating that the other types of facilities assigned to a complexity factor of 3 appear to be significantly less complex than a foundry, while the types of facilities assigned to a complexity factor of 5 appear to be similar in complexity to foundry operations. LSS also requested that primary metal and secondary refining industries be moved from a complexity factor of 3 to a complexity factor of 5. LSS described its processes, and stated that it must comply with various air, water, and solid and hazardous waste regulations and permits. LSS asserted that its processes "are on a complexity par with industries included in complexity factor 5."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. As a result of the comments received, the commission has significantly modified the rule with regard to determining the complexity of a site. Specifically, the commission has deleted the complexity factor, as proposed in §60.2(e), and removed complexity as a divisor in the site rating formula. Instead, in adopted new §60.2(d)(2), every site will be assigned complexity points based upon its types of permits, and this will be utilized in repeat violator designation only. These changes will more accurately reflect the complexity of sites, and allow for a uniform treatment of persons.

Proposed §60.2(e)(2)

With regard to proposed §60.2(e)(2), PIC asserted that determining ratings and classifications on a site-specific basis satisfies the statutory provisions requiring consideration of an entity's number of sites and that further consideration of that criterion under proposed §60.2(e)(2) is unsupported.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. However, the commission does not agree with the commenter that determining ratings and classification on a site-specific basis satisfies the statutory provisions regarding consideration of number of sites. The commission has adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2).

AquaSource, V&E, Reliant, AECT, and TXOGA commented regarding proposed §60.2(e)(2). AquaSource stated that it concurs with the additional complexity factor as assigned in this paragraph, and suggested further the addition of another point

for persons with more than 100 sites, and the addition of another point for persons with more than 200 sites. On the other hand, V&E stated that there is no justification provided for the 25-site threshold, and further stated that "it is not clear whether the consideration of the number of sites owned, as required by the statute, is real or merely illusory." Reliant stated that the use of 25 sites as the cut-off is a simplistic approach that does not address complex sites, asserting that a single complex site is subject to greater regulatory burden than 25 less complex sites. AECT provided similar comments. Reliant and AECT both suggested a tiered approach. Reliant suggested adding to the end of the proposed language, "only if the site is owned or operated by a person that owns or operates at least the following number of sites based on the site's complexity factor: A) 20 sites, if the complexity factor is 1; B) 10 sites, if the complexity factor is 3; and C) 5 sites, if the complexity factor is 5." AECT provided the same suggestion, while further suggesting the replacement of the existing text with "The complexity factor determined in paragraph (1) of this subsection will increase by one," thereby removing completely the proposal regarding the use of 25 sites as a trigger. TXU supported the comments submitted by AECT. TXOGA added that the "legislative language adds further support to TXOGA's belief that some consideration of number of EPNs, for example, (a more direct link to a 'facility') should be incorporated into this rulemaking." Finally, TXOGA stated that it supports Brown McCarroll's suggestions regarding complexity. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission has instead adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2). The adopted paragraph utilizes a tiered approach, assigning points toward the total repeat violator designation criteria based upon how many sites are owned or operated in the State of Texas by a person.

7-Eleven commented regarding proposed §60.2(e)(2). 7-Eleven stated that it supports "a close linkage between the Repeat Violator standard and the relative complexity of a person's environmental compliance obligations. This linkage, however, must recognize and implement the legislative mandate to give equal weight to the difficulty presented by mandating regulatory programs at numerous separate facilities." 7-Eleven recommended that the following language be added to the end of this proposed paragraph: "For persons that own or operate 100 or more sites in the State of Texas, the complexity factor determined in paragraph (1) of this section will increase by an additional one point. For each additional 100 sites owned or operated by such persons in the State of Texas, the complexity factor determined in paragraph (1) of this section will increase by an additional one point." Further, in order to address the number of facilities issue with regard to repeat violators, 7-Eleven recommended the addition of another sentence, to read: "With respect to the criteria for designation of a person as a Repeat Violator, for every 100 facilities owned or operated by a person in the State of Texas, the number of major violations which must be documented in the compliance period in order to be considered a Repeat Violator under Section 60.2 will increase by one."

The commission responds that it has deleted this proposed subsection as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission has instead adopted §60.2(d)(3) to account for the number of sites owned by a person as part of the repeat violator designation criteria, as required by TWC, §5.754(c)(2). The adopted paragraph utilizes a tiered approach, assigning points toward the total repeat violator designation criteria based upon how many sites are owned or operated in the State of Texas by a person.

§60.2(e) (proposed as §60.2(f))

The commission adopts new §60.2(e), proposed as §60.2(f), concerning the formula, to effectively and equitably implement the requirement of TWC, §5.754(a), for the commission to establish by rule, a set of standards for the classification of a person's compliance history. TWC, §5.753, requires that the components of compliance history include not only the site which is the subject of the permit application, enforcement action, investigation, or application for the participation in an innovative program but also information pertaining to all regulated sites in the State of Texas as well as outside Texas. The commission has determined that it is appropriate, for purposes of classification, to distinguish between the site which is the subject of the commission decision and any other sites owned or operated by the person. Specifically, although information on all sites inside the State of Texas, as well as information on final enforcement orders, court judgments, and criminal convictions outside Texas, will be included in compliance histories, the classification for a site will be based on only information on the site which is the subject of the classification. In addition, the site ratings for each individual site owned or operated by a person in the State of Texas will then be averaged to provide a classification of high, poor, or average for each *person* with sites in the State of Texas. The executive director will determine each site rating based upon the method adopted in the paragraphs under new §60.2(e).

The commission has determined that the numbers used for multipliers and/or factors are appropriate and will effectively and equitably provide for performance classifications based upon compliance history. The point values assigned to the individual components and factors were chosen to provide a broad enough range to be able to detect clusters or natural gradations of performance across sites. Certain point values, as adopted, will be determined by the significance of the violations; other point values will be determined by the type and complexity of the component. Additional discussion of each formula calculation is subsequently provided in this preamble. The commission received a number of comments suggesting various point systems or alternatives, and considered all of those comments in developing the new process. The commission has incorporated the best of all of these suggestions in the formula being adopted.

Adopted new §60.2(e)(1), proposed as §60.2(f)(1), concerning site rating, addresses the calculations to be performed for a site for which a permit application, enforcement action, investigation, or participation in an innovative program is being considered. Paragraph (1) includes the calculations to be performed for the site for the time period reviewed, based upon the compliance history at the site. The commission deleted the definition of "site" as proposed in this paragraph because it is already defined in §60.2(a).

The point values were assigned to violations in NOVs, final orders, court judgments, and criminal convictions in a way that

demonstrates the relative seriousness of the enforcement action conducted by the state. Violations in NOVs carry the lowest points because NOVs are the least serious of the commission's enforcement options. Violations in final orders carry significantly more points than violations in NOVs because orders contain violations that are more serious or substantial than those in NOVs, or contain violations that have been repeated or unaddressed. Further, orders represent final commission actions as opposed to allegations included in NOVs. In addition, in response to comments received, the commission is adopting modifications to the rule to further distinguish between adjudicated orders and non-adjudicated (expedited) orders, and also to distinguish between expedited orders containing a denial of liability (those issued under TWC, §7.070 (1660 orders)), and those without a denial of liability. The commission utilizes legal action through the courts for persons violating commission orders in situations where injunctive relief may be necessary and when, in the executive director's judgment, higher penalties are warranted. Thus, violations in court actions are assigned higher points than violations in NOVs. The point values for violations in adjudicated orders and judgments are the same. The commission considers the most severe form of enforcement to be criminal prosecution and has assigned the highest point value for violations included in criminal convictions.

Adopted new §60.2(e)(1)(A), proposed as §60.2(f)(1)(A), has been modified in response to comments received. Subparagraph (A) reflects the multiplier for the number of major violations, depending upon the type of enforcement document containing the violations. This subparagraph has been modified from proposal to provide for a wider range of points to reflect the differences in the variety of enforcement actions as well as to provide incentives for a person to settle enforcement cases expeditiously. As adopted, the rule provides the following point assignment for major violations: any adjudicated final court judgments and default judgments shall be multiplied by 160; any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140; any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120; any final prohibitory emergency orders issued by the commission shall be multiplied by 120; any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and any agreed final enforcement orders containing a denial of liability shall be multiplied by 80. The commission has determined that it is appropriate to provide such distinctions between enforcement resolution types by their associated point values because it more accurately reflects distinctions between the different "levels" of enforcement actions available to the commission and the severity of the violations included in those actions.

The commission has determined that major violations contained in these components should be weighted more heavily than those contained in NOVs because these components are final commission actions, whereas NOVs are the lowest level of enforcement. The reference to repeat violators has been removed from adopted §60.2(e)(1)(A), but the requirement regarding repeat violators in TWC, §5.574(c)(3), is addressed in adopted §60.2(e)(1)(J), as discussed subsequently in this preamble. Specifically, adopted §60.2(e)(1)(J) provides for a significant addition to the number of points in the formula based on a person's designation as a repeat violator at a site, and as such, will serve as a driver towards the poor performer classification. The commission has determined that this is especially appropriate in light of the modification to the definition of major violation and modification to the repeat violator designation, whereby complexity, size, the number of sites in Texas, and location in a nonattainment area are all taken into consideration before determining that a person is a repeat violator at a site.

Adopted new §60.2(e)(1)(B), proposed as §60.2(f)(1)(B), and new §60.2(e)(1)(C), proposed as §60.2(f)(1)(C), have been modified in response to comments received. Moderate and minor violations have been assigned multiples in the same manner as previously described for major violations.

Adopted new §60.2(e)(1)(D), proposed as §60.2(f)(1)(D), has been modified in response to comments received. Specifically, the reference to repeat violators has been removed from adopted §60.2(e)(1)(D). However, the requirement in TWC, §5.574(c)(3), regarding repeat violators is addressed in adopted §60.2(e)(1)(J), through the addition of 500 points in the formula for repeat violators, as discussed elsewhere in this preamble.

The commission has determined that major violations contained in NOVs should be weighted less than those contained in other types of enforcement because NOVs are the lowest level of enforcement. The weight of the multipliers is different for the types of violations to reflect the severity of the violation and the fact that NOVs are the lowest level of enforcement. This same analysis and distinction is also adopted for moderate and minor violations contained in any NOVs, in adopted §60.2(e)(1)(E) and (F), which were proposed as §60.2(f)(1)(E) and (F). Subparagraphs (E) and (F) have been adopted without substantive modification.

Adopted new §60.2(e)(1)(G) has been modified from proposal as §60.2(f)(1)(G) in response to comments. The commission has determined that all counts in criminal convictions should be weighted more heavily than violations contained in final administrative orders or other final actions, even those classified as major violations. Based upon comments received, the commission has determined that it is appropriate to distinguish between the most serious criminal convictions and those of a less serious nature. Specifically, subparagraph (G) has been divided into two clauses, and has been modified to read: The number of counts in all criminal convictions: (i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and (ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.

Adopted new §60.2(e)(1)(H), which was proposed as §60.2(f)(1)(H), states that the number of chronic excessive emissions events from §60.1(c)(4) shall be multiplied by 100, as proposed. The commission has proposed criteria for determining chronic excessive emissions events in another rulemaking (Rule Log Number 2001-075-101-AI) to implement HB 2912, §5.01. Until that rulemaking is adopted, the executive director will not use, and the commission will not consider, this multiplier in classifying a site.

Adopted new §60.2(e)(1)(I) states that the subtotals from subparagraphs (A) - (H) of this paragraph shall be added together. This will provide a total for points associated with compliance history components for the site during the compliance period, including: violations (major, moderate, and minor) included in any

NOVs or any final enforcement orders, court judgments, and consent decrees of this state and the federal government relating to compliance with applicable legal requirements under the jurisdiction of the commission or the EPA for the compliance period. Section 60.2(e)(1)(I) has not been modified since proposed as §60.2(f)(1)(I).

The commission has deleted the use of a complexity factor in the formula, as proposed in §60.2(f)(1)(J), limiting the use of complexity to the repeat violator designation. This is discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, specifically in the discussion regarding §60.2(d). Instead, the commission has adopted in subparagraph (J) the following language: "If the person is a repeat violator as determined under subsection (d) of this section, then 500 points shall be added to the total in subparagraph (I) of this paragraph. If the person is not a repeat violator as determined under subsection (d) of this section, then zero points shall be added to the total in subparagraph (I) of this paragraph." This significant addition to the number of points in the formula based on a person's designation as a repeat violator at a site will serve as a driver towards the poor performer classification. The commission has determined that this is especially appropriate in light of the modification to the definition of major violation and modification to the repeat violator designation, whereby complexity, size, the number of sites in Texas, and location in a nonattainment area are all taken into consideration before determining that a person is a repeat violator at a site.

In response to comments received regarding proposed §60.2(f)(3)(A), concerning mitigating factors, the commission has adopted language at §60.2(e)(1)(K), regarding environmental audits. Specifically, subparagraph (K) reads: If the total in subparagraph (J) of this paragraph is greater than zero, then: (i) subtract 1 point from the total in subparagraph (J) of this paragraph for each notice of an intended audit submitted to the agency during the compliance period; or (ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, and the site was granted immunity from an administrative or civil penalty for that violation(s) under the agency's Environmental Audit Program, then the following number(s) shall be subtracted from the total in subparagraph (J) of this paragraph: (I) the number of major violations multiplied by 5; (II) the number of moderate violations multiplied by 3; and (III) the number of minor violations multiplied by 1. This modification to the rule is intended to address concerns that "positive points" should be awarded in the classification formula for at least some of the positive components from §60.1(c). First, subparagraph (K) requires that the subtotal in subparagraph (J) be greater than zero so that a site with no investigations during the compliance period does not receive a "high performer" classification merely by submitting a notice of intent to perform an environmental audit. Similarly, the commission has determined that it is not appropriate for a site to be classified as a "high performer" based solely on the disclosure of violations under an environmental audit. As such, the rule, as adopted, will provide "positive points" equivalent to the number of points assigned to major, moderate, and minor violations included in an NOV. A point for a notice of intended audit under clause (i) will only be subtracted from subparagraph (J) when there are no points under clause (ii) being subtracted for applicable violations disclosed as a result of the audit for which notice was provided.

Adopted new §60.2(e)(1)(L), proposed as §60.2(f)(1)(K), has been modified in response to comments received. As adopted, subparagraph (L) states: "The result of the calculations in subparagraph (I) - (K) of this paragraph shall be divided by the number of investigations conducted during the compliance period plus 1. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. All sites with a classification of 'average performer by default' are assigned 3.01 points." This division will normalize the total point value by averaging, based upon the total number of investigations performed at the site during the compliance period. The rule has been modified from proposal to include the addition of one in the denominator to the total number of investigations performed at a site during the compliance period. This serves a two-fold purpose: first, it provides some cushioning for those sites which may not be investigated very frequently; and second, it ensures that there will never be a zero in the denominator, which is mathematically incorrect. Additionally, the rule has been modified to more clearly and accurately reflect what constitutes an investigation for purposes of this chapter, specifying that it is something conducted by the executive director or his staff or agent, as opposed to being conducted by the regulated entity, or by a citizen, for example. The rule also has been modified to clarify that the investigation does not have to be conducted at the site. This modification allows for the inclusion of record reviews conducted at agency offices, as intended.

The rule has also been modified to exclude from the number of investigations counted in the denominator of the site rating formula those investigations initiated by citizen complaints, (although violations documented in NOVs and enforcement actions resulting from such investigations will still be counted in the site rating formula). As noted in the adoption preamble for Phase I of the compliance history rulemaking concerning components, complaints are not specifically included as a component of compliance history because other components will, in effect, include pertinent aspects of this same information. For instance, a citizen may file a complaint regarding an environmental incident. The executive director will investigate, and, if a violation is documented, the executive director will issue an NOV or initiate enforcement, as appropriate. Thus, the complaint will be part of the compliance history via the NOV or commission order. The commission also noted in the adoption preamble for Phase I that during the legislative process citizen complaints were not included in HB 2912. Complaints were excluded from the compliance history components, not to exclude any underlying violation(s), but in order to avoid having potentially unverified, unverifiable, or stacked complaints counted as a negative component of a person's compliance history. With regard to the current rulemaking, the commission has similarly determined that it is inappropriate to include complaint investigations in the denominator of the site rating formula, as the denominator serves to "equalize" the opportunities for violations to be documented at a site, in a positive manner (i.e. because the number of investigations serves as a divisor, the higher the number of investigations, the lower the overall site rating becomes). Specifically, including complaint investigations in the denominator could serve to inappropriately and undeservedly skew a site rating for the better. For instance,

one or more complaints may be filed against a site on different occasions during the compliance period. Agency staff will investigate the complaint allegations, but may not be able to verify them even if they existed at the time the complaint was made. Under these circumstances, no NOV would be issued and no enforcement action would be initiated. Also, complaint investigations are generally limited in scope to the issue which was the subject of the complaint, as opposed to other investigations which are generally much broader in scope. Further, the agency has no control over how many complaints are made or who initiates complaints, but is required to investigate all complaints. All of these factors form the basis for the commission's determination that, from a fairness standpoint, it is as inappropriate to allow complaints to "positively" skew a site rating unjustifiably as it is inappropriate to allow complaints to unjustifiably "negatively" skew a site rating. Given these considerations, only any underlying violation(s) discovered through a complaint investigation will be included in a person's compliance history.

Finally, the last sentence of this adopted subparagraph has been added in response to other modifications to the rule which states that a person will be classified as a high, average, or poor performer based upon a mathematical averaging of the points for each of the sites owned or operated by that person. In order to address the situation in which there is no information upon which to base a classification rating, and as such the site is assigned a classification of "average performer by default" under adopted §60.2(b), the commission has determined that it is appropriate to assign such sites the average of the point range for the average performer classification. Without such a provision, the point value for an "average performer by default" site would be zero and, when utilized in averaging scores for the person's classification, would unfairly skew the total point score for the person. The adopted number 3.01 is the average point value of the average performer group in the sample population of 2736 sites utilized to determine the point ranges in adopted §60.2(e)(2), as discussed in more detail later in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

In response to comments received, the commission has adopted new language at §60.2(e)(1)(M) which reads: "If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Regulatory Flexibility and Environmental Management Systems) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (L) of this paragraph by 0.9." The addition of this provision provides certainty in the formula for those persons who implement certified EMSs. The commission has determined that it is only appropriate to include in the formula those EMSs certified under Chapter 90, as such EMSs have met certain criteria. In addition, it is appropriate to only provide this downward adjustment in point values for those certified EMSs which have been in place for at least one year, because it takes time subsequent to the implementation of an EMS for improvements to be seen. Finally, the commission has determined that it is appropriate to use a percentage reduction rather than a straight point value, as this provides a more equitable result regardless of the complexity or size of a site. The commission notes that there is still an opportunity, under adopted §60.2(e)(3)(A)(ii), for a site's classification to be improved from poor to average based upon the implementation of an EMS which is not certified under Chapter 90. This is discussed in more detail in the portion of the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble regarding adopted §60.2(e)(3), proposed as §60.2(f)(3).

Proposed §60.2(f) has been changed to §60.2(e) due to modifications and deletions made earlier in the rule. Additionally, the commission has modified adopted §60.2(e), by changing the word "will" to "shall" for clarity and consistency.

MMM and Fort Worth COC commented regarding proposed §60.2(f). MMM asked how its operations out-of-state will be factored into its classification and site rating. Similarly, Fort Worth COC commented that the proposed rules are not clear concerning how points may be assigned for violations that have occurred at other facilities or in other states. Fort Worth COC also commented that there is no calculation regarding how the compliance history of one site will be impacted by other sites owned or operated by the same person.

The commission responds that out-of-state operations will not be "factored" into site ratings and they will have no bearing on the numbers used in the formula or the resulting point value used to classify a site and a person. However, any out-of-state enforcement actions will be included in the compliance history report as referenced in adopted §60.3(a)(1)(B), and will be used in consideration of a pattern of environmental compliance. The site rating will not be affected by the compliance history of other sites owned or operated by the person; however, the classification of the person will be. The adopted rule provides for calculation of a classification for a person by averaging the site rating of each site owned or operated by that person in Texas.

C&H and Onyx commented regarding proposed §60.2(f). C&H stated, "Creating an objective calculation for a subjective compliance issue is unworkable." C&H further stated that the proposal is not sufficient to allow for alteration of a compliance classification if circumstances warrant it, or if the situation is unique, and added that the flexibility available is for positive factors, but not negative ones. C&H then provided an example of how the formula can be inappropriate: a small business, with only one investigation during the compliance period which resulted in an enforcement order being issued with two moderate violations would end up in the poor performer category with 120 points. Similarly, Onyx expressed a "general concern that the compliance history ratings may not accurately reflect the environmental performance of a facility." Onyx stated that, based upon its experience, compliance efforts cannot be accurately measured using a numerical system, because "acts of nature, power failures, uninformed customers, and other occurrences of this type all play a role in the compliance performance of a facility."

The commission disagrees that an objective calculation for compliance history is unworkable. The adopted rule will allow just such an objective evaluation of compliance. With regard to flexibility for positive or negative factors in the alteration of a classification, in accordance with §60.3(e), reclassification may be sought for only poor performers and average performers with 30 points or more and only if a change in classification will result. The rule also provides for correction of clerical errors in person or site classifications at any time. The modified formula ameliorates the issue of a person with infrequent investigations by raising the denominator by one in all cases. The commission acknowledges that many things play a role in the compliance performance; however, not all of the examples enumerated by Onyx would result in violations. This subsection of the rule has been extensively modified in response to comments, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

C&H commented regarding proposed §60.2(f). C&H stated that the rule creates a compliance history for an individual site, although §60.1(c) states that the compliance history shall include information specific to the site under review as well as additional sites owned or operated by the same person, and that there is no calculation regarding how one site might have its compliance history affected by other sites owned or operated by the same person. C&H also stated that the commission could have the ability to reduce the high performer classification without any standard or criteria on which to base that decision. C&H suggested that an optional percentage allocation should be set out in the rule. For instance, the calculated number for the compliance history rating for a site may be adjusted up or down by 10% based upon the compliance history ratings of other sites owned or operated by the same person. C&H further stated that the commission should not consider sites outside the State of Texas "since there is no analogous compliance history rule in other states or federal systems."

The commission responds that a site classification is specific to that site. Each additional site owned or operated by the same person within Texas will also receive a site classification. All the sites' ratings will be averaged to determine a person's classification. The executive director may change the classification of a poor performer to an average performer, but not to a high performer, based upon mitigating factors. In addition, the executive director may, upon the appeal of a classification, change the classification of either a poor performer, or an average performer with 30 points or more, but not the classification of a high performer. This issue has been clarified in the rule. The commission disagrees that a specific "up or down" adjustment percentage be adopted because such an approach would not necessarily reflect the overall performance of the person and may blur patterns in compliance history that could be observed by an evaluation or mitigating factors. With regard to sites in other states, the statute specifically requires that compliance histories include orders, judgments, and convictions relating to violations of environmental laws of other states. No change was made to the rule in response to this comment.

V&E and 7-Eleven commented regarding proposed §60.2(f). V&E stated that it concurs with the approach of evaluating "a site independently and also in connection with other sites owned or operated by the same person." However, V&E also stated that the formula for a site "does not meet the statutory requirements of establishing standards for the classification of a person's compliance history." In a similar vein, 7-Eleven stated, "The Commission should clearly explain the legal basis for its decision to not develop a compliance history classification for persons that are owners or operators of regulated facilities," adding that the legislature mandated that each person's compliance history must be classified.

In response to comments, the rule has been modified. In addition to a classification specific to all sites owned or operated by the same person within Texas, all the site ratings will be averaged to determine a person's classification.

TXI commented regarding proposed §60.2(f). TXI stated that it does not believe a formula should be used to determine compliance history classifications, as it asserts that a formula cannot anticipate all possible scenarios. TXI expressed concern that the commission will be criticized by opponents of a site if mitigating factors are used to raise a compliance history rating. As such, TXI recommended a qualitative approach, using the standards set out in the TWC. Specifically, TXI recommended the revision of proposed §60.2(f) to read: "In classifying a site's compliance history, the Commission shall consider the number and significance of violations, if any, at the site (as defined in subsection (c) of this section), the complexity of the operations and regulations applicable to the site (as defined in subsection (3) of this section), and whether the site is a repeat violator as defined in subsection (d) of this section."

Section 60.2(e)(3) and §60.3(e) anticipate that there may be scenarios where a strict formula approach does not capture all aspects of a site's compliance history and provide flexibility to modify a classification in such scenarios. Also, the commenter's suggested approach is not feasible considering the large number of sites to be evaluated under the statute. No changes have been made in response to this comment; however, this subsection of the rule has been substantially revised as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Huntsman commented regarding proposed §60.2(f). Huntsman asserted that "corporate liability is vicarious: a corporation with a firm commitment to environmental compliance can be indicted for the culpable conduct of its employees." Huntsman, therefore, suggested that when a corporation cooperates with regard to a federal or state investigation into environmental criminal offenses, "that conduct should be assigned a numeric value that can be divided into the violation points used to calculate a site's compliance history. Alternatively, such cooperation could be considered as a mitigating factor under {proposed} §60.2(f)(3)."

Indictment, by itself, does not impact the site rating. Only the counts in criminal convictions against regulated entities will be assessed for use in the formula. The commission disagrees that the level of cooperation should be either assigned a numeric value or considered a mitigating factor because the interaction would be between the entity and an outside party, the prosecutor, and such interaction and the quality thereof would be difficult for the executive director to assess in any consistent manner. Information on the nature of the corporate criminal conviction may be provided, not as a mitigating factor, but in an appeal of classification under §60.3(e) if a site is classified as a poor performer or an average performer with 30 points or more. No changes have been made in response to this comment.

BP commented regarding proposed §60.2. BP stated that, rather than "establishing a set of standards for the classification of a person's compliance history" as directed by the legislature, the commission has chosen to utilize an algebraic formula. BP asserted that it believes this is a possible approach, but it must be "replicable," meaning that the same inputs must provide the same outputs. BP stated that it is not convinced that this will result based on the proposal, for many reasons. And, BP asserted that it is difficult to express complexity accurately in a numeric formula.

The accuracy of and the ability to replicate results through the use of the adopted formula conserves agency resources. In addition, other entities will know how to calculate rankings and classifications. Furthermore, the complexity factor has been modified in response to many comments received. The complexity factor, as adopted, is used with regard to repeat violators in an attempt to recognize that some operations are inherently more technically challenging. Consequently, it is appropriate to consider complexity before adding the 500 points associated with repeat violator status to the total points used to classify a site.

LSS commented regarding proposed §60.2(f)(1). LSS stated that it appreciates "the difficulty in developing a ranking system for a broad range of environmental performance," and further, that it believes that weighting criminal convictions more heavily than enforcement actions, and enforcement actions more heavily than NOVs makes for a logical approach.

The commission appreciates the positive comments in support of the rule.

H&W commented regarding proposed §60.2(f)(1), stating that paragraph (1) should be clarified to reflect that the "formula requires only the addition of all of the violations documented to have been committed by the *site* under review."

The commission has added the phrase "based upon the compliance history at the site" to the text. The formula does not include compliance history components at other sites owned or operated by that person. A site is rated solely on the points resulting from its compliance history. However, classification of a person considers the rating of the site, as well as all other sites in Texas owned or operated by the person by averaging them together.

PIC commented regarding proposed §60.2(f)(1). PIC requested clarification regarding "whether the commission's intent in the proposal was for the person to face the consequences of 'repeat violator status' immediately upon the documentation of the violation that initially triggers this classification, or face the consequences only with respect to subsequent violations after this classification is initially triggered. For example, Company X receives a final order documenting the same major violation at its facility that was previously documented in a different final order the year before. There are no other components in Company X's compliance history. Under {proposed} §60.2(f)(1)(A), does Company X have 200 points or 400 points? PIC's interpretation of proposed {proposed} §60.2(d) and {proposed} §60.2(f)(1)(A) is that Company X would have 400 points; however, PIC seeks clarification."

The consequences of repeat violator status are immediate upon the issuance of the second (or third or fourth) document containing a major violation. However, the commission would also note that the adopted rule has been modified as to what constitutes repeat violator designation. Specifically, it is not required that the same or similar major violation be documented during the compliance period; rather, it is the occurrence of any violations (more than one, two, or three, as applicable) designated as major under adopted §60.2(c)(1). For clarification, Company X would have had 400 points under the proposed rule.

BP commented regarding proposed §60.2(f)(1). BP asserted that the proposed rule, which assigns points to consent decrees, "will inhibit companies from entering into voluntary decrees with government," adding that this would not be good for government, industry, or the environment. BP made reference to a consent decree it entered with EPA, which it asserts was "outside the traditional enforcement realm."

The legislature has determined that "enforcement orders, court judgments, consent decrees, and criminal convictions" be included as components of compliance history. The adopted rule differentiates between consent decrees containing a denial of liability and those that do not by decreasing the multiplier from 140 to 120. The adopted rule differentiates between the types of court orders by allocating different point values for the violations contained therein.

GI[2] commented regarding proposed §60.2(f)(1), suggesting that NOVs generated from POTWs not be included in the site classification formula for a metal finishing site if the violations in the NOV have been corrected and the site has come back into compliance through self-monitoring and reporting.

The comment is outside the scope of this rulemaking, as the issue of NOVs was addressed in the first phase of the compliance history rulemaking. However, the POTW is not acting as an agent for the commission, so any NOV issued by the POTW would not be included as a compliance history component. No changes have been made in response to this comment.

Fort Worth COC, C&H, TAB, and TCC commented regarding proposed §60.2(f)(1). Fort Worth COC, C&H, TAB, and TCC stated that the rule should provide for a gradual decrease in the point values, or less weight, given to violations that occurred in the past. TCC recommended that "formula items within the past year could have a factor of 1; formula items that are between one and two years old, a factor of 0.8; formula items between two and three years old, a factor of 0.6; formula items between three and four years old, a factor of 0.4; and formula items between four and five years old, a factor of 0.2." TCC added that there might need to be adjustments made to the point ranges, but this would provide the commission with the ability to look at improvements as good indicators, and declining performance as a bad indicator. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Additionally, Fort Worth COC stated that similar consideration should be given to average or high performers purchasing poor performing sites. C&H stated that a new owner being "encumbered" by the violations of the previous owner is "not only blatantly unfair, but would discourage development and investment in Texas and impede real estate transactions throughout the state." TAB stated that it believes that a company's current compliance is a more accurate indicator of performance than past compliance.

The commission disagrees with these comments. With regard to a decrease in the point values, the commission determined during the first phase of compliance history rulemaking that a five-year compliance history is appropriate, and that by establishing this period a distinction is made between "newer" and "older" violations. "Older" violations (i.e., outside the compliance period) will not be counted as part of a person's compliance history. "Newer" violations (i.e., within the compliance period) will be counted as part of a person's compliance history, and will be assigned point values based upon their designation as major, moderate, or minor violations, and upon what type of action they were included in. The formula adopted by the commission as stated in §60.2 includes as a divisor the number of investigations conducted over the five-year period. Through this divisor, the impact of an older compliance history component will be decreased over time as additional investigations are conducted, provided that additional violations are not identified in those later investigations.

With regard to the issue of giving similar consideration to previous violations when an average or high performer purchases a poor performing site, the commission responds that this issue is addressed under "mitigating factors" in adopted §60.2(e)(3), in that the executive director shall evaluate such a circumstance and may modify (raise) the classification for the purchased site. No changes have been made in response to these comments.

TAB, ATINGP, UT, Brown McCarroll, TCC, and PIC commented regarding proposed §60.2(f)(1). TAB and TCC recommended that there be a distinction between "agreed orders and findings

orders" and that agreed orders should not be included in the compliance history formula. TAB gave as an example the situation in which a company enters into an agreed order "as much to accelerate emissions reductions in advance of TNRCC adopting rules." ATINGP commented that violations in agreed orders should be assigned less weight than violations in "orders of a tribunal after a full adjudication," basing this on the premise that a person "should not be penalized for finding a path that will bring a quick and economical resolution to an enforcement action." ATINGP recommended that violations in agreed orders should only be assigned point values twice those in NOVs. Similarly, UT recommended that 1660 orders receive fewer points in the formula than findings orders, suggesting that if a major violation in a findings order receives 100 points, the same violation in a 1660 order should receive 50 points. UT asserted that this approach would provide incentive for a regulated entity to agree to an order. Additionally, TCC asserted that consent decrees should not be weighted the same as court judgments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Brown McCarroll provided similar comments, asserting that violations in "no findings orders" should have considerably less value that those in findings orders. TXOGA endorsed the comments submitted by Brown McCarroll. PIC submitted "that violations in final court orders and consent decrees should be weighted more heavily than violations in final administrative orders."

The commission modified the rule to distinguish between types of orders and types of court documents as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission points out that the example given by TAB is not an example of an enforcement order, and thus, orders entered as part of a state implementation plan (SIP) agreement are not included in compliance history.

Fort Worth COC, C&H, V&E, TAB, TXI, T&K, BP, Brown McCarroll, TXOGA, and TCC commented regarding proposed §60.2(f)(1). TCC stated that the inclusion of violations in NOVs for which scores are also added for violations included in orders or judgments "appears to create the circumstance where the issuance of an NOE (for which no points are added) would be preferable to the issuance of an NOV. Granted, the points for NOVs are small, this apparent inequity could be addressed by deleting NOVs that result in orders, judgments or decrees." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

TXOGA asserted that the rule "should not 'double count' violations unless there is evidence that the company is not making an effort to comply," stating that the proposed approach is not appropriate for operators who are making their best attempt to comply, as "{m}any violations simply cannot be corrected 'on the spot' of within several days of an inspector's visit." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. Fort Worth COC, C&H, TAB, and TXI commented that the rule allows violations cited in an NOV, that are later included in a commission Order, to be counted twice. C&H and TAB asserted that the rule should state that the same violation, listed in both an NOV and any order or decree, can only be used once in the compliance history calculation. V&E expressed similar concerns, and stated that it concurs with TCC's recommendations. As an alternative, V&E suggested that points be assigned to an NOV based upon the level of the violations contained in it, rather than assigning points for each violation in the NOV, thereby avoiding counting specific violations twice while recognizing the legislative directive to include NOVs. Brown McCarroll expressed similar concerns, and recommended that the following be added to the end of the first sentence in proposed subparagraph (D): "excluding such major violations that are also included in any final enforcement orders, court judgments, and consent decrees considered under paragraph (f)(1)(A) of this section." Brown McCarroll recommended the same approach to proposed subparagraphs (E) and (F). TXOGA endorsed the comments submitted by Brown McCarroll. T&K similarly asserted that the rule, as proposed, could result in not only double, but triple or even quadruple counting of a violation, as it moves from a self-disclosed violation, to an NOV, to an Executive Director's Preliminary Report and Petition (EDPRP), to a final enforcement order. As such, T&K recommended that the rule be clarified to reflect that violations listed in an EDPRP would not be included in the formula. T&K stated that it does not believe the commission is authorized by the statute to multiple counting of the same violation; but rather, the legislature's intention was to take into account, through the inclusion of NOVs, violations that do not proceed to enforcement and those violations contained in 1660 orders. BP asserted that by double-counting NOVs and orders, any person who disagrees with the NOV and avails itself of its due process rights is punished, and as such, recommended the elimination of any double-counting for purposes of this rule.

Commission records reflect that approximately 95% of all violations cited in an NOV are resolved prior to the need to initiate enforcement (or conversely, only 5% of violations cited in NOVs result in enforcement). An NOV provides a specific time period for the recipient to correct the violations. If all of the violations included are in fact corrected during that time period, then no enforcement action is initiated. However, if all the violations are not corrected during the time period, then enforcement will be initiated. The commission has determined that it is appropriate to count those same violations in both the NOV and a subsequent order because the recipient was given an opportunity to come into compliance before enforcement was initiated and did not do so. It is also important to note that a violation noted in an NOV will receive a significantly lower point value than the same violation included in an order will receive. Additionally, a person may be able to demonstrate that an NOV was without merit, and in such cases, the specific violations cited in error will be removed from the compliance history and not counted toward site rating. The violations included in a Notice of Enforcement (NOE) letter or EDPRP will not be included in compliance history calculations, because those are the violations that, if confirmed, will appear in the commission order. In addition, there is no statutory mandate to include them in the compliance history. No changes have been made in response to these comments.

LSS commented regarding proposed §60.2(f)(1). LSS requested that self-reported NOVs not be included in the ratings formula as NOVs, but if included, LSS asserted that clarification is needed. Specifically, LSS provided, as an example, the situation where a wastewater permit requires operation of a continuous temperature recorder. LSS continued, "If the recorder fails to operate properly in the period between collection of the wastewater samples...that is an exceedance of the permit conditions and must be reported with the Daily Monitoring Reports (DMR)...Technically, this could be considered to be a self-reported violation, yet it is hardly indicative of a failure of a company's environmental program."

This comment is outside the scope of this rulemaking, as what constitutes an NOV was addressed in Phase I of the compliance history rulemaking concerning §60.1.

T&K and Chaparral commented regarding proposed §60.2(f)(1). T&K and Chaparral submitted essentially the same comment regarding the scope and use of self-reported violations as "notices of violation" under the proposed rules. In the preamble to Phase I, the commission stated that "NOVs" include self-reported violations that are submitted to the commission in various required reports, such as DMRs. T&K sought clarification of the agency's intent to include such self-reported violations for two reasons. First, T&K argued that interpreting "NOVs" to include these self-reported violations is impermissibly broad. Had the legislature intended "notice of violation" to be a term of art different from its common usage, it would have included such a definition in the statute. It didn't, and the commission cannot redefine "NOV" to have a meaning or subject matter different from the meaning the agency has uniformly applied in the past. Second, T&K argued that certain quoted passages in the preamble support the position that an NOV must be issued by the executive director to become part of a facility's compliance history. In addition, T&K also asserted that some derivations that are self-disclosed by a regulated entity in these types of reports do not necessarily represent violations. As such, T&K recommended that only NOVs issued by the executive director should be included in the compliance history formula. In the alternative, T&K requested that the commission specifically clarify in the rule that self-reported violations in these types of reports will be included in the compliance history formula.

One of the components of compliance history listed in §60.1(c)(7) is "all written notices of violation, including written notification of a violation from a regulated entity." This provision specifically states that self-reported violations will be considered NOVs for the purposes of this rule. This is consistent with the legislature's directive in TWC, §5.753(d), to include "notices of violation" as a component of a person's compliance history. Nothing in TWC, §5.753(d), limits the agency's consideration of "notices of violation" to only those notices that are issued by the executive director. It is appropriate for the commission to include self-reported violations in the category of "notices of violation" considered in the compliance history formula.

Fort Worth COC commented regarding proposed §60.2(f)(1). Fort Worth COC commented that there is a "double jeopardy" concern with, for instance, including as a component of compliance history a consent decree entered into prior to the compliance history rules. Fort Worth COC went on to say, "It seems inherently unfair, perhaps even illegal, to penalize the entity after the fact," when, if the entity had known at the time of negotiations that the decision would have impacts in the future, it might have made a different choice in legal action.

The commission responds that this comment is outside the scope of this rulemaking. The components of compliance history, as well as the timing and length of the compliance history period, were established in the first phase of the compliance history rulemaking. However, as noted in the proposal preamble to this rulemaking, there was a request for an opinion submitted to the OAG with regard to components of compliance history as promulgated under §60.1 (OAG Request Number RQ-0482-JC). The issue raised in the request for an opinion specifically asked "{w}hether it is proper or constitutional to construe the language of H.B. 2912, §18.05(i) to refer to notices of violation, enforcement orders, and other compliance history actions that are issued or occur prior to February 1, 2002." The OAG issued Opinion No. JC-0515 on June 24, 2002. In that opinion, the OAG determined "The provision of the Commission rule that establishes the time period for compliance history as five years before the agency's regulatory authority is initiated or invoked, including compliance history before February 1, 2002, is consistent with section 5.753. The time period is also consistent with section 18.05(i) of House Bill 2912, an effective date provision applicable to the changes in the definition of compliance history made by section 5.753 and the rule implementing it." Additionally, the OAG determined that "It is unnecessary to decide whether a regulated entity has a vested right under article I, section 16 of the Texas Constitution to have compliance history determined according to the law in effect when the relevant events took place. Even if such a right exists, the compliance history rule applies to programs designed to protect public health, safety, and welfare, and the Legislature is not precluded by article I, section 16 of the Texas Constitution from enacting retroactive statutes that are necessary to safeguard these interests." As a result of this opinion, the commission will utilize historical NOVs and enforcement actions issued during the five-year compliance period as provided for in §60.1. No changes have been made in response to this comment.

AquaSource, T&K, and Chaparral commented regarding proposed §60.2(f)(1). AquaSource stated that the rule should be clarified to reflect that one non-complying action will only count once, and gave as an example that an excursion of a permit limit should be counted only once, and not three times as a violation of the permit, of a rule, and of a statute. T&K and Chaparral provided similar comments, stating that for "purposes of the formula, the number of major, moderate or minor violations should equal the number of events of noncompliance."

The commission disagrees with the AquaSource comment that the rule requires amendment, but agrees with the concept that one non-complying action will only count as one violation, although there may be more than one legal basis of the violation. The commission also disagrees with T&K and Chaparral in that the number of events of noncompliance is a term utilized in the penalty policy and those events do not necessarily equal the number of violations. In the penalty policy, "events" means the number of times or the period of time that the violation occurred. Where the penalty policy is looking at number of events for each violation, the site rating for compliance history purposes is based on violations. As noted previously, a violation may be counted more than once in the compliance history formula. No changes to the rule have been made in response to these comments.

Plano commented regarding proposed §60.2(f)(1). Plano recommended that, rather than assign the complexity factors as proposed in §60.2(e) which are then utilized as a divisor in proposed §60.2(f)(1)(J), there should be a base point value assigned to each level of complexity. Specifically, Plano suggested that the formula be changed to: "(base complexity level points) - (violation points) - (investigations (>1)) + (mitigation points) = total points," with the base complexity level points as 700, 600, or 500 for a complexity level of 5, 3, or 1, respectively. Plano further recommended modification to the point ranges in proposed §60.2(f)(2) based upon this formula.

The rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission received a number of comments suggesting various point systems or alternatives, and considered all of those comments in developing the new process. The new process includes the best of all of these suggestions. The formula proposed by Plano does not take into

account the repeat violator and chronic excessive emissions event issues that are required to be included by HB 2912.

T&K and Chaparral commented regarding proposed §60.2(f)(1). T&K and Chaparral stated that the commission "lacks authority to enhance the effect of repeat violator status by doubling the points added to the compliance rating if a company is a repeat violator." T&K and Chaparral added that the proposal appears to apply the doubling to any violations, even those wholly unrelated to past violations, and recommended that the rule clarify that the doubling only applies to a repeat of the same violation at the same facility or unit, not to any violation at any site owned or operated by one who has been classified as a repeat violator.

TWC, §5.754, specifically requires the commission to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of facilities owned or operated by the person, and to consider the significance of the violation and whether the person is a repeat violator. It is appropriate that the effect of being designated a repeat violator should be significant in terms of the person's site rating and resulting classification. This section of the rule has been modified as a result of other comments. The site will be assigned 500 points if it is a repeat violator rather than utilizing a multiplication factor as originally proposed. Based upon comments received, the commission has substantially modified the definition of repeat violation, which now requires two, three, or four major violations before receiving the repeat violator designation depending upon the criteria points for the site.

Huntsman commented regarding proposed §60.2(f)(1). Huntsman stated that the Phase II rules are "written so that violations at major sources will yield a disproportionately high total," adding that "chemical plants are complex, integrated operations that process a high volume of potentially hazardous material 24 hours a day, seven days a week, 52 weeks a year." Huntsman asserted that violations at a major source are more likely to lead to an NOV or enforcement action because the margin for error has to be smaller at large operations, and because major sources have more emission points and regulated facilities to be inspected. Huntsman further asserted that the proposed language for categorizing violations as either major, moderate, or minor and assigning them point values "is ambiguous and may have unintended result." By way of example, Huntsman asked whether ten violations or one would be faced by a site where, upon investigation, ten valves which have been tagged as leaking but have not been repaired are discovered? Huntsman specifically requested that commission seriously reconsider the proposed formula to "bring proportionality" into this phase of the rulemaking.

The commission agrees that major sources are more likely to have an NOV or enforcement action because of complexity and size, but does not believe that the assessment of major, moderate, or minor is ambiguous. Adopted §60.2(c) has been modified to clarify the terms "major," "moderate," and "minor." Adopted §60.2(d) has been modified to more appropriately evaluate whether a person is a repeat violator. Adopted §60.2(e) has been modified to account for differences in types of enforcement actions and the resulting point values.

The rule has been modified to take complexity and size into consideration in the context of repeat violators. The adopted rule specifies the criteria to be utilized to determine repeat violator status in adopted subsection (d)(2) - (6). As proposed, §60.2(e) addressed site complexity, and was based on a site's primary SIC code. Because the commission agrees with the commenters that this approach did not adequately reflect the complexity of sites or reflect the requirements of the statute, proposed subsection (e) has been deleted, and replaced with adopted §60.2(d)(2), which now addresses the assignment of points to a site based upon complexity. As adopted, complexity is based upon the number and types of permits issued to a person at a site. The commission recognizes that there are many different ways to deal with complexity, and appreciates the suggestions provided by the commenters. The commission has determined, based on examples provided by the commenters, that the number and types of permits issued to a site are a better determinant of complexity because they more accurately reflect the level of regulation and thus, the comparative number of requirements that must be met, and, therefore, modified the rule accordingly.

§60.2(e)(1)(A) (proposed as §60.2(f)(1)(A))

The commission has modified the text in adopted §60.2(e)(1)(A) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to major violations contained in those actions from proposed 100 points for all, to a range of 160 points to 80 points; breaking the distinctions out into six clauses; deleting the text "as specified in §60.1(c)(1) and (2) of this title" for stylistic consistency between this and other subparagraphs; and deleting from subparagraph (A) the text, "If the person is a repeat violator, then this number shall further be multiplied by 2" because the treatment of repeat violators within the formula has been modified and moved to its own subparagraph. These changes were made to reflect the relative seriousness of the enforcement action conducted by the state. The commission is adopting modifications to the rule to further distinguish between adjudicated orders and non-adjudicated (expedited) orders, and also to distinguish between expedited orders containing a denial of liability (those issued under TWC, §7.070 (1660 orders)), and those without a denial of liability. The commission utilizes legal action through the courts for persons violating commission orders, in situations where injunctive relief may be necessary, and when, in the executive director's judgment, higher penalties are warranted. Thus, violations in court actions are assigned higher points. The point values for violations in adjudicated orders and judgments are the same. The commission considers the most severe form of enforcement to be criminal prosecution and has assigned the highest point value for violations included in criminal convictions. The rule has been modified from proposal to provide for a wider range of points to reflect the differences in the variety of enforcement actions as well as to provide incentives for a person to settle enforcement cases expeditiously. The commission has determined that it is appropriate to provide such distinctions between enforcement resolution types and their associated point values, because it more accurately reflects distinctions between the different "levels" of enforcement actions available to the commission and the severity of the violations included in those actions.

AECT, V&E, TIP, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(f)(1)(A). AECT asserted that, due to the over-broad classification of major violations to include all HPVs, coupled with the definition of repeat violator as proposed without any reference to the complexity of a site, 100 points for each major violation is too stringent, as is the proposal to double the number for a repeat violator. TIP made a similar comment. V&E suggested, for clarification, that "at the site in question" be added after "repeat violator." Garland, San Antonio, GEUS, and SMEC commented that consideration should be given to reducing the point value assigned to violations in existing enforcement orders. Garland, San Antonio, GEUS, and SMEC

based this on their assertion that one major violation automatically categorizes a site as a poor performer under the proposed point ranges, and added that "this is of even more concern when older, existing orders are included in the initial compliance history calculations."

The commission responds that proposed §60.2(f)(1)(A) has been revised as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission retained a sliding scale for the points based upon the level of enforcement (e.g. NOV, order, court judgment) because it more accurately reflects distinctions between the different "levels" of enforcement actions available to the commission and the severity of the violations included in those actions. Section 60.2(e)(1)(J) has been modified to provide that an additional 500 points will be added to a repeat violator. It does not double the repeat violator score. Existing enforcement orders should not be assigned fewer points. One major violation will not automatically categorize a site as a poor performer because of the divisor in adopted §60.2(e)(1)(L). As adopted, §60.2(e)(1) clarifies that the violations used in the formula relate to the specific site.

§60.2(e)(1)(B) (proposed as §60.2(f)(1)(B))

The commission has modified the text in adopted §60.2(e)(1)(B) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to moderate violations contained in those actions from proposed 60 points for all, to a range of 45 points to 115 points; breaking those distinctions into five clauses; and deleting the text "as specified in §60.1(c)(1) and (2) of this title" for stylistic consistency between this and other subparagraphs. The point range rationale for §60.2(e)(1)(B) is the same for that at §60.2(e)(1)(A).

§60.2(e)(1)(C) (proposed as §60.2(f)(1)(C))

The commission has modified the text in adopted §60.2(e)(1)(C) by: making distinctions between the types of enforcement actions and as a result, broadening the associated point values assigned to moderate violations contained in those actions from proposed 20 points for all, to a range of 15 to 45 points; breaking the distinctions out into five clauses; and deleting the text "as specified in §60.1(c)(1) and (2) of this title" for stylistic consistency between this and other subparagraphs. The point range rationale for §60.2(e)(1)(C) is the same for that at §60.2(e)(1)(A).

§60.2(e)(1)(D) (proposed as§60.2(f)(1)(D))

The commission has modified the text in adopted §60.2(e)(1)(D) by: deleting the text "as specified in §60.1(c)(7) of this title" for stylistic consistency between this and other subparagraphs; and deleting from subparagraph (D) the text, "If the person is a repeat violator, then this number shall further be multiplied by 2" because the treatment of repeat violators within the formula has been modified and moved to its own subparagraph.

V&E commented regarding proposed §60.2(f)(1)(D), suggesting that, for clarification, "at the site in question" be added after "repeat violator."

Adopted §60.2(e)(1) has been modified to specify that the violations used in the formula relate to the specific site for which a classification is being determined, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(1)(E) (proposed as §60.2(f)(1)(E))

The commission has modified the text in adopted §60.2(e)(1)(E) by deleting the text "as specified in §60.1(c)(7) of this title" for stylistic consistency between this and other subparagraphs.

§60.2(e)(1)(F) (proposed as §60.2(f)(1)(F))

The commission has modified the text in adopted §60.2(e)(1)(F) by deleting the text "as specified in §60.1(c)(7) of this title" for stylistic consistency between this and other subparagraphs.

§60.2(e)(1)(G) (proposed as §60.2(f)(1)(G))

The commission has deleted the phrase "as specified in §60.1(c)(1) of this title" from adopted §60.2(e)(1)(G) for stylistic consistency between this and other subparagraphs. Additionally, this subparagraph was modified to differentiate between convictions that are major and moderate as determined in §60.2(c)(1) and (2) as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

OxyChem and Oxy Permian commented regarding proposed §60.2(f)(1)(G). OxyChem and Oxy Permian stated that, in general, they are in agreement with most of the factors, but they believe that the score for criminal convictions is very low. They provided a scenario in which a person with a criminal conviction could still receive a classification of average performer at a site, and went on to say that it may even be possible, based on the rule as proposed, for someone with a criminal conviction to receive a classification of high performer. OxyChem and Oxy Permian suggested as one possible alternative raising the point value assigned to a criminal conviction to something higher than 500 points in order to portray extreme noncompliance. OxyChem and Oxy Permian suggested as an alternative deleting proposed §60.2(f)(1)(G) and adding a new §60.2(f)(2)(D) as follows: "(D) If any site, regardless of its compliance rating score, has had a criminal conviction during the review period, it will automatically be categorized as a poor performer described in §60.2(f)(2). The poor performer rating will be changed to that exhibited by the system, provided that the site has been either a high performer in the two consecutive years subsequent to the criminal conviction, or the site has been at least an average performer for the three consecutive years subsequent to the criminal conviction. If a site is unable to modify its rating during the review period in which the criminal conviction occurred, it will remain a poor performer until the term of the applicable review period expires, after which, its rating will be as described in §60.2(f)(2)."

Criminal convictions are an extremely serious issue as recognized by subsection (e)(1)(G), which requires that the number of counts in criminal convictions be multiplied by either 250 or 500 (depending on the kind of convictions). This could result in a score significantly in excess of 500. Automatically moving a person with a criminal conviction into the poor performer classification focuses only on this one issue and does not allow consideration of the entire compliance history for that person. The statute requires the commission to establish standards for the classification of a person's compliance history. With this rulemaking, the commission has a compliance history evaluation mechanism and has assigned a point value to criminal convictions that indicate the serious nature of that specific compliance history component. In the site rating formula, criminal conviction points will drive that person toward the poor performer category; however, the final site rating will reflect the person's entire compliance history at the site in question over the compliance period. The revised formula recognizes that there are distinctions

between one criminal conviction and another and applies point values to reflect those distinctions.

AquaSource, V&E, WM, TAB, TXI, ExxonMobil, Brown McCarroll, TCC, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(G). AquaSource stated that, for the reasons it enumerated in its comments regarding proposed §60.2(c)(1)(F), it believes that the criminal convictions with a point value of 500 should be limited to "willful or intentional felony convictions sought and obtained by either the Task Force or a state agency." AquaSource contended that law enforcement is variable across the state, and additionally, it would not be fair to penalize a person who utilized seasonal employees or independent contractors whose convictions did not reflect the "employer's willingness or ability to comply with applicable law." Additionally, AquaSource stated that misdemeanor criminal convictions should be classified as to "actual and documented harm to human health and the environment." Similarly, V&E, WM, Allied, BFI, TxSWANA, and NSWMA suggested the modification of the text from "The number of counts in all criminal convictions" to "The number of major violation counts in criminal convictions." Further, V&E, WM, Allied, BFI, TxSWANA, and NSWMA suggested the addition of a new subparagraph (H) to read, "The number of moderate violation counts in criminal convictions as specified in §60.1(c)(1) of this title shall be multiplied by 100." V&E, Allied, BFI, TxSWANA, and NSWMA asserted that the suggested changes would recognize that criminal conduct varies widely, and convictions can result from a range of relatively minor violations to a much greater deviation of the law. WM, TAB, and TCC recommended that the commission distinguish between misdemeanor and felony counts, and ExxonMobil suggested that due to the severity of the penalties imposed by the proposal, only felony conviction brought by the commission, and perhaps EPA, should be included. V&E further asserted that its suggested changes and additions to proposed §60.2(c)(1)(F) and (2)(G), and (f)(1)(G) and (H) recognize that "many environmental crimes are not classified as misdemeanors or felonies." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Brown McCarroll recommended that this subparagraph be modified to read:

"The number of counts, which include a demonstrated degree of mental culpability, in all felony criminal convictions will be multiplied by 500. the number of counts, which include a demonstrated degree of mental culpability, in all misdemeanor criminal convictions will be multiplied by 200. Such counts where there is a demonstrated degree of mental culpability will be determined by the Executive Director on a case-by-case basis in light of the seriousness of the evidence presented at trial or the underlying facts that led to a criminal conviction."

TXOGA endorsed the comments submitted by Brown McCarroll. TXI stated that "the mere fact that a count is included in a criminal conviction does not necessarily mean that it should be subject to the major multiples proposed" in this subparagraph, adding that the *mens rea* requirement that is generally applied to criminal cases is not necessarily required in environmental cases.

In response to this comment, §60.2(e)(1)(G) has been modified so that less serious criminal offenses will be assessed 250 points as opposed to the 500 points previously proposed. The more serious criminal offenses will continue to be assessed 500 points per criminal count. The revised formula recognizes that there are distinctions between one criminal conviction and another and applies point values to reflect those distinctions. As a result proposed §60.2(f)(1)(G), adopted as §60.2(e)(1)(G), is revised to read as follows: "(G) The number of counts in all criminal convictions: (i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and (ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250."

§60.2(e)(1)(H) (proposed as §60.2(f)(1)(H)) The commission has deleted the phrase "as specified in §60.1(c)(4) of this title" from adopted §60.2(e)(1)(H) for stylistic consistency between this and other subparagraphs.

MMM commented regarding proposed §60.2(f)(1)(H). MMM asked, with regard to the term "chronic excessive emissions events," what the definition of "excessive" is. The commenter further asked how this component will be factored into classification and rating.

The concept of what constitutes an "excessive emissions event" and a "chronic excessive emissions event" is being addressed through other rulemaking, and is therefore outside the scope of this rulemaking. However, once the applicable rulemaking is adopted and those terms "defined," any instances of chronic excessive emissions events will be noted and included as a component of compliance history, with each occurrence during the compliance period being multiplied by 100 and added to the total points for a site.

OxyChem and Oxy Permian, Reliant, AECT, TAB, TXI, ExxonMobil, TIP, and TXOGA commented regarding proposed §60.2(f)(1)(H). Reliant and AECT stated that two events should not be considered chronic; rather, Reliant asserted that chronic is typically defined as "marked by long duration or frequent recurrence," while AECT asserted that it is typically defined as "marked by frequent occurrence." TAB commented that, since the term chronic excessive emissions events is not defined in the rule, it should not be subject to a multiplier. Additionally, TAB stated that "undoubtedly" such violations will be deemed major, and as such will already be counted in the formula under proposed subparagraph (A) or (D) of this paragraph. TXI provided comments similar to TAB's. CPS objected "to the use of any properly reported upset, maintenance, start-up or shut-down events or deviations under Title V as 'chronic excessive emission events.'" CPS stated that categorizing releases that occur under certain circumstances as "criteria for poor compliance" unjustly penalizes persons who properly maintain their equipment, and added that properly reported releases should not be held against a person's good compliance history. TXU supports the comments made by AECT. ExxonMobil commented that this provision should not be applied retroactively, but instead should only apply to events that occur after the rulemaking on chronic excessive emissions events if in effect. TIP provided a similar comment. ExxonMobil also expressed concern with the other rulemaking considering having as few as two occurrences in five years considered "chronic."

The definition of chronic excessive emissions events is outside the scope of this rulemaking. Properly reporting an emissions event does not ensure that the release will not be considered excessive. The compliance history will include all unauthorized emissions that are not exempted under 30 TAC Chapter 101. The commission agrees that chronic excessive emissions events will be defined once rulemaking for Chapter 101 is completed,

and will not apply retroactively to emissions events that occurred prior to the effective date of that rulemaking. In light of the statutory deadline, the commission is proceeding with incorporation of a point value for chronic excessive emissions events into this rule. In addition, the specific definition adopted will not change the seriousness of an emissions event in terms of compliance history and the rule appropriately captures this concept.

TXOGA commented, regarding proposed §60.2(f)(1)(H), that the "definition of chronic excessive emissions event should link to same piece of equipment, same pollutant, same cause, etc.," adding that the term chronic implies recurring, but more than two or three times. TXOGA stated that impacts should be based on national ambient air quality standards violations, and that, in addition, "values above an effects screening level might require additional review but are not necessarily evidence of impact." Additionally, TXOGA asserted that "the definition ... in the pending Chapter 101 rules is biased against large, complex operators. In the statutory language for 'excessive emission event,' the legislature specifically directed the agency to consider the frequency of a *facility's* emissions events." TXOGA requested that the commission describe how they intend to address size and complexity issues in the Chapter 101 rulemaking. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

These comments are outside the scope of this rulemaking.

Valero, T&K, TIP, TCC, Garland, San Antonio, GEUS, and SMEC commented regarding proposed §60.2(f)(1)(H). Valero and TIP expressed concern at the impact of chronic excessive emissions events on compliance histories, since the determination of what constitutes excessive is still to be determined. Because of this, Valero, TIP, and T&K assert that chronic excessive emissions events "cannot reasonably be incorporated into the site rating formula at this time" especially considering the potential for significant impact on the compliance history rating with the proposed 100 points. TCC stated that it is impossible to comment on whether the scoring associated with this subparagraph is appropriate without knowing what "chronic excessive emissions events" are. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. Similarly, T&K asserted that including chronic excessive emissions events "is improper as such is not a component of compliance history under" TWC, §5.753(b). Furthermore, T&K stated that its understanding is that "the procedure for determining whether emissions events become 'excessive' or 'chronic' are not anticipated to be enforcement procedures, further supporting the argument that these should not become part of a facility's compliance history." T&K added that the events leading to a determination that something is a chronic excessive emissions event will be included as compliance history components independently anyway. As such, T&K recommended that this subparagraph be deleted from the rule, and reproposed after the term "chronic excessive emissions events" is defined in the applicable rulemaking. Garland, San Antonio, GEUS, and SMEC asserted that a person will be classified as a poor performer with a single violation of a rule that is not yet adopted, and recommended that this provision should be "less aggressive" until such time as the other rule is adopted. Additionally, Garland, San Antonio, GEUS, and SMEC expressed concern that the point value proposed is the same as that for a major, adjudicated violation, and that since chronic excessive emissions events will be enforced by the agency, this will "result in a double assessment of significant points for the same event." As such, Garland, San Antonio, GEUS, and SMEC recommended that the point value for this provision be reduced from 100 to 25.

Chronic excessive emissions events are retained in the classification formula in terms of compliance history because they constitute a serious threat to the environment, and the rule appropriately captures this concept. THSC, §382.0216(j), requires the commission to account for and consider chronic excessive emissions events and emissions events for which the commission has initiated enforcement in the manner set forth by the commission in its review of a person's compliance history. The statutory directive requires the commission to develop the manner in which it will include chronic excessive emissions events in its review of a person's compliance history. As indicated in the proposal, the executive director will not use and the commission will not consider this multiplier in classifying a site until the rulemaking related to emissions events is adopted later this summer. The legislature's directive in THSC, §382.0216(j), evidences its intent that the commission account for chronic excessive emissions events in this rulemaking.

§60.2(e)(1)(I) (proposed as §60.2(f)(1)(I))

Brown McCarroll commented regarding proposed §60.2(f)(1)(I). Brown McCarroll suggested that subparagraph (I) be modified to account for the age of violations, stating that such an "'aging' factor would help prevent a component from 4 to 5 years ago from having the same effect on a site's rating as a recent component. In addition, the aging factor would highlight trends toward compliance or non-compliance, with the most recent history being the strongest indicator." TXOGA endorsed the comments submitted by Brown McCarroll.

With regard to a decrease in the point values, the commission determined during the first phase of the compliance history rulemaking that a five-year compliance history is appropriate and, that by establishing this period a distinction is made between "newer" and "older" violations. "Older" violations (i.e., outside the compliance period) will not be counted as part of a person's compliance history. "Newer" violations (i.e., within the compliance period) will be counted as part of a person's compliance history and will be assigned point values based upon their designation as major, moderate, or minor violations, and upon what type of action they were included in. The formula adopted by the commission as stated in §60.2 includes as a divisor the number of investigations conducted over the five-year period. Through this divisor, the impact of an older compliance history component will be decreased over time as additional investigations are conducted, provided that additional violations are not identified in those later investigations. No change in the rule language is necessary in response to this comment.

§60.2(e)(1)(J) (proposed as §60.2(f)(1)(J))

TCCI and TCAP commented regarding proposed §60.2(f)(1)(J). TCCI expressed concerns that the complexity factor in proposed §60.2(e) and (f)(1)(J) will have an adverse effect on small businesses. While stating that it does not know how to solve this issue, TCCI stated that it "appears that a small polluter could be perceived as a worse company than a large company that pollutes," and is concerned with the inequities. Similarly, TCAP stated that it is concerned that the complexity factor allowing for a reduction of the compliance history score for a site designated as complex "may create inequities between large and small entities," and hopes that the rule will be written so as not to "set up implicit discrimination against entities who pollute less."

In response to comments, the commission has modified this subparagraph as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The modified formula in adopted §60.2(e)(1) no longer includes complexity in the divisor; complexity is now considered in determining repeat violator status.

PIC commented regarding proposed §60.2(f)(1)(J), stating, "With respect to the complexity factor component determined under §60.2(e), the statute provides only that complexity of facility operations is to be considered when determining whether the person is a 'repeat violator.' Texas Water Code §5.754(c)(2). Therefore, consideration of the complexity factor should be limited to determining whether a person is a 'repeat violator' under §60.2(d)."

In response to comments, this subparagraph, as proposed, has been deleted; this was discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Complexity is to be used in determination of repeat violator status.

§60.2(e)(1)(L) (proposed as §60.2(f)(1)(K))

The commission has relettered proposed subparagraph (K) due to the addition of a new subparagraph prior to it. Additionally, the commission has changed the phrase "{t}he result in subparagraph (J)" to "{t}he result of the calculations in subparagraphs (I) - (K)" in order to more clearly reflect that the formula flows from subparagraphs (I) to (J) to (K), even if the "if/then" conditions in subparagraphs (J) and (K) are not met; deleted the phrase "at the site" from the text of this subparagraph as a correction in response to a comment received; changed "investigations" to "an investigation" as a result of modifying the discussion of what an investigation includes for purposes of this chapter; and deleted the text "include record reviews and physical site evaluations" and replaced it with a more detailed discussion of what constitutes an investigation, for clarity and in response to comments received.

MMM commented regarding proposed §60.2(f)(1)(K). MMM commented that the "site rating is partially based on the number of visits by a regulatory agency," and asked whether all visits are considered the same. MMM asked whether there should be a weighted average based on type or complexity of the investigation.

All investigations are counted the same in the compliance history classification formula. The complexity or type of investigation performed is directly related to the complexity or type of facility/site being investigated. The number of investigations is utilized as a normalization factor, as obviously more investigations can result in more violations being documented, but it is not intended to reflect complexity. No change has been made in response to this comment.

AquaSource and TCC commented regarding proposed §60.2(f)(1)(K). AquaSource stated that it believes that all monthly DMRs should be included in a compliance history. AquaSource further stated that it is unclear regarding the preamble language which states that DMR evaluations will be counted as "investigations." TCC stated that it is unclear regarding what will constitute a record review, and as such requested that the commission provide specific examples in the preamble of record reviews that will count as investigations. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC.

The commission responds that a definition of "investigation" has been included in adopted §60.2(e)(1)(L). For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information related to compliance status. Examples of record reviews that will be included under investigations are: wastewater discharge monitoring report evaluations; Title V permit certification evaluations; emissions event notification evaluations; reviews of reports submitted under 40 Code of Federal Regulations Parts 60, 61, and 63; reviews of reports submitted under 30 TAC Chapters 116 or 117; reviews of stack performance tests; and evaluations of continuous emission monitoring system or predictive emission monitoring system certifications.

V&E, DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, WM, NTMWD, TDA, TMRA, ExxonMobil, TIP, Allied, BFI, TxSWANA, NSWMA, Reliant, AECT, ATINGP, and Brown McCarroll commented regarding proposed §60.2(f)(1)(K). V&E and WM suggested that the phrase "and each environmental audit notice sent to the agency pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act, *Tex. Rev. Civ. Stat. Ann. art 4447cc(Vernon's)*" be added to the end of the proposed language. TMRA stated that it believes that environmental audits should be "given more express positive treatment in the site rating formula in order to maximize" incentives to conduct environmental audits. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that including audits as investigations would encourage the regulated community to conduct such audits, leading to improved compliance. They further suggested that a reasonable limit could be placed on the number of audits which could be counted as investigations. V&E, NTMWD, TMRA, TIP, ExxonMobil, Reliant, AECT, ATINGP, and Brown McCarroll also stated that "investigations" should include those conducted by the EPA, as well as other environmental regulatory agencies whose data is utilized in compliance history. Allied, BFI, TxSWANA, NSWMA, TMRA and TIP suggested that investigations conducted by the Railroad Commission of Texas (RRC) should be included because these investigations could lead to TNRCC enforcement and could impact a site's compliance history. NTMWD also stated that other types of record reviews should be added to the list provided in the proposal preamble, including, but not limited to: "quarterly groundwater monitoring reports, quarterly landfill gas monitoring reports, biomonitoring reports required pursuant to TPDES permits, and annual pretreatment program reports required pursuant to TPDES permits." Additionally, NTMWD asserted that there should be a process identified to allow the regulated community to request that additional reports be added to the list, which could be maintained on the commission's website. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration." TIP also asserted that because investigations vary in length from a matter of hours to a week or longer, the length of investigations should be considered as well.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The preamble for the adoption of §60.1 specifically stated that NOVs issued by EPA are not compliance history components. Use of the fact of the investigation without allowing use of

the information gleaned through that investigation would not be equitable. RRC is not an agent of the executive director; therefore, results of investigations conducted by that agency will not be included in compliance history under this rule. NTMWD listed additional good examples of reports that are typically reviewed upon receipt by the agency. If such a review is conducted, it will be counted as an investigation. The commission disagrees with the TIP suggestion that the length of an investigation should be considered in this subparagraph. The complexity or type of investigation performed is directly related to the complexity or type of facility/site being investigated. The number of investigations is utilized as a normalization factor, as obviously more investigations can result in more violations being documented, but it is not intended to reflect complexity.

A wide range of investigations will be recognized and considered by the agency as part of the formula. The range and number of investigations will allow sufficient consideration of a site's overall compliance status without the addition of a further weighting factor based on the time spent to conduct an investigation.

Reliant, AECT, ATINGP, Brown McCarroll, TXOGA, AeA, TIP, ExxonMobil, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(K). Reliant, AECT, ATINGP, and Brown McCarroll agreed with the proposal that the number of investigations and record reviews be included in the divisor of the formula. Reliant, AECT, and Brown McCarroll suggested the following record reviews also be included: Title V deviation report evaluations; reviews of emissions inventories; CEMS evaluations and allowance tracking reports under the Acid Rain Program and similar programs; storm water discharge monitoring report evaluations; Toxic Release Inventory report evaluations; Comprehensive Environmental Responsibility, Compensation, and Liability Act (CERCLA)/Emergency Planning and Community Right-to-Know Act (EPCRA) release notification evaluations; and evaluations of monthly and annual waste receipt summaries submitted under 30 TAC Chapter 335. Brown McCarroll also included several more types of record reviews, including: TNRCC waste classification audits; UIC reports under §331.65, such as completion report evaluations, injection operation quarterly reports and/or monthly report evaluations, etc.; UST report evaluations under §334.10; industrial and hazardous waste reporting evaluations under §§335.71, 335.73, 335.113, 335.115, 335.117, 335.153, 335.155, and 335.164; financial assurance submittal evaluations; and report evaluations required under permits or other types of operations/authorizations. Brown McCarroll asserted that the list of record reviews should be "non-exclusive." TXOGA endorsed the comments submitted by Brown McCarroll, and additionally included in its list the "number of parameters in each DMR." Furthermore, TXOGA and ExxonMobil asserted that the text should be modified to read "for the site" instead of "at the site" in order to keep from limiting record reviews to those conducted at the site. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA. AeA stated that if the number of investigations is kept in the formula, it requests clarification of the term "investigation," stating that as proposed, it rules out investigations that are not conducted at the site, thereby ruling out record reviews. TIP made a similar comment. Similarly, Allied, BFI, TxSWANA, and NSWMA recommended changing "at the site" to "relating to the site." ATINGP more generically stated that "certain record reviews of self-reported data should also be included in this definition." AECT supported including TNRCC waste classification audits in the list of record reviews which should be considered investigations. TXU supported AECT's comments.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission is not limiting investigations to a specific list of record reviews because the definition adopted in §60.2(e)(1)(L) states that an investigation is any evaluation made by the executive director or the executive director's staff or agent to determine compliance status. The commission does not agree with the TXOGA comment that investigations should include the number of parameters in each DMR. Review of a DMR will count as a single investigation because it is a single report. The commission agrees with TXOGA that record reviews relate to a site, whether that review is conducted on or off the site.

Huntsman commented regarding proposed §60.2(f)(1)(K). Huntsman stated that the number of days an investigation lasts should define the numeric value assigned to a scheduled investigation, including any follow-up meetings. Huntsman asserted that the following should also be included as investigations: annual and quarterly effluent sampling reports required by both state and federal clean water legislation; all state, federal, and local reports, if the site is connected to a POTW as an Industrial User; annual waste summaries and other reports required by state and federal laws regulating hazardous waste; reporting requirements under the Toxic Substances Control Act, as well as separate reports to the United States Nuclear Regulatory Commission (NRC) under CERCLA; and the number of emissions points on the site's annual emission inventory, because each emission point requires its own discrete set of emission calculations. With regard to this list, Huntsman also believes it should be included in the rule, and not merely in the preamble to the rule. Next, Huntsman expressed "concern with the use of 'review' or 'evaluation' as a trigger for counting an activity," because a company would get no credit for a complete and timely submission of the required reports if the agency does not have time to review them, and believes the rule should be revised to give credit for completion of such reports. Finally, Huntsman suggested that "any investigation triggered by a site's self-reporting should be double-counted to reflect the site's role in bringing the violation to the attention of the Agency."

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission determined not to list specific investigations in this subparagraph, but included a definition of the term "investigation." Submittal of a required report is not equivalent to an investigation. An investigation is an *evaluation* of compliance, and it is the evaluation of compliance that is significant because that is when the assessment of compliance occurs. Additionally, not all the reports listed in the Huntsman recommendation, for example, reporting requirements under the Toxic Substances Control Act, are assessed by agency staff or agents, and thus are not appropriate to include in the site rating. The commission disagrees that self-reported violations should be double-counted, because they are only evaluated one time. In addition, the commission has adopted changes to the classification formula to give positive credit to sites that disclose violations under the Texas Environmental, Health, and Safety Audit Privilege Act and has added to the mitigating factors to allow for consideration of other self-reported violations not otherwise required to be self-reported.

T&K, ExxonMobil, Chaparral, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.2(f)(1)(K). T&K and Chaparral suggested that the definitions all be put into a definition section at the beginning of the chapter. Additionally, T&K and Chaparral requested that "investigations of citizen complaints" be added to the rule. T&K and Chaparral also stated that it supports the interpretation of record reviews as provided in the proposal preamble, but stated that it should be added to the rule for clarity as a separate definition. T&K and Chaparral further asserted that the following should be included in the definition of record reviews: regional review of upset/maintenance/emission events reports, deviation reports, discharge monitoring reports, NSPS excess emission reports, quarterly COMs reports, Annual Compliance Certifications, MACT notifications, and any other report which the TNRCC reviews for compliance issues." ExxonMobil asserted that the list of record reviews included in the proposal preamble "for the most part do not recognize other media regulations such as waste." T&K and Chaparral asserted that "conducted at the site" should be deleted from the first sentence of proposed subparagraph (K), as "most 'record reviews' and many citizen complaint investigations are not conducted at the site." Allied, BFI, TxSWANA, and NSWMA stated that they believe the following reports involve reviews that can give rise to enforcement, and should therefore be included in this rule or preamble as record reviews: Landfill Gas Monitoring Reports; Groundwater Monitoring Reports (both Assessment and Detection Monitoring); Alternative Daily Cover Reports; Title V deviation reports; Emissions Inventories; Stormwater Discharge Monitoring Reports; CERCLA/EPCRA Release Notifications; and TNRCC reviews of citizen-collected evidence submissions under 30 TAC §70.4. Allied, BFI, TxSWANA, and NSWMA added that they do not believe that this list should be considered "exclusive;" rather, they think there should be a mechanism for the regulated community to recommend additions to the list of "recognized record reviews," which could be available on the agency website and updated periodically.

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), as been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. T&K, Chaparral, Allied, BFI, TxSWANA, and NSWMA have listed additional good examples of reports that are typically reviewed upon receipt by the agency. If such a review is conducted, it will be counted as an investigation. The commission notes that CERCLA/EPCRA Release Notifications are not TNRCC requirements per se; however, agency rules do require similar types of reports which would count when reviewed. Additionally, citizen collected evidence submissions do not count as investigations because the individual submitting the evidence is not the executive director's agent. The commission determined not to list specific investigations in this subparagraph, but included a definition of the term "investigation." Finally, the commission notes that it has specifically excluded investigations of citizen complaints from the definition of "investigation" for purposes of this chapter. This was done in order to keep complaint investigations from unfairly improving a site's classification rating, as discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Regarding proposed §60.2(f)(1)(K), TMRA provided a list of additional reports it believes should be included as investigations. TMRA explained that several of the reports included in its list are filed with either the RRC or the TDH "pursuant to the requirements of RCT and TDH permits and regulations but the information included in those reports exposes TMRA members," under TNRCC MOUs with these agencies, "to potential TNRCC enforcement." TMRA further asserted that the rules need to address how many record reviews a facility will be given credit for if it is equipped with CEMS or COMS. TMRA stated "that the final rule and preamble should recognize a far greater number of inspections at sites equipped with CEMS/COMS," as they monitor emissions continuously, and as a result are likely to result in a greater number of documented violations. TMRA stated that it believes CEMS/COMS reports should "qualify as at least weekly inspections to provide an adequate off-set to the significantly increased risk of violation detection." Finally, TMRA recommended that the commission provide for a process whereby the regulated community can verify the number of record reviews that will be counted towards compliance history and suggested that additional reports be added to the list, and that such a list could be maintained and updated on the agency's website.

The commission responds that proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission decided not to list specific investigations in this subparagraph, but included a definition of the term "investigation." The only investigations that will be included in the site rating are those that are conducted by the executive director or the executive director's staff or agent. RRC and TDH are not agents of the executive director. Normally, one record review will be conducted on each CEMS report submitted, although there may be times when a record review consists of the evaluation of more than one CEMS report. The commission disagrees that CEMS/COMS reports should qualify as at least weekly investigations because the investigation is the actual evaluation of the monitoring data to determine compliance.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(1)(K). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the proposal omits "one of the most common types of investigations conducted at agricultural operations--investigations resulting from neighbor complaints." The commenters asserted that "investigations which determine that the neighbor complaint did not justify a notice of violation or other types of further action by TNRCC should be documented and included in the count of 'investigations' so as to accurately reflect all investigations." The commenters also asserted that annual soil sampling on CAFO land application areas should be included as investigations, and recommended that "and each annual soil sampling of land application areas" should be added to the end of the text of this subparagraph. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission disagrees that investigations resulting from neighbor complaints should be included in the number of investigations in the denominator of the site rating formula, and has modified the definition of investigation set forth in adopted §60.2(e)(1)(L) accordingly to exclude these types of investigations. The commission has made this modification in order to keep complaint investigations from unfairly improving a site's classification rating, as discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, the commission disagrees that annual soil sampling of land application

areas should be counted as an investigation, but rather any agency review or evaluation of that soil sampling would be counted as an investigation.

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(1)(K). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the commission must ensure that record reviews that do not reveal violations are documented and memorialized so as to be included in the compliance history computation. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission agrees with this comment, and intends on implementing the rule in this manner. No changes to the rule have been made in response to this comment.

Plano, TAB, CPS, LSS, TIP, TXOGA, TCC, AeA, and ExxonMobil commented regarding proposed §60.2(f)(1)(K). Plano expressed concerns that the formula appears to penalize persons if they do not have enough investigations to divide into the total points, and added that the proposed system would actually benefit poor performers and hurt high performers. Plano and LSS stated that the reduced number of investigations resulting from the implementation of an EMS serves as a further disincentive, based on the proposal that the number of investigations be used in the denominator of the formula. TAB, TIP, TCC, and TXOGA made similar comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC. Similarly, CPS recommended that this portion of the formula be deleted. AeA further expressed concern that this aspect of the formula "significantly reduces the value of participating in the EMS program," due to the reduction of investigations provided as an EMS incentive. ExxonMobil provided similar comments regarding EMSs.

The commission disagrees that the formula penalizes persons "if they do not have enough investigations." As adopted in §60.2(e)(1), the number of investigations is the only divisor utilized in this formula because this component allows the site rating to be normalized so that sites may be compared with one another based upon the number of opportunities for violations to be documented. The commission notes that high performers will not necessarily receive fewer investigations based on the classification. High performers will still be required to submit, as applicable, DMRs, deviation reports, or other required reports that are submitted monthly, quarterly, or annually. Further, all sites will be subject to investigations in response to complaints in accordance with the agency's complaint response policy. With respect to compliance investigations not triggered by complaints, the commission may choose to direct its resources toward those facilities with a poorer compliance record. Poor performers may receive additional investigations, and will receive unannounced investigations. The commission disagrees that the formula provides a disincentive for entities to implement an EMS, because a major reason for implementing an EMS is to avoid violations in the first place. Additionally, the rule does give credit for implementation of an EMS in either adopted §60.2(e)(1)(M) or (3)(A)(ii). No change in the rule language is necessary in response to this comment.

Plano and AeA commented regarding proposed §60.2(f)(1)(K). Plano requested clarification regarding the definition of "investigation" in this section, specifically with regard to whether an investigation refers to State-only investigations and/or record reviews or also includes local investigations and/or record reviews. Similarly, AeA recommended that this term exclude investigations prompted by complaints or compliance concerns. However, AeA expressed concern with the use of the number of investigations in the formula at all, as it appears to "reward those sites that are most often investigated."

Proposed §60.2(f)(1)(K), adopted as §60.2(e)(1)(L), has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. A definition of "investigation" has been included in adopted §60.2(e)(1)(L). For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaint. An investigation may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. The commission agrees with AeA's position that investigations prompted by complaints should not be considered investigations under this rule. As discussed in more detail previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, although complaint investigations do evaluate compliance, they are generally limited in scope to only the issue which was the subject of the complaint. The commission has determined that to include complaint investigations in the denominator of the site rating formula could inappropriately improve a site's rating and, therefore, has excluded complaint investigations from the definition of "investigation" under adopted §60.2(e)(1)(L).

TCAP commented regarding proposed §60.2(f)(1)(K). TCAP stated that small businesses typically have few or no investigations, and as such suggested that this factor be modified to "1 + number of investigations."

Adopted §60.2(e)(1)(L) has been modified to include the number of investigations conducted during the compliance period plus one. This serves a two-fold purpose. First, it provides some cushioning for those sites which may not be investigated very frequently. Second, it ensures that the denominator of the formula will not be zero, which is mathematically incorrect.

PIC commented regarding proposed §60.2(f)(1)(K). PIC stated that it objects to the use of the number of investigations at the site during the compliance period as a divisor in the formula. PIC added, "The statute does not require consideration to be given to the number of investigations. Moreover, even if some consideration of the number of investigations is reasonable, using the number of investigations as yet another divisor has the potential to vastly reduce the site rating in an unreasonable way. This is particularly true in the case of follow-up investigations used to determine whether violations previously documented continue to exist or have been properly addressed. Regardless of the outcome of the follow-up investigation, it does not seem reasonable to reduce the site rating by a factor based on this follow-up inspection that was needed only because of the site's initial violations(s)." Additionally, PIC asserted that this is also true in the case of complaint investigations, stating, "Under this formula, it seems that a site could actually benefit from receiving a complaint if the conditions complained of had abated by the time the region investigator arrived at the site and no violations were documented. Even in cases where some minor or moderate violations were documented during the complaint investigation, the divisor is now increasing which could dramatically reduce the site rating that previously existed. Also, the rule's use of the number of investigations during the compliance period does not take into

account whether there has been sufficient time for any violations documented during such an inspection to be pursued through NOV's, final orders, court judgments or consent decrees. In that sense, there seems to be no reasonable relationship between the numerator and the denominator of the formula."

The commission disagrees with the PIC position that the number of investigations should not be used as a divisor in the formula. As adopted in §60.2(e)(1), the number of investigations is the only divisor utilized in this formula because this component allows the site rating to be normalized so that sites may be compared with one another based upon the number of opportunities for violations to be documented. The commission acknowledges the issues raised by PIC related to follow-up investigations. However, it is only by conducting these investigations that the agency can confirm the current state of compliance at a site. A person should receive the benefit or consequences of such investigations as warranted by the situation. The commission agrees with PIC's concerns regarding complaint investigations and has excluded them from the definition of "investigation" as discussed in greater detail previously in the SECTION BY SECTION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(1)(M)

V&E, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding the addition of a new subparagraph in the formula. V&E suggested the addition of a new subparagraph that would read, "The result in {proposed} subparagraph K of the paragraph shall be multiplied by 0.5 for a site that has an environmental management system that is qualified to receive regulatory incentives pursuant to Chapter 90." V&E asserted that "making certain positive components automatic will provide additional incentives to the regulated community to perform environmental audits and create environmental management systems" while meeting legislative intent and preserving the discretion of the executive director in evaluating compliance history components. TMRA, Allied, BFI, TxSWANA, and NSWMA provided very similar comments, but suggested a multiplier of 0.25.

The commission agrees that certified EMSs should receive positive points in the site classification formula. Because the commission has adopted Chapter 90, it is clear what components will be included and implemented in an EMS certified by the agency and therefore, the commission is comfortable with establishing a specific percentage reduction for these EMSs. The commission has adopted §60.2(e)(1)(M), as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission, however, adopted a multiplier of 0.9, resulting in a 10% reduction in the overall points for the site classification, because while the development and implementation of a system is important, it is the actual performance that is the most meaningful.

§60.2(e)(2) (proposed as §60.2(f)(2))

The commission adopts new §60.2(e)(2), proposed as §60.2(f)(2), concerning point ranges, which states that the executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification, as proposed in subparagraphs (A) - (C): fewer than 0.10 points, high performer; 0.10 points to 45 points, average performer; and more than 45 points, poor performer. The point ranges have been modified based upon use of the formula adopted in §60.2(e)(1) and evaluating data on a sample population of 2,736 sites in Texas. The sample population had 1,060 sites that were "average performer by default." There were 830 sites that had zero points based upon at least one investigation. The highest point value was 500. All site ratings except the "average performer by default" were plotted and groupings were identified. There did appear to be a natural break at 0.10 point and that point value was selected as the division between high performers and average performers. On the high point value end of the graph, the groupings were not as distinguishable, but two break points were observable at 30 points and 60 points. Because there were two viable break points, the commission determined that the midpoint between them, or 45 points, would be a reasonable place to draw a line between the average performers and poor performers. The commission has evaluated compliance history for permitting and enforcement decisions for several years. The commission reviewed the data on the sample population and evaluated the specific sites that were grouped into each category. Based upon this considerable experience utilizing compliance history in its decisions prior to this rulemaking, the commission determined that the groupings were appropriate because the groupings were consistent with previous actions taken by the agency.

The average value of the average performer group based upon all the sites in that group is 3.01 points. In accordance with adopted §60.2(e)(1)(L), all sites with inadequate information to determine a site rating will be assigned a value of 3.01.

In the sample population, 33.26% of the sites would be high performers; 65.39% of the sites would be average performers; and 1.35% would be poor performers.

Points are assigned to the applicable components of a site's compliance history, and those points are applied to the formula. The executive director will then categorize a site's performance. The commission specifically invited comments on the point range proposal. The commission received several comments in response to this solicitation as to what point values to assign to each range. All comments are addressed elsewhere in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified the text of adopted paragraph §60.2(e)(2) from "{t}he executive director will assign the site a classification based upon the compliance history evaluation, utilizing the following ranges for each classification" to "{t}he executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification" in order to more clearly and accurately reflect what the classification is based on and how it is applied. The new language references paragraph (1) in order to be clear that the classification is specifically based upon application of the formula.

TXOGA and TCC commented regarding proposed §60.2(f)(2). TXOGA stated that it does not believe that a bell curve distribution is appropriate with regard to site classification. TXOGA asserted, "It is our understanding that the legislature intended this rule to delineate the bad actors rather than to penalize responsible operators by applying a 'label' through a 'forced distribution.' The agency previously reported 94-98% compliance rates in TNRCC's 2001 enforcement report. Based on the agency's own study, we expect our industry to score favorably in the compliance history ranking, as well. Therefore, we anticipate an accurate compliance history ranking will score our facilities favorably consistent with the agency's own inspection findings."

TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The Annual Enforcement Report reflects a high level of compliance. The commission agrees with the commenters that a bell curve is not appropriate for compliance history classification. Based on the commission's experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. The commission's evaluation of permit applicants for their potential ability to perform prior to issuing an initial permit helps minimize the number of persons in the poor category compared to the regulated universe.

TCE, LCVEF, DAR, SEED Coalition, TCONR, ACT, PC, and 479 individuals commented regarding proposed §60.2(f)(2). TCE, LCVEF, DAR, SEED Coalition, TCONR, PC, and 477 individuals commented that the rule should be revised such that only legitimate "high performers" are rated as such. Another individual stated that this should be corrected prior to implementation of the rule. These commenters stated that the proposed rule results in too many sites being classified as high performers. Many commenters stated that a formula making it so easy to be classified as a high performer "will have no credibility with the public and will hurt those facilities that actually are high performers." Similarly, ACT commented that the proposed rule would "undermine the value of the process to the true high performers." ACT added that the proposal preamble did not provide a reasoned justification for this outcome. ACT asserted that according to the legislation, average performers should be those that generally comply with the law, while high performers should be those who do better than general compliance. ACT stated that the "statutory language and intent can *only* be met with a qualitative classification scheme that leads to the following qualitative results: High performer (above-average--i.e. a few minor NOVs and no enforcement orders); Average performer (general compliance--i.e. a few isolated non-repeat violations with an enforcement order or two in the five-year period); and Poor performer (below average--i.e. repeat violators; more significant violations and more enforcement orders)." Additionally, ACT stated, "Again, the rules should seek to create a distribution similar to a bell shaped curve, with the vast majority of facilities that do what is generally required as being average performers, and reserving the high and poor performance label to those that deserve special consideration." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

As discussed previously, forcing sites to a bell-shaped curve is not necessarily reflective of the true compliance status of the regulated universe. Based on the commission's experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. The commission has modified the point ranges as a result of changing the formula in adopted §60.2(e)(1).

DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(2). DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF stated that the proposed point ranges "appear to be unrealistically low." The commenters based this on their assertion that a "person with a single major violation (in a final order, and with a complexity factor of one) is immediately placed into the poor performer category, and thereafter--for the next five years--would be subject to the entirety of the poor performer implications of compliance history," as would someone with five minor violations in an enforcement order. The commenters expressed concern with the inclusion of NOVs issued on or after September 1, 1999, in classifying compliance history. The commenters stated, "in the past, the regulated community routinely resolved NOVs to avoid the costs of litigation, and persons were encouraged to settle NOVs by the Commission's penalty deferral policy, which was applied in the case of expedited settlements. Now, past NOVs, even those which were totally without merit, will become a part of a person's compliance history." The commenters also stated that they "have been unable to fully evaluate the impact of the proposed rule and associated point system on CAFOs or other regulated entities," because of the "vague and subjective nature of the classifications of violations as major, moderate or minor." As such, the commenters stated that they believe the threshold for poor performers is much too small, and should be more in the range of 500 points. TDA stated that the point ranges in the matrix appear to be arbitrary. Additionally, TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The OAG issued Opinion No. JC-0515 on June 24, 2002 which stated: "The provision of the Commission rule that establishes the time period for compliance history as five years before the agency's regulatory authority is initiated or invoked, including compliance history before February 1, 2002, is consistent with section 5.753. The time period is also consistent with section 18.05(i) of House Bill 2912, an effective date provision applicable to the changes in the definition of compliance history made by section 5.753 and the rule implementing it." Additionally, the OAG determined that "It is unnecessary to decide whether a regulated entity has a vested right under article I, section 16 of the Texas Constitution to have compliance history determined according to the law in effect when the relevant events took place. Even if such a right exists, the compliance history rule applies to programs designed to protect public health, safety, and welfare, and the Legislature is not precluded by article I, section 16 of the Texas Constitution from enacting retroactive statutes that are necessary to safeguard these interests." As a result of this opinion, the commission will utilize historical NOVs and enforcement actions issued during the five-year compliance period. As discussed in the adoption preamble for §60.1, if a person believes that a past NOV was issued without merit, that person may appeal to the regional management to review the NOV and factual situation. The threshold for poor performers has been modified due to modifications in the formula made in response to other comments.

T&K, ATINGP, Chaparral, and TCC commented regarding proposed §60.2(f)(2). T&K and Chaparral stated that the adopting of point ranges should be delayed until the rest of the use rule is implemented and a representative number of compliance history classifications have been run to demonstrate high, average, and poor performance. TCC stated that it is impossible to know if the point ranges are appropriate, because it is not possible for facilities to calculate their scores due to uncertainty regarding what the commission will be using in all of the factors. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. T&K and Chaparral added that they believe it "may be more reasonable to rank facilities as high, average or poor performers within the same complexity class." ATINGP asserted that the rulemaking is flawed, because the basis for the point ranges proposed is not adequately explained in the preamble or the rulemaking record.

The commission has modified and adopted §60.2(e)(2). Based on the commission's experience with compliance history, most sites have an average environmental performance and the site classification ranges adopted in §60.2(e)(2) reflect this. A bell curve is not appropriate for compliance history classification as forcing sites to a bell-shaped curve is not necessarily reflective of the true compliance status of the regulated universe. In addition, §60.2(d) has been modified so that complexity is used in the calculation of repeat violator status and is not used to group performers.

Plano and PIC commented regarding proposed §60.2(f)(2). Plano recommended that the point ranges be modified in conjunction with its recommendation to modify the formula, as discussed elsewhere in this preamble with regard to proposed §60.2(f)(1). Specifically, Plano suggested that the point ranges be 500 - 450 for a high performer, 449 - 250 for an average performer, and 249 - 0 for a poor performer, based upon the high performer rating beginning at the minimum based point level established for the lowest complexity level of 500 for a complexity level 1. PIC stated, "If, and only if, PIC's other comments regarding site rating score methodologies are followed, PIC makes the following corresponding comments regarding recommended point ranges for classification: less than 100 points--high performer; 100 points to 599 points--average performer; 600 points and above--poor performer."

Modifications to the site rating formula in adopted §60.2(e)(1) have been made, as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Consequently, the point ranges used to establish a site's classification have been modified in adopted §60.2(e)(2). In addition, the complexity factor has been moved to the determination of repeat violator in §60.2(d).

§60.2(e)(2)(A) (proposed as §60.2(f)(2)(A))

The commission has changed the word "less" to "fewer" in adopted §60.2(e)(2)(A) for clarity.

§60.2(e)(3) (proposed as §60.2(f)(3))

The commission adopts new §60.2(e)(3), concerning mitigating factors, which states, "The executive director shall evaluate mitigating factors for a site classified as a poor performer." This will allow the executive director to place a person's site in a performance classification based not only on the actual points scored for the "negative" components, certified EMSs, and environmental audits, but also on other mitigating factors, as appropriate for the specific site. The purpose of adopted new §60.2(e)(3) is to allow the executive director to fully evaluate a person's demonstrated commitment to environmental excellence at a site as part of the classification process.

The commission has modified the text from proposal of §60.2(e)(3) with the addition of "classified as a poor performer" to clarify that the mitigating factors only apply to sites which are classified as poor performer under adopted §60.2(e)(2). Additionally, the structure of subsection (e)(3) has been modified by moving the portion of proposed §60.2(f)(3) relating to reclassification of a site to subsection (e)(3)(A).

OxyChem and Oxy Permian commented regarding proposed §60.2(f)(3). OxyChem and Oxy Permian stated that they believe that all of the items referenced in proposed §60.2(f)(3)(A) (the positive components) should count positively towards a site's compliance history and are supportive of the commission's intent to allow voluntary programs to "play a part" in compliance histories. However, they expressed concern that even with these programs, it is possible that a site may not be a good performer, and as such, do not believe that it is incumbent on the executive director to base an upward adjustment of a compliance classification on the submittal of a letter of intent to conduct an environmental audit, or the presence of an EMS. OxyChem and Oxy Permian recommended rather that, if a person believes that the compliance history classification for its site does not accurately reflect compliance at that site, and that its voluntary programs are high quality, then the burden of changing the rating belongs with the site rather than the executive director. OxyChem and Oxy Permian recommended that the language in proposed §60.2(f)(3) be modified to read: "(3) Mitigating factors. Sites may request that the executive director evaluate mitigating factors for the site. The executive director shall evaluate mitigating factors for the site and may reclassify the site based upon these factors. The mitigating factors include...." OxyChem and Oxy Permian stated that their recommended approach serves to: require the site to inform the executive director of its positive compliance programs and demonstrate that they are having a positive impact; compel others who do not participate in positive programs to undertake positive initiatives; and relieve the executive director of the potential to have to review hundreds or even thousands of site-specific programs.

The commission responds that §60.2(f)(3), adopted as §60.2(e)(3), has been modified to limit the use of mitigating factors to the evaluation of a site classified as a poor performer. The positive impact of an environmental audit is now considered under adopted §60.2(e)(1)(K). A notice of an intended audit will play a very small part in the compliance history; however, disclosures of violations will be more beneficial to a person who chooses to make such a disclosure assuming the disclosure is granted immunity from administrative or civil penalties. The commission placed audits and disclosures for which immunity is granted directly in the formula for which immunity is granted because it wanted to promote the use of these beneficial tools. EMSs may be considered under adopted §60.2(e)(1)(M) if certified by the agency, or under adopted §60.2(e)(3)(A)(ii) if not certified by the agency. A certified EMS may reduce a site rating by 10%, and it is anticipated that other types of EMSs would result in a less than 10% reduction. The commission believes that it is appropriate to automatically evaluate mitigating factors for a site classified as a poor performer rather than require that person to make such a request due to the consequences required by statute of being in the poor performer classification.

PHA commented regarding proposed §60.2(f)(3). PHA suggested that the rule should provide a procedure for a person to submit information regarding any of the positive components. PHA asserted that the proposed rule acknowledges that such information originates with the regulated entity, and added that, "to give full effect to all aspects of compliance history," such information must be assimilated by the agency.

The commission responds that any person who desires to submit information regarding any of the positive components may submit their information to the Enforcement Division, MC-219, P. O. Box 13087, Austin, Texas 78711-3087. It is not necessary for the rule to establish a procedure for assimilation of such information, as the commission already has procedures for maintaining compliance information. The commission does have a complete record of all notices of audits and subsequent disclosures.

Plano, DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, TTF, and TDA commented regarding proposed §60.2(f)(3). Plano expressed concern that the rule does not require the executive director to reclassify a site when mitigating factors exist, and stated that without such a definite requirement, "there is no incentive for a facility owner to undertake mitigation efforts." Plano specifically cited as an example that it is "expensive and time-consuming to implement" an EMS, and as such, a person should be guaranteed that it will be counted, not merely considered. Plano, therefore, recommended changing the word "may" to "shall" in this paragraph. Plano also asserted that mitigating factors should have an established number of points to be credited in the formula. DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF commented that the rule should provide specific point values for positive components to offset negative points. Without an objective point value for the positive components, the commenters asserted that the incentive to undertake the positive components is undercut. The commenters further added that the rule should provide a reward for "any prompt response and resolution of a compliance issue or NOV" through a reduction in the amount of the site rating in order to encourage prompt response. TDA urged the commission to give the comments submitted by the agriculture industry "every consideration."

The commission responds that positive points have now been included in adopted §60.2(e)(1)(K) and (M) for audits and certified EMSs, respectively. Additionally, adopted §60.2(e)(3)(A)(ii) includes other types of EMSs. The commission disagrees that the rule should require the executive director to reclassify a site when mitigating factors exist because the mere existence of any mitigating factor may not sufficiently offset the poor performance of that site. The commission has determined that the use of mitigating factors requires the exercise of discretion and consideration of site- or person-specific factors by the executive director because of widely varying factual circumstances. Thus, the commission has retained the permissive language originally proposed. The commission does agree with DFA, TAD, TBC, TCFA, TEC, TFB, TPPA, TPF, and TTF concerning the positive components of audits and EMSs. An objective point value has been added as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission has not made any changes concerning prompt response and resolution of a compliance issue or NOV, because that is not a component of compliance history. However, prompt resolution may prevent the need for further enforcement action and therefore avoid the addition of points as a result of such action.

Brown McCarroll commented regarding proposed §60.2(f)(3). Brown McCarroll asserted that the proposal regarding mitigating factors is "too subjective and the rules should provide for a more predictable effect on site characterization," which would provide "concrete incentives." Brown McCarroll also stated that the commission "is charged with providing incentives for the use of environmental management systems and other methods of improving environmental performance" in TWC, §5.131 and §5.755. As such, Brown McCarroll recommended the following modification to proposed §60.2(f)(3):

"(3) Mitigating factors. The executive director shall adjust the site rating according to the following mitigating factors: (A) For each §60.1(c)(8) {Audit Privilege Act Notices and Disclosures} compliance history component for the site during the most recent two years of the compliance period, the site rating shall be reduced by 30 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (B) For each TNRCC-approved compliance history component specified in §60.1(c)(9) {Environmental Management Systems} currently implemented for the site, the site rating shall be reduced by 50 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (C) For each compliance history component identified in §60.1(c)(10) {voluntary on-site compliance assessment} for the site during the most recent two years of the compliance period, the site rating shall be reduced by 30 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in subsection (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (D) For each compliance history component identified in §60.1(c)(11) {participation in voluntary pollution reduction programs} for the site during the most recent two years of the compliance period, the site rating shall be reduced by 20 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (E) For each compliance history component identified in §60.1(c)(12) {early compliance with or offer of a product that meets future stated or federal government environmental requirements} for the site during the most recent two years of the compliance period, the site rating shall be reduced by 20 points. For high performers identified in paragraph (f)(2)(A) and for average performers identified in paragraph (f)(2)(B) of this section, such point reduction cannot move the site to below zero; (F) A regional entity, all of whose other sites in the State have a high or average classification, who for the purposes of regionalization, purchased a site with a poor performer classification, the site rating shall be reduced by 50 points for a five-year period after purchase of the site; and (G) A person, all of whose other sites in the State have a high or average performer classification, who purchased a site with a poor performer classification, the site rating shall be reduced by 50 points for a five-year period after purchase of the site."

TXOGA endorsed the comments submitted by Brown McCarroll.

The commission disagrees with these comments. Adopted §60.2(e)(3) has been modified as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The adopted rules now provide for specific positive points for notices of intended audits, as well as disclosures of violation(s) for which immunity from administrative or civil penalties was granted, and certified EMSs; however, as adopted the rule retains the executive director's discretion for other types of EMSs, and other mitigating factors. Because the factual circumstances surrounding other types of mitigating factors will vary from case to case, this discretionary approach is important so that the issues related to each mitigating factor can be sufficiently evaluated for their relative importance and impact.

AquaSource and TIP commented regarding proposed §60.2(f)(3). AquaSource recommended the addition of a fourth and fifth category of mitigating factors. First, it suggested that the commission take into account the "capital commitment or amount of capital invested in attempting to reach compliance." AquaSource contended that it would prove to be a disincentive to commit such capital outlays if the commission does not provide for some recognition of it. Additionally, AquaSource suggested that the situation "where substantial progress has

been made, but full compliance will still take more time" should be considered as a mitigating factor. TIP also recommended the addition of another mitigating factor "for companies that self report potential noncompliance outside of the Texas Audit Privilege Act." TIP asserted that this type of self-reporting "has a considerable positive impact on the environment and saves precious Agency resources," and further, "fosters a strong relationship between companies and regulators and should be encouraged to the greatest extent possible."

The commission disagrees that a mitigation factor based on the capital commitment or amount of capital invested in attempting to reach compliance should be added. Capital does not necessarily reflect compliance status and cannot always be independently verified. The commission does not believe that lack of this additional mitigating factor would prove to be a disincentive to the purchase of poor performing sites because adopted §60.2(e)(3) already offers mitigation based upon such a purchase.

AquaSource suggested that partial compliance should be considered as a mitigating factor. The commission believes that partial compliance as it relates to purchasing and improving a poor performing site can be addressed by entering into a compliance agreement with the executive director at the time of purchase whereby a schedule for improvements and a return to compliance is specified. Compliance agreements do not count as part of a site's compliance history for site classification purposes. Such agreements do offer a provision to request an extension of time, if necessary, due to unforeseen circumstances. In these cases, the new owner will not be accruing additional violations as long as the new owner performs on the agreement. The commission has adopted §60.2(e)(3)(B), which states that when a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification or becomes permitted to operate a site with a poor performer classification and the person contemporaneously enters into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director shall reclassify the site from poor performer to average performer with 45 points until such time as the next annual compliance history classification is performed. Further, the adopted rule states that the executive director may, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points based on the executive director's evaluation of the person's compliance with the terms of the compliance agreement. Because purchases of poor performing sites by average or high performing persons may have occurred prior to the effective date of this rule, the commission has adopted at §60.2(e)(3)(A)(iii) modifications to proposed §60.2(e)(3)(C) to address this issue. Specifically, the modified language reflects that the executive director shall evaluate and may reclassify the site from poor performer to average performer when a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of the rule. Additionally, should a new owner enter into an agreed order with the commission, the new owner similarly would not be accruing additional violations for the issues addressed in that order as long as the new owner complies with the order.

The commission agrees with the TIP recommendation that noncompliance reported outside of the Texas Audit Privilege Act should be a mitigating factor because it recognizes that a site may perform other kinds of audits or self-evaluations that may be similar to environmental audits and provide the same benefits to the community. However, these audits or self-evaluations do not have the same conditions and requirements as environmental audits conducted under the Texas Audit Privilege Act, and thus, the commission has added these self disclosures in adopted §60.2(e)(3)(A)(iv) as a mitigating factor.

TCONR, ACT, and 472 individuals commented regarding proposed §60.2(f)(3). TCONR stated that the proposed rule, in requiring the executive director to evaluate mitigating factors, repeats the same "misstep" included in the Phase I compliance history rules, namely that the mitigating factors are not proper components of compliance history, are irrelevant, and are not authorized by HB 2912. ACT provided similar comments, adding that while such actions may imply a commitment to "environmental excellence," they do not provide or constitute a measure of actual performance. However, ACT added that if the commission is going to consider these factors, it agrees with the approach of considering them in a qualitative sense, rather than quantitatively. TCONR asserted that the proposal gives the executive director discretion without providing any standards or guidance, and as such, opens the agency "to claims of discrimination in application of the rules and defeats the intent of HB 2912 to achieve a consistent and effective compliance history program." TCONR further stated, "The Phase II rules must make it clear that these 'mitigating factors' will not be used to downgrade the severity of violations, to conceal whether an entity is a repeat violator or move an entity from a 'poor performer' to an 'average performer' or from an 'average performer' to a 'high performer.' To apply these components otherwise would penalize entities with actual good performance records and shield, as well as reward, repeat violators and poor performers." ACT provided very similar comments. TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT. Additionally, 471 individuals stated that the rule should not allow for the use of mitigating factors, because as proposed, the executive director is allowed to grant industries with bad records a status of average or high performer. One individual added that "this power in the hands of the ED is an invitation to bribery."

The commission responds that the mitigation factors are appropriate because they do allow the executive director to evaluate a person's commitment to environmental compliance. This provision, as adopted in §60.2(e)(3), is now limited to the evaluations of sites classified as poor performers. In some circumstances it may be appropriate to reclassify a site from poor performer to average performer if a program that substantially offsets the impact of poor regulatory performance is implemented at that site. Mitigation requires the assessment of the specific situation and, therefore, flexibility is necessary.

Regarding proposed §60.2(f)(3), Fort Worth asserted that this paragraph should be modified to include as a new mitigating factor the situation in which a city has established a superior SSO prevention program. Fort Worth stated that this is appropriate because many SSOs "are preventable through use of an aggressive I&I reduction and line maintenance program such as that established by Fort Worth," and as such, the commission should only penalize a city for SSO events when the city does not have such a program in place.

The commission disagrees with this comment. The complexity of maintaining SSOs is already addressed in adopted §60.2(d)(2)

concerning complexity of the site. No changes have been made to the rule in response to this comment.

ATINGP commented regarding proposed §60.2(f)(3). ATINGP stated that it supports the mitigating factors as proposed in the rule. Further, ATINGP recommends that the "white knight" provision be expanded "so that it applies to acquisitions that predate the effective date of the rules." ATINGP asserted that, if the OAG opinion referenced in the proposal preamble determines that the inclusion of components predating the effective date of the statute or the rules is appropriate, then "the natural gas pipeline industry will be unfairly impacted" because "many acquisitions and consolidations of natural gas pipelines has been occurring within the industry over the past decade." ATINGP expressed concern that many persons will be held accountable for compliance histories for which they are not responsible. As such, ATINGP suggested that the "white knight" provision be expanded such that it applies to acquisitions completed any time during the applicable compliance period.

The commission responds that this provision has been modified to reflect that the executive director shall evaluate and may reclassify a site from poor performer to average performer when a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of the rule. This modification has been made to address the situation in which a site now classified as a poor performer was purchased during the five-year compliance period, but prior to the effective date of this rule, by a person all of whose other sites will now be classified as high or average performers under this rule. Adopted §60.2(e)(3)(A)(iii) and (B) applies specifically to a person who has purchased a site with a poor performer classification.

H&W commented regarding proposed §60.2(f)(3). H&W commented that the commission "should clarify the difference in 'regional entity' and 'person'" in this paragraph.

As explained further in the portion of this SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section concerning adopted §60.2(e)(3)(C), the commission has combined the provisions proposed as §60.2(f)(3)(B) and (C). Adopted §60.2(e)(3)(A)(iii) and (B) generally allows for mitigation where a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification, or becomes permitted to operate a site with a poor performer classification, including a situation where a person acquires or takes over a poor performer site for the purpose of regionalization, and the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance.

Huntsman commented regarding proposed §60.2(f)(3). Huntsman asserted that "projects that can be shown to have provided a result that is 'beyond compliance'" should be treated as mitigating factors, adding that the "policy considerations that support a positive credit for audits in the proposed rule support" this modification to the rule. Similarly, Huntsman requested that "monitoring projects that go beyond required compliance," such as source compliance monitoring, and ambient or fence line monitoring, be treated as a mitigating factor under proposed §60.2(f)(3).

The commission disagrees with this recommendation. There is already benefit to a person who is implementing projects beyond the minimum requirements because those projects assist the person in maintaining operating conditions and emission or discharge levels that comply with its authorizations. This ability to stay in compliance results in a better site rating due to lack of, or reduction of, violations.

§60.2(e)(3)(A), (proposed as §60.2(f)(3), in part, and §60.2(f)(3)(A))

Adopted new §60.2(e)(3)(A) includes a portion of what was proposed as §60.2(f)(3). The portion of proposed §60.2(f)(3) relating to reclassification of a site has been split out and moved to this subparagraph. As a result of this modification to the structure of the rule, the subparagraphs proposed under §60.2(f)(3) have now become clauses under adopted §60.2(e)(3)(A), as discussed in more detail later in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified the text from proposal with the addition of "from poor performer to average performer" to clarify that the mitigating factors can only be utilized to potentially upgrade the performance classification to average performer. The phrase "with 45 points" has also been added to reflect that if a site is reclassified from poor performer to average performer, the site rating will be set as the bottom of the average performer classification (e.g., 45 points). The site will then be averaged with any other sites owned or operated by the person in order to establish an aggregate rating for that person.

§60.2(e)(3)(A)(i), (proposed as §60.2(f)(3)(A))

Adopted §60.2(e)(3)(A)(i) includes as one mitigating factor "other compliance history components included in §60.1(c)(10) - (12) of this title." These positive components include: any voluntary on-site compliance assessments conducted by the executive director under a special assistance program; participation in a voluntary pollution reduction program; and a description of early compliance with, or offer of, a product that meets future state or federal government environmental requirements. The commission solicited comments concerning whether and how to quantify the use of EMS and audits in the compliance history analysis and subsequent classification. The commission received several comments in response to this solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

The commission has modified adopted §60.2(e)(3)(A)(i) by changing the reference from §60.1(c)(8) - (12) to paragraphs (10) - (12), because environmental audits, as found in §60.1(c)(8), are now addressed under adopted §60.2(e)(1)(K) in the formula, and in adopted §60.2(e)(3)(D) as a mitigating factor. Additionally, EMSs, as found in §60.1(c)(9), are now addressed under adopted §60.2(e)(1)(M) and (3)(A)(ii).

MMM, Fort Worth COC, and C&H commented regarding proposed §60.2(f)(3)(A). MMM asked how "the positive things we as a site are doing, i.e., an EMS" will be factored into classification and site rating. Fort Worth COC and C&H stated that the rules should provide for the positive measures undertaken by an entity. C&H asserted that an objective value must be provided for positive components as long as there are objective values for negative components. Additionally, MMM asked if each site has to have an EMS, or will a company-wide EMS suffice.

The commission responds that the rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Specifically regarding implementation of an EMS, the commission has determined that an EMS must be implemented by site as opposed to company-wide in order to be credited as a positive component, because the compliance history classifications are determined on a site basis in addition to a person basis.

TML and LSS commented regarding proposed §60.2(f)(3)(A). TML commented that it believes the rule does not provide enough emphasis on positive environmental compliance, further stating that, "If implemented effectively, compliance-based regulation should lead to proactive efforts, and even competition, among the regulated community to obtain better ratings." TML asserted that the rule, as proposed, does not provide sufficient opportunity for a city or other entity to demonstrate environmental responsibility or improve its rating, and went on to say that this is particularly apparent with regard to EMSs. TML advocated modification of the rule to include a new subparagraph (J), (K), or (L) to proposed §60.2(f)(1), to divide the result of the preceding paragraph by two if the person "has implemented and is operating an EMS that is compliance with TNRCC's EMS rules." Similarly, LSS made reference to the rulemaking required by HB 2997 regarding Regulatory Incentives for EMSs, and stated that the proposed compliance history rule "does not clearly define a means of awarding credit for companies that implement EMS."

The commission responds that it has modified the rule as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

V&E, WM, GI^2, Fort Worth COC, C&H, Reliant, AECT, TAB, T&K, ATINGP, AeA, UT, TIP, and 7-Eleven commented regarding proposed §60.2(f)(3)(A). V&E stated that "reclassification of a site based upon positive components of compliance history should be mandatory." V&E and TAB suggested that points should be established for all of the positive components. V&E added that points for positive components should be deducted from the total points for negative components. TIP provided a similar comment. Similarly, WM stated that it disagrees with the positive components being left to the discretion of the executive director because of resource issues and potential inconsistency. Reliant made similar comments. Reliant asserted that the rule should define positive components, and "recognize them in some way that is consistent with the compliance formula." AECT provided similar comments. TAB listed three reasons it believes the positive components should have point values assigned: 1) there is a lack of certainty, as proposed; 2) with the lack of certainty comes less "incentive for a company to go to the time and expense of" implementing either an EMS or performing an environmental audit; and 3) as proposed, it leaves the executive director open to criticism, lessening the likelihood that he will use this discretionary factor to affect a compliance classification. AECT expressed concern that the proposed approach would create a negative perception on the part of the public that the executive director is "pro-regulated community," and believes it would be unwise to adopt such a rule. AECT, therefore, suggested that proposed §60.2(f)(1) be revised such that specific points are assigned to the components in proposed §60.1(c)(8) - (12). TXU supported the comments made by AECT. GI^2 suggested that positive points be included in the formula for "companies who achieve successful EMS, voluntary on-site compliance assessments and/or other Local, State or Federal environmental programs and promote environmental stewardship," as an incentive and as a method of raising a compliance rating. Similarly, Fort Worth COC and C&H stated that an entity with an EMS in place should receive a point reduction in the compliance history formula, because the EMS rules indicate the number of investigations conducted at a site will be reduced if an EMS is in place. Fort Worth COC and C&H asserted that this could result in a site with an EMS in place having a higher compliance history point total as there would be fewer investigations counted in the denominator in the formula. T&K asserted that EMSs and audits "should be addressed expressly in the formula as an incentive to encourage their use." T&K suggested that, for a site with an EMS meeting the minimum standards of 30 TAC, §90.32, a 10% per year reduction in total points should be given; additionally, a 10% per year reduction in points should be given "for each site-wide audit under the audit privilege act that covers an entire regulatory program under the jurisdiction of the TNRCC that is subject to the compliance history rule and applicable to the facility." T&K stated that under this scenario, if a facility was subject to TWC, Chapters 26 and 27, and THSC, Chapter 361, 382, and 401, it would receive up to a 50% reduction in points. ATINGP stated that EMSs and environmental audits should be encouraged, and recommended that each be assigned a point value of 0.5 to be added as a divisor in the formula. AeA commented that, while it appreciates the need for flexibility, it "believes that by giving specific values to positive aspects of compliance history, TNRCC will encourage additional facilities to adopt more proactive measures for managing their environmental issues." Specifically, AeA recommended that a percentage reduction in the overall compliance score be set for certain components, either as absolute numbers, or ranges. UT also expressed concern that there are not specific high point values assigned to the mitigating factors. UT asserted that doing so would "reward those entities that demonstrate a commitment to environmental excellence and to the implementation of systems that endure continuous improvement in environmental compliance." Additionally, UT stated that "the application of mitigating factors to reach a defensible classification may also require an approach where the Executive Director will be required to write a 'reasoned justification' for a reclassification, accompanied by a 'motion to overturn' procedure for use either by the entity of the public to secure Commission review of the reclassification," and recommended the addition of such a procedure to proposed §60.2(f)(3). 7-Eleven stated that the commission should encourage environmental excellence by modifying the rule to require that the executive director assign points for all applicable factors from proposed §60.1(c)(8) - (12), adding that to minimize the resource commitment required to implement this, it could be limited to "those situations where mitigating factors are likely to have a practical impact, e.g., where the site classification is within 10 points of reaching a higher site classification."

The commission responds that the rule has been modified as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

TCC commented regarding proposed §60.2(f)(3)(A). TCC suggested that "the existence of an 'approved' EMS should result in a halving of the ultimate score, or in the alternative, a deduction of, say, 50 points from the final score." OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TCC. Garland, San Antonio, GEUS, and SMEC stated that the compliance history rules "do not provide a clear way out for an entity that has received a poor rating," adding that a mechanism for improving performance is to provide positive, sure incentives to sites. Therefore, Garland, San Antonio, GEUS, and SMEC

recommended the addition of a new §60.2(f)(4), which would read: In addition to the discretionary mitigating factors identified above, the following may be used to reclassify the site by subtracting points from the final score in proposed §60.2(f)(1)(K): (A) Conduct an environmental audit of the site: subtract 10 points; (B) Implementation of an environmental management system: subtract 25 points.

The commission responds that it has modified the rules to include positive points for notices of intended audits, as well as disclosures of violation(s) which were granted immunity from administrative or civil penalties, and certified EMSs as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Additionally, non-certified EMSs, other positive components, and voluntarily reporting a violation or reporting a violation under the Texas Audit Privilege Act which is not granted immunity are also included in the mitigating factors as adopted.

Huntsman commented regarding proposed §60.2(f)(3)(A). Huntsman recommended that there be a value assigned to approved EMSs, which could be used to reduce the violation points in the formula, suggesting a sliding scale of 25% to 50%. Additionally, Huntsman expressed concern that "30 TAC §90.2(e)(f) provides that companies that have been adjudicated liable for an environmental violation (whether civil or criminal) are not entitled to 'regulatory incentives' for a period of three years following the 'date the judgment was final.' Regulatory incentives include use of an EMS 'in a person's compliance history and compliance summaries.' 30 TAC §90.34(5)." Huntsman raised this same issue in the Phase I compliance history rulemaking, to which the commission responded in part, "In addition to meeting the statutory requirements to establish the *voluntary* regulatory incentive program discussed above under Chapter 90, the commission is additionally required under HB 2997 which amended TWC, §26.028, by adding new subsection (e) and re-entering existing subsections (e) - (g) as subsections (f) - (h) to include information regarding an EMS in an applicant's compliance history and compliance summaries for which an authorization is sought. Therefore, proposed Chapter 60 language regarding inclusion of an EMS in compliance history has been developed to meet this requirement. Regardless of whether a person requests to participate in the voluntary EMS regulatory incentive program under Chapter 90, HB 2997 statutory language requires the consideration of EMS in all compliance histories and summaries. *Therefore, the language in Chapter 90 does not supersede or prohibit the additional statutory requirements contained in HB 2997, but is meant to be a complimentary program to the compliance history requirements contained in Chapter 60 and encourage more entities to develop EMS."* (Emphasis added). Huntsman, although appreciative of the commission's willingness to consider this element as a mitigating factor, stated that it is still concerned "whether language used in response to its comments to the Phase 1 rule can preempt the express prohibition found at 30 TAC §90.34(5)," and requested that the commission incorporate its comments concerning the use of EMS into the text of the Phase II rule.

The commission responds that Chapter 90 does not supersede the requirements of Chapter 60, which expressly includes the type of EMS system as a component of the compliance history in §60.1, and is included in the development of a site rating in adopted §60.2. The commission has modified the rule in response to this comment.

PIC commented regarding proposed §60.2(f)(3)(A). PIC stated that it disagrees with the inclusion of mitigating factors which contain no parameters on the amount a site rating can be adjusted, adding that the executive director's unrestricted discretion to reclassify a site with no standards set forth in the rule violates the requirement of TWC, §5.754. PIC stated, "To the extent that the listed factors are to be used as positive components of compliance history, they should be assigned specific maximum point values that can then be subtracted from the site rating. These factors can only be included in the rule's 'set of standards' if they are valued quantitatively and applied to adjust the numeric site rating, rather than valued qualitatively and applied subjectively to place a person in an entirely different classification than determined by a site rating score calculated according to a detailed, prescriptive formula. Moreover, the factors included under §60.3(f)(3)(A) should not be used to improve a site rating unless a site has shown demonstrated improvement in its compliance since the time the listed measures were implemented. If demonstrated compliance improvement is shown, the maximum reduction to a site rating that should be allowed is 100 points--the equivalent amount of points received for a major violation documented in a final order."

The commission responds that it does not agree with PIC. TWC, §5.754, does not preclude a qualitative evaluation of a person or site. The executive director can evaluate the mitigating factors in a consistent manner, in accordance with administrative law requirements. The executive director has extensive expertise in evaluating compliance which is tied directly to the EMS program, voluntary self-disclosures, small business audits, early compliance, and pollution reduction. The rule has been structured to allow the executive director to take into account the particular circumstances related to a person or site when evaluating new ownership and the effectiveness of a new owner in improving compliance at a site. As discussed previously, flexibility is necessary due to widely varying factual circumstances of different persons and sites.

C&H, LSS, and BP commented regarding proposed §60.2(f)(3)(A). C&H and LSS stated that violations disclosed through a voluntary self-audit should not adversely affect a person's compliance history rating. C&H added that while self-audits can be counted as a positive factor in the rule, the rule should specifically state that any disclosures would not be "classified as violations for the purposes of compliance calculation." BP provided similar comments. LSS suggested that to include such self-reported violations in the compliance history as NOVs would prove to be a disincentive for companies to perform environmental audits.

The commission responds that it has revised adopted §60.2(e)(1)(K) to include the reduction of points when a person notifies the commission of an intended audit or when a person discloses violations after an audit which is conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, and the site was granted immunity from an administrative or civil penalty for that violation(s) by the agency. Additionally, the commission added a new §60.2(e)(3)(A)(iv) for voluntarily reporting a violation to the executive director that is not otherwise required to be reported, and that is not reported under the Texas Audit Privilege Act, or that is reported under the Texas Audit Privilege Act but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency. In regard to compliance history, violations disclosed under the Texas Audit Privilege Act are required to be included in the compliance history by that Act.

However, the violations are noted in the compliance history as being self-disclosed.

C&H commented regarding proposed §60.2(f)(3)(A). C&H stated that the commission should implement in its compliance history calculation something similar to California's process by which, in its enforcement of hazardous waste standards, California decreases the base penalty amount by 5% for each previous consecutive investigation report in which no violations were noted. Similarly, C&H stated that the compliance history calculations should include another of California's enforcement processes in which it adjusts a penalty downward by 15% if the respondent has an ISO 14001 certificate.

The commission responds that it has modified the rule as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble to include positive points for implementation of a certified EMS, in addition to retaining non-certified EMSs in the mitigating factors. The commission elected a reduction of 10% for certified EMSs because the value of the EMS is more appropriately found through improved performance, and thus fewer violations, which will create a better score. The commission has not made a modification concerning previous consecutive investigation reports in which no violations were reported because §60.2(e)(1) already utilizes investigations as a divisor. This divisor may provide more benefits than a 5% reduction, depending upon the number of investigations performed during the compliance period, and thus another reduction is not warranted.

BP and CPS commented regarding proposed §60.2(f)(3)(A). BP stated that it supports the evaluation of a total site rating to determine its appropriateness based upon positive components. Similarly, CPS stated that it supports the inclusion of in-house audits, voluntary pollution control programs, and the use of EMSs in a positive manner, as the company can control the number of such things it conducts.

The commission appreciates the positive comments in support of the rule and notes that notices of intended environmental audits, as well as disclosures of violation(s) which are granted immunity from administrative or civil penalties, and certified EMSs are now specifically included in the formula for site rating rather than in mitigating factors.

AeA commented regarding proposed §60.2(f)(3). AeA recommended the addition of an incentive which would provide that, if a facility participates in the commission's EMS or other voluntary programs, it could use that to "mitigate" the occurrence of a one-time, non-criminal, major or moderate violation event." AeA suggested that a site's compliance history should not be "downgraded" as a result of a one-time event, even if it was a serious violation, if the following criteria are met: the site has an approved EMS in place; the site had a compliance history classification of above average or average in the six-month evaluation prior to the one-time event; the executive director is satisfied that the circumstances leading to the violation have been eliminated or fully remedied; and no additional major or moderate violations occur during the five-year compliance period.

The commission responds that it has modified the rule by adding §60.2(e)(1)(M) to include an agency-certified EMS as part of the site rating formula. The EMS adjustment in subparagraph (M) is a 10% positive adjustment to the overall site rating. This modification should provide a similar outcome to that suggested by AeA.

§60.2(e)(3)(A)(ii) (proposed as §60.2(f)(3)(A) (in part))

The commission has adopted at §60.2(e)(3)(A)(ii) language which states that implementation of an EMS not certified under Chapter 90 at a site for more than one year will be given consideration as a mitigating factor in site classification. This is not new; during proposal of this rule, this was included in §60.2(f)(3)(A). However, it has been split out into a separate subparagraph at adoption because of the fact that, in response to comments received, adopted §60.2(e)(1)(M) provides for specific point values in the classification formula for agency-certified EMSs.

§60.2(e)(3)(A)(iii) (proposed as §60.2(f)(3)(B) and (C))

Adopted new §60.2(e)(3)(A)(iii) includes as another mitigating factor the situation in which a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule.

In order to avoid possible confusion, the commission has combined the two subparagraphs proposed as §60.2(f)(3)(B) and (C) as the two subparagraphs, as proposed, addressed similar situations. Adopted §60.2(e)(3)(A)(iii) will apply to a situation where a person, all of whose other sites have a high or average performer classification, purchases or becomes permitted to operate a site with a poor performer classification for the purpose of regionalization. The commission continues to encourage regionalization and believes that compliance history should not be a roadblock to integrating poor performing facilities with high performing facilities.

Additionally, "or average" has been added to adopted §60.2(e)(3)(A)(iii) in response to comments received, in order to broaden the scope of those persons who may benefit from this mitigating factor. Limiting applicability of the provision to only those persons all of whose other sites have high performer classifications does not allow for mitigation where an average performer purchases or operates a poor performing site. The commission has adopted the revised language to encourage such purchases or changes in operation which should result in improved environmental performance. Additionally, the phrase "or became permitted to operate a site with a poor performer classification" has been added in response to comments received, in order to provide for the scenario in which one of the permittees is not the owner, but rather the operator of the site, and as such did not "purchase" the site, as discussed elsewhere in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. Further, the following phrase has been added to this clause: "if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule." This phrase has been added to address the situation in which a site now classified as a poor performer was purchased during the five-year compliance period, but prior to the effective date of this rule, by a person all of whose other sites will now be classified as high or average performers under this rule. Finally, the word "and" has been included at the end of this subparagraph, because an additional subparagraph has been added to this paragraph as adopted.

NTMWD, OxyChem and Oxy Permian, LCRA, and TIP commented regarding proposed §60.2(f)(3)(B). NTMWD suggested that the mitigating factor include regional entities all of whose

other sites fall into either the average or high classification and include regional entities who become permitted to operate a poor performer site. LCRA stated that it "is encouraged that the TNRCC has recognized and appropriately addressed the situation in which a reputable entity acquires, with the intent to improve, a site with a poor performance ranking." However, LCRA expressed concern with the proposal that all other sites be high performers may not always be realistic, because sites with inadequate compliance information default to average. Therefore, LCRA recommended that the requirement that all other sites be high performers be limited to those sites with adequate compliance information such that they have not defaulted to average. OxyChem and Oxy Permian stated that they are supportive of this portion of the proposed rule in which a regional entity, all of whose other sites are high performers, may decide to buy another site with a poor performer classification. The commenters stated that they believe that it is beneficial to both the agency and the purchasing entity to acquire a poor performing site. However, OxyChem and Oxy Permian stated that it is important for the agency to realize that in determining whether to purchase a poor performing site, the high performing purchaser will review the restrictions placed on the poor performing site by the commission. As such, OxyChem and Oxy Permian stated that they believe the rules should provide incentives for high performers who acquire a poor performing site, such as the relaxation of certain requirements in proposed §60.3. TIP asserted that a disincentive could be created for high performing companies considering the purchase of poor performing sites by certain mandatory impacts for poor performers and repeat violators in the proposal.

The commission responds that it has modified adopted §60.2(e)(3)(A)(iii) and (B), as discussed elsewhere in this preamble. The commission responds to LCRA's concern by stating that the rule has been modified to include both average and high performer sites in the mitigating factor. Additionally, the commission responds that when mitigating factors are utilized to change the classification of a site from poor performer to average performer, the requirements found in §60.3 relating to poor performers no longer apply to that site.

TXI, TMRA, TIP, Garland, San Antonio, GEUS, SMEC, V&E, Reliant, and AECT commented regarding proposed §60.2(f)(3)(B). TXI recommended that average performers should also get the benefit of this mitigating factor. Similarly, TMRA recommended that if proposed paragraph (3)(B) and (C) are retained in the rule, "or average" should be added after the term "high" so as not to unduly punish entities with average compliance history classifications. TIP also stated that it is supportive of proposed subparagraphs (B) and (C), and believes that they should also apply to average performers. Garland, San Antonio, GEUS, and SMEC similarly commented that limiting this provision to high performers may prove to be a disincentive for regional entities to assume control of poor performing sites. V&E, Reliant, and AECT stated that this subparagraph should be modified to include average as well as high performing sites. V&E added that, as proposed, it would apply to very few persons, and "could only be used one time by a high performing person until the purchased site also becomes a high performer." V&E and AECT asserted that this modification would further the commission's stated goal of not deterring investment in poor performing facilities. AECT added that it believes that, as proposed, this subparagraph would rarely, if ever, apply to anyone having more than one site, based on its understanding that the number of high performing sites will be fairly small. TXU supported the comments of AECT.

The commission agrees with the commenters and has modified the rule accordingly, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

Proposed §60.2(f)(3)(C))

As discussed previously, the commission has combined the two subparagraphs proposed as §60.2(f)(3)(B) and (C), providing a mitigating factor where a person, all of whose other sites have a high or average performer classification, purchases or becomes permitted to operate a site with a poor performer classification, if the person entered into a compliance agreement with the executive director.

MMM commented regarding proposed §60.2(f)(3)(C). MMM asked how acquiring a company which has a poor performer classification would affect the acquiring company's classification?

The commission responds that the compliance history components "attached" to a site are included in the compliance history classification for the acquiring company (i.e. points will be assigned for violations occurring during the five-year compliance period but prior to the acquisition). However, the commission does not want the acquisition of a poor performing site to create a roadblock to integrating poor sites with higher performing ones, and as such is adopting, as a mitigating factor, the ability of the executive director to reclassify an otherwise poor performing site when it has been acquired by a person all of whose other sites have a high or average performance classification, if the person entered into a compliance agreement with the executive director.

§60.2(e)(3)(A)(iv)

The commission has adopted §60.2(e)(3)(A)(iv), which adds for evaluation, as a mitigating factor, voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, or that is reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency. This has been added in response to comments received, as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.2(e)(3)(B)

The commission has adopted §60.2(e)(3)(B), which addresses the scenario in which a person, all of whose other sites have a high or average performer classification, purchases a site with a poor performer classification or becomes permitted to operate a site with a poor performer classification and the person contemporaneously enters into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance. Specifically, this provision provides that the executive director *shall* reclassify the site from poor performer to average performer with 45 points until such time as the next annual compliance history classification is performed. It further provides that the executive director *may*, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points, based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement. This has been added to the rule in response to comments, as it provides certainty regarding the initial reclassification of a site for average- or high-performer

persons purchasing a poor performing site subsequent to the effective date of this rule, and simultaneously entering into a compliance agreement with the executive director regarding bringing the site into compliance. The commission has determined, however, that it is appropriate to evaluate the person's efforts in meeting the terms of the compliance agreement during annual compliance history classifications to determine whether reclassification is warranted at that time. In other words, the existence of the compliance agreement does not assure the person of reclassification of the poor performing site; rather, it is the person's efforts with regard to bringing the site into compliance which will be considered as a mitigating factor during annual compliance history classifications. If, for example, a poor performing site, Site X, is purchased by ABC Company which is a high performer, and ABC Company and the executive director enter into a compliance agreement regarding Site X, then the classification of Site X becomes "average" until September 1st when the annual compliance history classification of all sites is calculated. This is true whether the purchase and entry into a compliance agreement occurred on September 2nd, or on August 30th. However, when the annual compliance history classification is calculated, and mitigating factors are considered for reclassification of the site, the time frames in, and the effective date of the compliance agreement will be taken into consideration.

§60.2(f)

The commission has adopted subsection (f) concerning person classification, which states, "The executive director shall assign a classification to a person by averaging the site ratings of all the sites owned and/or operated by that person." As discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, numerous comments were received concerning the addition of a classification for a person. The commission agreed that these comments accurately reflected the legislative direction, and as such, adopted this subsection to reflect how the classification of a person will be calculated.

§60.2(g)

Adopted new §60.2(g) provides for the agency to provide Internet notice of person and site classifications within 30 days after the completion of the classification. Internet posting of classifications is consistent with the requirements of TWC, §5.1733, which provides that the commission shall post public information on its website. In addition, posting the information on the agency's website serves as a mechanism to inform interested persons of the agency's classifications in the event that corrections or appeals are deemed necessary.

§60.3

The commission adopts new §60.3, Use of Compliance History, with modifications to the proposal.

The commission adopts new §60.3 to address the requirements of TWC, §5.754(e), which states that the commission by rule shall provide for the use of compliance history classifications in commission decisions relating to: the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit; enforcement; the use of announced investigations; and participation in innovative programs.

Adopted new §60.3(a), concerning permitting, will address the use of compliance history with regard to those permit actions identified in §60.1(a) which are subject to compliance history review. Specifically, the adopted language in §60.3(a)(1) states that, for permit actions subject to compliance history review identified in §60.1(a), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit, reflecting the requirements of TWC, §5.754(e) and (g). The adopted language in §60.3(a)(1) adds under subparagraphs (A) and (B) that the agency shall consider compliance history by: evaluating the person's site-specific compliance history and classification; and evaluating the person's aggregate compliance history and classification, especially considering patterns of environmental compliance. Adopted subparagraph (A) refers to the site classification as adopted in §60.2(e). Adopted subparagraph (B) refers to the person's classification as adopted in §60.2(f), and reflects the agency's ability to look at the *person's* overall classification and compliance history in permit decisions regarding a site, including the compliance history of that site, as well as the person's entire environmental compliance history at other sites owned or operated in Texas, and sites outside the State of Texas.

The commission adopts new §60.3(a)(2), concerning review of permit application. Under this paragraph, the commission adopts language which states that in the review of an application for a new, amended, modified, or renewed permit, the executive director or commission may require permit conditions or provisions to address an applicant's compliance history. It further states that poor performers are subject to any additional oversight necessary to improve environmental compliance. This will ensure that environmental compliance is achieved, and as a result, will assist a performer (poor or otherwise) in improving its classification.

This paragraph addresses the requirements of TWC, §5.754(g), which states that rules adopted "for the use of compliance history shall provide for additional oversight of, and review of applications regarding, facilities owned or operated by a person whose compliance performance is in the lowest classification." The commission intends to utilize any and all appropriate mechanisms to address compliance history issues. For example, the commission may impose reduced permit terms, more frequent monitoring, or more prescriptive permit conditions, if warranted. This determination, however, will be made on a case-by-case basis to ensure that any special permit provisions are appropriately tailored to the site under review and its compliance history.

The commission adopts new §60.3(a)(3), concerning poor performers and repeat violators, to address the requirements of TWC, §5.754(e)(1), which states that the agency shall consider compliance history in decisions to issue, renew, amend, modify, deny, suspend, or revoke a permit. Additionally, TWC, §5.754(i), states, "The commission shall consider the compliance history of a regulated entity when determining whether to grant the regulated entity's application for a permit or permit amendment for any activity under the commission's jurisdiction to which this Subchapter applies."

Adopted new §60.3(a)(3)(A) will include actions the agency *shall* take if a site is classified as a poor performer.

Adopted §60.3(a)(3)(A)(i) states that the agency shall deny or suspend a person's authority relating to that site to discharge under a general permit issued under 30 TAC Chapter 205, if that person's site is classified as a poor performer. This reflects the modification to TWC, §26.040(h), made by HB 2912, §16.07, which requires, "Notwithstanding other provisions of this chapter, the commission, after hearing, shall deny or suspend a discharger's authority to discharge under a general permit if the

commission determines that the discharger's compliance history is in the lowest classification under Sections 5.753 and 5.754 and rules adopted and procedures developed under those sections."

Adopted §60.3(a)(3)(A)(ii) states that the agency shall deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116, relating to Control of Air Pollution by Permits for New Construction or Modification, if the person's site is classified as a poor performer. This reflects the requirement in TWC, §5.754(h)(2), which states, "The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified in the lowest classification developed under this section from: ... obtaining or renewing a flexible permit under the program administered by the commission under Chapter 382, Health and Safety Code...."

Adopted new §60.3(a)(3)(B) states the actions the agency *may* take upon application for a permit, permit renewal, modification, or amendment relating to that site if a site is classified as a poor performer.

Adopted new §60.3(a)(3)(B)(i) states that the agency may deny or amend a solid waste management facility permit if a person's site is classified as a poor performer. This reflects the modification to THSC, §361.089(a), made by HB 2912, §16.12, which states, "The commission may, for good cause, deny or amend a permit it issues or has authority to issue for reasons pertaining to public health, air or water pollution, or land use, or for having a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."

Adopted new §60.3(a)(3)(B)(ii) states that the agency may deny an original or renewal solid waste management facility permit if the person's site is classified as a poor performer. This reflects the modification to THSC, §361.089(e), made by HB 2912, §16.12, which states, "The commission may deny an original or renewal permit if it is found, after notice and hearing, that: {1} the applicant or permit holder has a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."

Adopted new §60.3(a)(3)(B)(iii) states that the agency may hold a hearing on an air permit amendment, modification, or renewal if the person's site is classified as a poor performer and, as a result of the hearing, deny, amend, or modify the permit. This reflects the modification to THSC, §382.056(o), made by HB 2912, §16.15, which states, "Notwithstanding other provisions of this chapter, the commission may hold a hearing on a permit amendment, modification, or renewal if the commission determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections."

Adopted new §60.3(a)(3)(C) states that, notwithstanding §305.65(8), if a site is classified as a poor performer or repeat violator and the agency determines that a person's compliance history raises an issue relating to the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications for a specified class of storage and processing permits. This reflects the modification to THSC, §361.088(f), made by HB 2912, §16.11, which requires, "Notwithstanding Subsection (e), if the commission determines that an applicant's compliance history under the method for evaluating compliance history developed by the commission under Section 5.754, Water Code, raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing."

Adopted new §60.3(a)(3)(D) reflects that, upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

Adopted new §60.3(a)(3)(E) states that the commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This mirrors the requirement of TWC, §5.754(i). As adopted, this will include violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

The commission adopts new §60.3(a)(4), concerning additional use of compliance history, to address other uses of compliance history. Adopted new §60.3(a)(4)(A) states that the commission may consider compliance history when: evaluating an application to renew or amend a permit under TWC, Chapter 26; considering the issuance, amendment, or renewal of a preconstruction permit, under THSC, Chapter 382; and making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

Adopted new §60.3(a)(4)(B) states that the commission shall consider compliance history when: considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste; considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27; determining whether and under which conditions a preconstruction permit should be renewed; and making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

The commission adopts new §60.3(a)(5), proposed as §60.3(a)(6), concerning revocation or suspension of a permit. This will address specifically the requirements of TWC, §5.754(e)(1), which states that the agency shall consider compliance history in decisions to issue, renew, amend, modify, deny, suspend, or revoke a permit. Specifically, the adopted language states, "...Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit."

The commission adopts new §60.3(a)(6), proposed as §60.3(a)(7), concerning repeat violator permit revocation. The adopted paragraph states, "In addition to the grounds for revocation or suspension under TWC, §§7.302 and 7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including:". This adopted provision addresses TWC, §5.754(f), which requires that the compliance history "assessment methods shall specify the circumstances in which the commission may revoke the permit of a repeat violator." The commission has determined that the following conditions or situations will reflect the conditions under which the agency might decide if appropriate to revoke the permit of a repeat violator: a criminal conviction classified as major under §60.2(c)(1)(E); an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(B);

repeatedly operating without required authorization; or documented falsification. Furthermore, the number and complexity of each site owned or operated by the person is addressed through the consideration of whether a person is a repeat violator at a site through adopted §60.2(d). The commission invited comments as to how to specifically consider the number and complexity of sites with respect to permit revocations and enhanced penalties for repeat violators. The commission also invited comments as to how to establish criteria for classifying a repeat violator, giving consideration to the number and complexity of sites in the definition of "repeat violators" itself. The commission also invited comment on the relationship between TWC, §5.754(c)(2), relating to criteria for classifying a repeat violator and §5.754(f), relating to permit revocation of a repeat violator. The commission received several comments in response to this solicitation. All comments are addressed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

§60.3

Fort Worth COC, C&H, OxyChem and Oxy Permian commented regarding proposed §60.3. Fort Worth COC and C&H commented that this section of the rule should provide incentives for high performers. C&H specifically suggested the following as incentives which should be included in the rule: reduced administrative penalties, decreased review times for permit amendments and modifications, longer terms for permits, recognition of a person's high performance record, automatic admission into innovative programs, scheduled investigations, and more flexibility in permitting. OxyChem and Oxy Permian stated that they are supportive of the initiatives in proposed §60.3, "and strongly urge that the TNRCC actively pursue the actions described." However, OxyChem and Oxy Permian also believe that high performing sites should be rewarded, including such incentives as: expedited permit application review periods; limited public notice requirements for permits; and limited compliance investigations. OxyChem and Oxy Permian cited Occupational Health & Safety Administration's (OSHA's) Voluntary Protection Program (VPP) as an example of how high performing sites are rewarded with tangible benefits for good performance, and they stated that they believe that providing incentives in §60.3, along with the mitigating factors in proposed §60.2(f)(3), provide the commission with the opportunity to duplicate the success of the OSHA VPP.

The commission appreciates the positive comment in support of the rule. Additionally, the commission responds that this rulemaking seeks only to implement the requirements of TWC, §5.754, concerning classification and use of compliance history, and as such, the comments concerning the addition of incentives are outside the scope of this rulemaking. TWC, §5.755, requires the commission to develop, by rule, a strategically-directed regulatory structure to provide incentives for enhanced environmental performance. During development of the rule associated with that requirement, the commission will be considering other potential incentives. It is not appropriate or necessary to add the provisions suggested by the commenters to the compliance history rule. As discussed previously, rule development relating to strategically-directed regulatory structure in accordance with TWC, §5.755, in 2003 will establish additional procedures for the use of incentives to enhance environmental performance. No changes have been made in response to these comments.

§60.3(a)(1)

ACT commented regarding proposed §60.3(a)(1). ACT stated that the rules need clarification because they do not provide a definition of compliance history, and specifically, §60.3 "needs to provide that the violations themselves can be considered when adding conditions to permits." ACT recommended that proposed subparagraph (A) of this paragraph be modified to read "site-specific compliance history, violations and classification;" and that proposed subparagraph (B) be modified to read "entire compliance history and violations common to the site under review and other sites, especially considering any patterns of environmental compliance." TCE, LCVEF, DAR, SEED Coalition, PC, and seven individuals supported the comments made by ACT.

The commission has made no change in response to this comment because the adopted rules provide for consideration of both the site and person classification in commission decisions. Also, existing §60.1 identifies "violations" as a component of compliance history. Therefore, a site-specific compliance history will include the violations which are applicable to that site. Additionally, the compliance history will include violations which occur at other sites. As the commission evaluates compliance history with regard to a permit action, it will consider both the specific site history and the history of that person at other sites, including violations common to the site under review. Information regarding compliance history at other sites is not included in the calculation of a site's classification rating. However, the person's classification does include the specific compliance history of all sites owned or operated in Texas. No change was made to the rule as a result of this comment.

TIP and BP commented regarding proposed §60.3(a)(1). TIP stated that the rule should be clarified to reflect "exactly when site classifications and/or entity-wide compliance history will be utilized in permitting decisions. In addition, the entire classification portion of the proposed rule only mentions site classification, and not 'site-specific compliance histories.'" BP provided similar comments, stating that the commission "should explain how the site-specific compliance history could lead to a different decision than would otherwise be reached by a review of the classification," and further, "clarify when site classifications and entity-wide compliance history will be utilized in permitting decisions." TIP asserted that "all impacts associated with these rules should be limited to the site in question." TIP stated that the legislature directed the commission to promulgate rules regarding the use of compliance history, but that the proposal only speaks to using compliance history without providing specifics on how it will be utilized. TIP added, "The Agency's purpose through administrative rulemaking should be to implement clear standards that expand upon sometimes broad legislative directives; not to provide even less guidance than the underlying legislation."

The commission will use a site-specific compliance history and the person's aggregate compliance history every time it makes decisions relating to the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. "Site," as defined in adopted §60.2(e)(1), is equivalent to "site-specific" as found in §60.3(a)(1)(A). TWC, §5.574, requires the commission to determine classifications of a person's compliance history, meaning that if that person owns or operates multiple facilities, the compliance at all of those locations will be taken into account in any permit or enforcement decision. As the commission evaluates compliance history with regard to a permit action, it will consider both the specific site history and the history of that person at other sites, including violations common to the site under review. Specifically, a permit may be written with specific provisions intended to address those issues that repeatedly occur at the person's site undergoing permit review, and/or at other sites owned or operated by that person. For example, the

commission may issue a permit with a provision that is based upon experiences occurring at other similar sites owned or operated by that person. In both of these instances, the purpose of the additional permit provision, presumably more detailed than other types of provisions, would be to underscore the importance of compliance relating to that particular operational issue and to avoid future noncompliance. Additionally, this same evaluation of violations at the site and common to multiple sites will be performed in the enforcement process and additional ordering provisions, or more detailed types of provisions may be included in an enforcement action as appropriate to those circumstances in order to avoid future noncompliance.

§60.3(a)(1)(B)

The commission has modified adopted §60.3(a)(1)(B) from proposal by changing the word "entire" to "aggregate" in order to clarify that it is not intended to extend the length of the compliance period to encompass the life of the site. Rather, this modification, especially coupled with the addition of the phrase "and classification" is intended to reflect that this subparagraph allows for consideration of the person's compliance history (as defined by this chapter) at all other sites in the State of Texas owned or operated by that person, which includes environmental actions taken for sites outside the State of Texas as well. The addition of "and classification" is also appropriate because as adopted, §60.2(f) provides for the classification of a person through averaging the classification ratings for all sites in the State of Texas owned or operated by that person.

AquaSource commented regarding proposed §60.3(a)(1)(B), requesting clarification regarding the term "site" as used in the proposal. Because in proposed §60.2(a), "site" is described as all units, etc. located at one street address, while elsewhere in the proposed rule and preamble reference is made to consideration of "out-of-state facilities and an entity's 'entire' compliance history," AquaSource asked whether the commission intends to consider the compliance record of all sites for those persons with more than one site, within and outside of Texas.

The commission clarifies that the term "site" is used in connection with classifying a particular set of regulated units at one location into one of the three categories of performers. Each classification in turn is part of a person's total compliance history that the commission will consider. With respect to out-of-state information, one of the listed components of compliance history in §60.1, the commission will consider information on enforcement orders, judgments, and criminal convictions at facilities outside Texas. No points are assigned to those enforcement actions occurring outside the State of Texas for inclusion in the site classification formula, but information on those actions is included for commission consideration on decisions relating to the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. The information provided is based on the EPA database system, the only readily-available comprehensive data system.

Regarding proposed §60.3(a)(1)(B), C&H asserted that considering a person's compliance history outside the State of Texas when making a permit or enforcement decision for a site in Texas is "problematic." C&H stated that using EPA's database could still provide disparate results among different persons operating in various states. C&H also stated that it is "impractical to judge the compliance of a site in Texas by the compliance of a site in California since each site is dealing with significantly different rules and has a different enforcement emphasis," and that without a "more consistent compliance history rating system nationwide," out-of-state compliance history issues should not be used in Texas.

The commission responds that, as discussed in the adoption preamble for the first phase of compliance history rulemaking, it is required by TWC, §5.753(b), to include in the components of compliance history, "to the extent readily available to the commission, enforcement orders, court judgments, and criminal convictions relating to violations of environmental laws of other states." As the EPA database system is the only readily available comprehensive data system, the commission believes that it is the appropriate source for compliance information. A regulated entity currently has, and will continue to have, the ability to submit (additional) information for consideration on behalf of a claim that information included in its compliance history is inaccurate and/or erroneous. A regulated entity or any other interested party is free, and in fact encouraged, to provide information for consideration to correct inaccuracies at any time. No change has been made in response to this comment.

TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(a)(1)(B). TMRA stated that subparagraph (B) should either be deleted, or it should be revised to read: "compliance history at other sites, especially considering patterns of environmental compliance such as when a regulated entity's compliance history is unacceptable based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violations." TMRA asserted that these revisions are necessary because, as proposed, the provision does not make it clear that "entire compliance history" refers to a person's other sites' compliance histories rather than to a longer period of time. Additionally, TMRA asserted that "patterns of environmental compliance" is not sufficiently defined. TMRA stated that the regulated community is entitled to more certainty than the proposed language provides, and added that the only place a "pattern" of conduct is referenced in the statute is at TWC, §5.754(i), and that this should provide the starting point. Allied, BFI, TxSWANA, and NSWMA provided similar comments.

The commission agrees with the comment regarding the need to clarify the rule language with respect to "entire compliance history," and as such, the rule language as adopted has been changed from "entire compliance history" to "aggregate compliance history and classification." In the context of adopted §60.3(a)(1)(B), "patterns of environmental compliance" refers to the general, overall conduct (good or bad), of the person and by the person who is the applicant at the site with a pending permit application, as well as at other sites owned or operated by that person, both in the State of Texas and in other states. The phrase "and classification" has been added after "compliance history" in adopted §60.3(a)(1)(B) because TWC, §5.754(e), requires the commission to use compliance history classifications in decisions regarding the issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit. The commission believes it was the intent of the legislature that overall compliance patterns should be considered in deciding whether to issue a permit, or how to possibly modify a permit. As such, no other changes have been made to the rule in response to these comments.

§60.3(a)(2)

The commission has modified the text of adopted §60.3(a)(2) by deleting subparagraphs (A) and (B) and revising the language

of the subsection. The rule now more concisely sets forth the authority of the agency to impose permit conditions in response to compliance history and implements the provisions of TWC, §5.754(g). The adopted rule provides that the agency "may require permit conditions or provisions to address an applicant's compliance history. Poor performers are subject to any additional oversight necessary to improve environmental compliance."

ACT commented regarding proposed §60.3(a)(2). ACT asserted that paragraph (2) needs modification to "make it clear that the violations themselves can be considered and that permit conditions, including the type identified in (2)(B) could be added to any permit, if they are found to be appropriate." As such, ACT recommended that the word "may" be deleted from the end of this paragraph, that proposed subparagraph (A) of this paragraph be modified to read "may require permit conditions or provisions as appropriate, including, but not limited to, the type of provisions in (B) below, in response to the compliance history or specific violations;" and that proposed subparagraph (B) be modified to read "if a person's site is classified as a poor performer, shall consider and may add conditions which would:". TCE, LCVEF, DAR, SEED Coalition, PC, and six individuals supported the comments made by ACT.

The commission agrees that the rules should reflect the authority of the agency to impose permit conditions or provisions to any permit. There may be circumstances, for example, where the commission may determine that it is appropriate to add special provisions to address the compliance history of an average performer. The commission notes, however, that the statute provides for additional oversight of poor performers. Thus, the rule has been modified to reflect the agency's broad discretion to add permit conditions or provisions to address compliance history regardless of the person or site classification, and to impose any additional oversight necessary for poor performers as required by TWC, §5.754(g). The commission intends to use any and all appropriate mechanisms to improve the environmental compliance of poor performers, in particular, but also any site for which compliance history raises concerns. The rule, as modified from the proposal, provides the commission the flexibility to address each situation based on the particular circumstances involving the site under review. The commission has determined that a case-by-case approach will lead to permit conditions that are appropriately tailored to the site and that are more effective in addressing compliance history. The commission also notes that no specific listing of potential permit conditions that may be added by the agency in response to compliance history would be comprehensive. Given these considerations, the commission has determined that the rule as revised from the proposal best achieves the objectives of TWC, §5.745(g).

T&K commented regarding proposed §60.3(a)(2), asserting that the provisions in proposed §60.3(a)(2)(A), and (B)(i), (iv) - (vi), (viii), and (ix) all exceed the commission's authority, requiring statutory authority to implement. T&K stated that each of these items "varies significantly" from the two items required by the statute to be adopted with respect to poor performers, and added that the rules of statutory construction "require that any additional items be of the same class as the listed items," with the items they've specified being "proscriptive, non-routine, and not routine components of the Commission's operations." Additionally, T&K asserted that clause (ix) "attempts to give the ED unbridled power in requiring permit provisions or conditions, without limits as to scope or cost." As such, T&K recommended that the specified items be deleted from the rule.

The commission responds that TWC, §5.754(g), does not prescribe, limit, or otherwise list the mechanisms that may be used by the agency to provide for additional oversight of poor performers in the review of permit applications. As described above, the commission intends to address compliance history in a manner that will allow case-by-case consideration of each facility. Further, the commission notes that §60.3(a)(2) has been revised to delete subparagraphs (A) and (B) as described previously. Adopted §60.3(a)(2) appropriately reflects the broad discretion granted by the statute.

§60.3(a)(2)(B)

AquaSource, CPS, and TXOGA commented regarding proposed §60.3(a)(2)(B). AquaSource asked what scope the commission envisions for citizen involvement through the use of citizen outreach programs or a citizen advisory panel. AquaSource further asked what legal basis there is for citizen participation. TXOGA expressed similar concerns. OxyChem and Oxy Permian, Huntsman, and BP support the comments submitted by TXOGA. CPS stated that "allowing more authority to the regional office to oversee operation of the facility would go much farther toward improving a poor permit performance" than reducing the term of a permit or requiring a citizen outreach program. CPS asserted that reducing a permit term would be difficult due to public notice requirements and review periods, and would tax the permitting staff who develop permit conditions. Additionally, CPS stated that there is significant cost associated with permit renewals, and that some of these costs are not accounted for in the Fiscal Note in the proposal preamble. CPS stated that in addition to permit renewal fees, there are also costs associated with publication of notices in newspapers, and the posting and maintenance of signs. CPS also stated that it believes that the public can register a complaint with the commission at any time, and does not have to wait for a permit renewal, so that reducing permit terms to allow citizen input is unnecessary.

The commission responds that TWC, §5.754(g), directs the commission to provide for additional oversight of, and review of applications regarding facilities owned or operated by persons whose compliance performance is in the lowest classification. The statute does not limit or prescribe the mechanisms that may be used by the agency in addressing compliance history. The commission fully intends to use any appropriate mechanism to address compliance history and improve environmental compliance of poor performers. The commission has determined, however, that it is important to retain the flexibility to specifically tailor any special permit conditions necessary to address compliance history to the site under review. Thus, the commission has modified §60.3(a)(2) as described previously.

Regarding proposed §60.3(a)(2)(B)(i), Fort Worth expressed concern that there could be a conflict with the commission's rules requiring basin-wide permitting on a five-year cycle if the permit term of a poor performer is reduced.

The commission does not agree that this clause would have conflicted with the commission's rules regarding basin-wide permitting. As stated in §305.71(e), relating to Basin Permitting, permits *generally* will be issued to maintain a five-year cycle of the expiration date schedule in accordance with the basin permitting schedule. Also, §305.71(e) specifically states, "The commission *may* issue a permit for less that a five-year term *if it determines that a shorter term is necessary*." (Emphasis added.) The commission does note, however, that this provision is no longer included in the adopted rule for the reasons discussed previously in this preamble.

TXI commented regarding proposed §60.3(a)(2)(B)(ii). TXI recommended deletion of clause (ii), as it asserts that whether more specificity is required is a technical issue which should have nothing to do with a person's compliance history classification. TXI asserted that Chapter 281 and other technical permitting rules govern this issue, that if the permittee has met those requirements then more specificity is not required, and that a permit engineer could use this provision to drive up permitting costs unreasonably without providing any environmental benefit.

The commission has deleted subparagraph (B) from the adopted rule for the reasons discussed previously in this preamble. However, with regard to the commenter's concern, the commission agrees that requiring more specificity in the permit application is a function of the technical sufficiency of the application. However, by requesting additional information, the commission would gain a better understanding of the facility's operation, and this would facilitate a determination as to the type and stringency of permit provisions which should be included in a permit to improve environmental compliance. The commission will determine on a case-by-case basis whether more specificity in the application is necessary to ensure environmental compliance.

TXI commented regarding proposed §60.3(a)(2)(B)(iv) and (v). TXI stated that this provision may go beyond the commission's statutory authority, and further may be counterproductive. TXI asserted that mandating citizen interaction seems to go beyond the statutory requirement that the commission provide additional oversight of, and review of applications of, poor performers. TXI expressed concern that such a mandate could worsen already poor relationships between the permittee and local citizenry, and "could certainly open the site up to additional liabilities not anticipated by the statutory language," adding that they could require both time and financial commitments that would be better spent working with the agency. As such, TXI recommended deletion of these clauses from the rule.

These clauses have been deleted from the rule for the reasons discussed previously in this preamble. The commission notes, however, that TWC, §5.754(g), does not limit or prescribe the mechanisms that may be used by the commission to provide for additional oversight of poor performers undergoing permit review.

TXI commented regarding proposed §60.3(a)(2)(B)(ix). TXI asserted that this clause, as a "catch-all provision" provides too much discretion for the executive director, and recommended that the text "as warranted" be replaced with "that are economically reasonable and technically practicable and that relate specifically to issues contained in the site's compliance history."

This provision has been deleted from the adopted rule for the reasons discussed previously in this preamble. However, the commission notes that TWC, §5.754(g), gives the agency broad discretion to exercise additional oversight over poor performers. The statute does not limit or prescribe the mechanisms that may be used in the exercise of this authority. The adopted rule ensures that the agency retains the flexibility to address each site's compliance history in the manner that is most effective to improve environmental compliance.

§60.3(a)(3)

T&K commented regarding proposed §60.3(a)(3). T&K stated that all of paragraph (3) "should be revised to clarify that the penalties in (A) - (E) relate specifically to the site that is classified as a poor performer or repeat violator rather than to a 'person.'"

The commission agrees that clarification is appropriate. Adopted §60.3(a)(3) has been modified to clarify that the provisions of that section apply to the "site" that is classified as a poor performer or a repeat violator rather than to the "person."

§60.3(a)(3)(A)

The commission has deleted the word "person's" from the text of subparagraph (A) as adopted, as it was unnecessary.

TXI commented regarding proposed §60.3(a)(3)(A)(i). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, rather than more generally to a "person," adding that this is consistent with the commission's proposed approach to compliance history. Additionally, TXI stated that this provision, which is not required by the TWC, "should only apply if the poor performer's classification has resulted, at least in part, from waste discharge problems." As such, TXI recommended that the text of this clause be modified to read: "deny or suspend the site's authority to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges) if the site's compliance history contains violations of waste discharge requirements."

The commission disagrees with this comment. Adopted §60.3(a)(3)(A) is specific to a site classified as a poor performer. Therefore, to deny a person's authority to discharge under a general permit issued under Chapter 205 means that the person at that poor performing site will not be allowed to use the general permit. Additionally, this provision is required by TWC, §26.040(h). No changes were made in response to this comment; however, this subparagraph was modified by adding "relating to that site" to clarify the intent.

§60.3(a)(3)(A)(ii)

TXI commented regarding proposed §60.3(a)(3)(A)(ii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, rather than more generally to a "person," adding that this is consistent with the commission's proposed approach to compliance history. As such, TXI recommended that the text of this clause be modified to read: "deny a permit from, or renewal of, a flexible permit for the site under Chapter 116 of this title...."

The commission disagrees with this comment. Adopted §60.3(a)(3)(A) is specific to a site classified as a poor performer. Therefore, to deny a person's authority to operate under a flexible permit under Chapter 116 means that the person at that poor performing site will not be allowed to use the flexible permit. No changes have been made in response to this comment; however, this subparagraph was modified by adding "relating to that site" to clarify the intent.

§60.3(a)(3)(B)

The commission has deleted the word "person's" from the text of §60.3(a)(3)(B) as adopted, as it was unnecessary. Additionally, the phrase "upon application for a permit, permit renewal, modification, or amendment relating to that site" has been added to clarify when such an action may be taken by the commission.

TXI commented regarding proposed §60.3(a)(3)(B). TXI recommended that the text of subparagraph (B) be modified to read: "If a person's site is classified as a poor performer, the agency may take the following actions, among others, relative to an application for a permit for the site:".

The commission agrees with the commenter and has modified §60.3(a)(3)(B) to read, "If a site is classified as a poor performer, upon application for a permit, permit renewal, modification, or amendment, the agency may take the following actions, including:".

§60.3(a)(3)(B)(i)

TXI commented regarding proposed §60.3(a)(3)(B)(i). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." As such, TXI recommended that the text of clause (i) be modified by adding "if the compliance history contains repeated violations of solid waste management requirements" to the end of the clause.

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(i) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, §60.3(a)(3)(B)(i) appropriately considers the entire multimedia compliance history of the site. No change was made to the rule in response to this comment.

§60.3(a)(3)(B)(ii)

TXI commented regarding proposed §60.3(a)(3)(B)(ii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." As such, TXI recommended that the text of clause (ii) be modified by adding "if the compliance history contains repeated violations of solid waste management requirements" to the end of the clause.

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(ii) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, §60.3(a)(3)(B)(ii) appropriately considers the entire multimedia compliance history of the site. No change was made to the rule in response to this comment.

§60.3(a)(3)(B)(iii)

The commission has added the phrase "and, as a result of the hearing, deny, amend, or modify the permit" to the text of adopted §60.3(a)(3)(B)(iii) in order to clarify and reflect that not only may the commission hold a hearing on such a permit, but that it may also take appropriate action as a result of the hearing.

TXI commented regarding proposed §60.3(a)(3)(B)(iii). TXI stated that as a mandatory penalty for a poor performer, this provision should relate specifically to the site that is classified as a poor performer, and further, that it "should not apply to a site unless they relate to specific compliance problems contained in the site's compliance history." Furthermore, TXI recommended that the commission not subject itself to additional contested case hearings if they are not requested by an affected party. As such, TXI recommended that the text of subparagraph (B) be modified to read: "require the publication of notice and a hearing on an air permit amendment, modification or renewal if the site's compliance history contains repeated violations of air quality requirements and a hearing is requested by an affected person."

The commission disagrees with this comment. Adopted §60.3(a)(3)(B)(iii) is already specific to a site that is classified as a poor performer. Section 60.1(c) says that the compliance history shall include multimedia compliance-related information about a site, specific to the site which is under review, as well as other sites which are owned or operated by the same person. TWC, §5.754, requires the commission to establish a set of standards for the classification of a person's compliance history. The commission does not believe that it may select only a portion of a site's compliance history for this classification. Thus, the commission believes that §60.3(a)(3)(B)(iii) should appropriately consider the entire multimedia compliance history of the site. The commission clarifies that holding a hearing is an optional action that can be taken with sites classified as a poor performer. This is consistent with THSC, §382.056(o), which gives the commission authority to hold a hearing if compliance history is of significant concern. No change was made to the rule as a result of this comment.

§60.3(a)(3)(C)

The commission has modified the text of adopted §60.3(a)(3)(C) by adding the phrase "a site is classified as a poor performer or repeat violator and" in order to clarify and accurately reflect that the site may either have a poor performer classification or be a repeat violator in order for this subparagraph to apply. Further, this change clarifies that it is the site which must have this classification or designation; this clarification is necessary in light of the fact that the rule, as adopted, provides for the compliance history classification of sites as well as persons.

V&E commented regarding proposed §60.3(a)(3)(C). V&E suggested, for clarity, that the text be modified from "if the agency determines..." to "if a person's site is classified as a poor performer or repeat violator and the agency determines...."

The commission agrees with the comment and has modified the text of adopted §60.3(a)(3)(C) to read "If a site is classified as a poor performer or repeat violator and the agency determines...."

§60.3(a)(3)(D)

The commission has added the phrase "upon application for a permit renewal or amendment" to the text of adopted §60.3(a)(3)(D) to clarify when such an action may be taken by the agency. Also, the commission changed the actions to "deny, modify, or amend a permit" in order to utilize the terminology specific to each media included under this chapter.

Reliant, AECT, TXI, T&K, TMRA, TXOGA, and TCC commented regarding proposed §60.3(a)(3)(D). TMRA asserted that it is appropriate to give consideration to the method or frequency of monitoring that resulted in the repeat violations. TMRA recommended that the text of subparagraph (D) be modified to read: "The commission may deny or modify a permit of a repeat violator (as defined by §60.2(d) of this title) after giving appropriate

consideration to the method and frequency of monitoring that identified the violations in question." T&K supported this comment. Reliant, AECT, and TCC stated that the list of specific types of violations that may be utilized to revoke the permit of a repeat violator should be included in this subparagraph as well, by adding "for" at the end of the proposed text, and adding new clauses: "(i) a criminal conviction; (ii) violations that caused or are expected to cause adverse effects on human health or safety or adverse effects on the environment; (iii) repeatedly operating without required authorizations; (iv) documented falsifications; or (v) egregious violations." TXU and T&K supported the comments of AECT. TXI similarly asserted that the proposed language is too broad, and proposed that it be revised as follows: "(D) The commission may deny or modify a permit of a repeat violator in the following circumstances: (i) the permit relates to a site that is classified as a poor performer; and (ii) the repeat violator's compliance history contains repeated violations that fall within the scope of the proposed permit modification or the permit to be denied." T&K stated that this proposed provision exceeds the commission's authority, adding that "the statute does not authorize the Commission to deny or modify a permit on the basis of the designation as a repeat violator," but rather the commission has authority "to use a repeat violator's compliance history classification in decisions regarding issuance, denial, modification, suspension or revocation of a permit." TXOGA commented that TWC, §5.754(f), only directs the agency to specify the circumstances under which it may revoke the permit of a repeat violator, not modify the permit of a repeat violator, and added that even if the legislature had intended to provide such discretion to the commission, the proposed rule does not provide any circumstances under which modification would be appropriate. As such, TXOGA recommended that the word "modify" should be removed from this subparagraph, and added that even if such action were appropriate, "it should be limited to those extreme cases where the violator shows consistent disregard for the regulatory process." TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The commission responds that paragraph (3) has been modified to say, "upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator." This is a general, permissive rule that is appropriate and authorized under TWC, §5.754(e). The details of the site's compliance history will form the basis of this decision. The commission disagrees with TXOGA's suggestion to delete the word "modify" because the word modification is specifically listed in TWC, §5.754(e)(1). Additionally, the commission notes that the repeat violator designation has been modified significantly since proposal. First, with regard to major violations, the commission has deleted proposed subparagraph (A) under §60.2(c)(1) regarding violations for which the commission has agreed with the EPA to take formal enforcement action, in accordance with EPA/TNRCC Enforcement MOU dated April 1, 1999. The commission decided that rather than base violation classification on when enforcement is initiated, it would be more appropriate to assess these violations using a method similar to the commission's penalty policy, which generally assesses significance based on impact or potential to impact human health, safety, or the environment. Additionally, as adopted, the repeat violator designation has been modified to include, at a site, the occurrence of two or more, as applicable based on specific criteria, of any violation designated as "major" under adopted §60.2(c)(1). The number of occurrences of a major violation required at a site to invoke the repeat violator designation is dependant upon the total criteria points for that site. As adopted, complexity has been removed as a divisor in the site rating formula and is now only considered as one of the criteria for designation as a repeat violator. The total criteria points are based upon the complexity of the site, the number of sites owned or operated by the same person in the State of Texas, the size of the site, and whether the site is located in a nonattainment area. The commission does not agree that it is appropriate to modify §60.3(a)(3)(D) to take into consideration the method or frequency of monitoring. If the monitoring data indicates violations of limits during the monitoring period, a resulting NOV would reference the violation one time, regardless of the specific number of occurrences documented in the data. The violation in the NOV would be assessed for a major, moderate, or minor classification based on overall average of the violations. Based on this averaging, the commission does not expect occasional exceedances to result in classification as a major violation.

§60.3(a)(3)(E)

The commission has deleted the phrase "but is not limited to" from the text of §60.3(a)(3)(E), as adopted, as it is redundant.

V&E and TIP commented regarding proposed §60.3(a)(3)(E). V&E suggested, for clarity, that the text be modified from "the commission shall deny..." to "If a person's site is classified as a poor performer or repeat violator and the commission shall deny...." TIP asserted that the rule should do more than repeat the statutory language with regard to "unacceptable compliance history," adding that the "Legislature surely expected the TNRCC to at least provide factors for determining when compliance histories will be deemed 'unacceptable.'"

The commission disagrees that this clarification is necessary. The rule language closely tracks the statutory language in TWC, §5.754(i), which does not qualify "regulated entity" by addressing site classification or repeat violator status. In adopted §60.3(a)(3)(E), the commission has provided factors for determining when compliance histories will be deemed unacceptable. The factors include violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment. Depending on the seriousness and extent of the violation, violations of such provisions would demonstrate both a recurring pattern and a consistent disregard for the regulatory process.

§60.3(a)(5), (proposed as §60.3(a)(6))

Proposed §60.3(a)(6) has been moved to adopted §60.3(a)(5), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity.

§60.3(a)(6), (proposed as §60.3(a)(7))

Proposed §60.3(a)(7) has been moved to adopted §60.3(a)(6), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The text of this paragraph has been modified from "Compliance history classifications shall be used in commission decisions relating to the revocation of a permit. The commission may revoke a permit of a repeat violator for:" to "In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including:". The change to the text has been made because there are circumstances in which a repeat violator would not be classified as a poor performer at a site, but the compliance history and the nature of that history is such that revocation

is appropriate. For example, violations that have occurred since the last classification were calculated may be of such a nature that revocation is appropriate. In addition, a violation may be of such a serious nature that, while the application of the classification formula does not result in a poor performer designation, the very nature of the violation demonstrates that the revocation of the entity's permit is the appropriate remedy to be sought by the executive director. The revocation authority under this section is discretionary, and will allow the executive director and the commission to weigh the particular circumstances in determining whether revocation of a repeat violator's permit is necessary and appropriate.

ACT asserted that "HB 2912 emphasized the role of compliance histories," directing the commission to provide methods for determining circumstances which might warrant revocation. ACT stated, "We believe revocation will only happen in relatively extreme cases, and the statute in no way *mandates* permit revocation for poor performers. The proposed rules suggest otherwise."

The commission agrees with this comment and has modified adopted §60.3(a)(6), proposed as §60.3(a)(7), to read, "In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including" the items specified in subparagraphs (A) - (D) of the adopted rule.

PIC commented regarding proposed §60.3(a)(7). PIC responded in the affirmative to the specific question posed in the proposal preamble regarding whether the circumstances in which a repeat violator's permit may be revoked should be addressed by the role repeat violations play in classifications of compliance history, adding the "repeat violator status determination has the result of increasing a site rating by 100% under {proposed} §60.2(f)(1)(A) and (D) and, therefore, will likely be the key factor in identifying and classifying the poorest performing sites." Additionally, PIC stated, "When a repeat violator is classified as a 'poor performer,' this should be the circumstances in which that person's permit may be revoked." As such, PIC suggested that paragraph (7) be revised to read as follows: "Repeat violator permit revocation. Compliance history classifications shall be used in commission decisions relating to the revocation of a permit. The commission may revoke a permit of a repeat violator classified as a poor performer." Furthermore, PIC proposed the deletion of §60.3(a)(7)(A) - (E), stating, "If the commission has gone to the trouble of using formulas to give weight to the items listed in §60.3(a)(7)(A) - (E) and making classifications based on those ratings, then the revocation decision should be based on this classification rather than revisiting the individual violations which have already been addressed in the detailed formula. Because revocation is the most severe consequence a person may face in the agency's permitting arena, it seems logical that no one would face revocation unless they were in the worst compliance classification. Therefore, it follows that the only repeat violators who should face revocation are ones classified as poor performers."

The commission agrees, in part, with the PIC recommendation regarding adopted §60.3(a)(6), proposed as §60.3(a)(7), and has modified the language as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. This modification does allow the revocation decision to be based on classification rather than revisiting individual violations. Additionally, the commission included language that a permit of a repeat violator may be revoked for cause, including the things specified in subparagraphs (A) - (D) of the adopted rule.

TXI commented regarding proposed §60.3(a)(7). TXI asserted that since the statute requires that the number and complexity of facilities be taken into account in designating a repeat violator, and because these issues are accounted for in the classification, "it seems reasonable to use the classification as the starting point in determining whether a permit should be revoked." Accordingly, TXI recommended that the second sentence of this paragraph be modified to read, "The commission may revoke a permit of a repeat violator whose site is classified as, or meets the criteria for classification, as a poor performer, for:".

The commission generally agrees with this comment and has modified the paragraph as previously discussed in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

TMRA commented regarding proposed §60.3(a)(7). TMRA asserted that it is appropriate to give consideration to the method or frequency of monitoring that resulted in the repeat violations. TMRA recommended that the text of the paragraph be modified to read: "After giving appropriate consideration to the method and frequency of monitoring that identified the violations in question, the commission may revoke a permit of a repeat violator (as defined by §60.2(d) of this title) for...."

The commission disagrees with the recommendation made by TMRA. The commission will evaluate the details of the site's compliance history prior to making its decision. The commission, in adopted §60.3(a)(6), proposed as §60.3(a)(7), has established the criteria as to when a repeat violator's permit may be revoked. The commission is not mandated to revoke the permit of a repeat violator, but is expected to evaluate whether such an action is appropriate based upon the specific circumstances of that person. No change to the rule has been made in response to this comment.

7-Eleven and ATINGP commented regarding proposed §60.3(a)(7). 7-Eleven commented that the "criteria for revocation of permits should be uniform as between Repeat Violators and Poor Performers." 7-Eleven further commented that, because the status of repeat violator is site specific, it is possible that one of a person's sites may have a significantly different compliance history than its other sites, and as such, permit revocation criteria should focus on site-specific justifications, and should only be considered for the individual site at which multiple violations have occurred. ATINGP commented that the following criteria should be added to this subparagraph: "the conviction must have occurred at the site where the permit is proposed to be revoked, and must have been performed by the same person who now holds the permit."

The commission responds that adopted §60.3(a)(6), proposed as §60.3(a)(7), does focus on a specific site because a repeat violator as defined in adopted §60.2(d) says "a person is a repeat violator *at a site* when, on multiple, separate occasions, a major violation(s) occurs during the compliance period" based upon the criteria in the paragraph. (Emphasis added). No changes have been made in response to these comments.

§60.3(a)(6)(A), (proposed as §60.3(a)(7)(A))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has added the phrase "classified as major under

§60.2(c)(1)(E) of this title" to the text of adopted §60.3(a)(6)(A). This modification is as a result of modifications to adopted §60.2(c), where criminal convictions have been divided out into classifications of both major and moderate violations, whereas in the proposal, all criminal convictions were considered major violations. As such, it was necessary to clarify which criminal convictions may be considered cause for revoking the permit of a repeat violator. The commission has determined that it is appropriate to limit major violations based on this element to those criminal convictions requiring the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

AquaSource and TXI commented regarding proposed §60.3(a)(7)(A). AquaSource stated that, for the same reasons and in the same vein it enumerated in its comments regarding proposed §60.2(c)(1)(F) and §60.2(f)(1)(G), it urges the commission to make a distinction between "willful/intentional felony criminal convictions and misdemeanors." Additionally, AquaSource again stated that misdemeanor criminal convictions should be classified as to actual and documented harm to human health and the environment. TXI reiterated its concern that criminal convictions are not necessarily indicative of major problems, and as such recommended that "involving a knowing violation of major significance under §60.2(c)(1)" be added to the end of this subparagraph.

The commission has determined that criminal convictions should be classified as "major violations" when the prosecutor must prove a *mens rea* or intent element to support the underlying criminal violation, but should be classified as a "moderate violation" when the conviction is based on a strict liability statute. The commission has determined that criminal violations that include an intent element are of such a serious nature that the violations should be classified as major violations. The revised rule language, as adopted, states:

§60.2(c)(1)(E): any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

§60.2(c)(2)(F): any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction.

§60.3(a)(6)(A): a criminal conviction classified as major under §60.2(c)(1)(E) of this title.

§60.3(a)(6)(B), (proposed as §60.3(a)(7)(B))

Proposed §60.3(a)(7)(B) has been moved to adopted §60.3(a)(6)(B), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(B) from "violations that caused or are expected to cause adverse effects on human health or safety or adverse effects on the environment" to "an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(C) of this title." This modification has been made in order to provide language consistent with modifications made to adopted §60.2(c)(1)(C) as discussed previously in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble, and to clarify and reflect that this subparagraph is referring to violations considered "major."

TAB, AECT, CPS, TXI, TXOGA, and TCC commented regarding proposed §60.3(a)(7)(B). TAB and AECT commented regarding the use of the word "safety" in the proposal, stating that it should be removed, as the commission does not have the authority to regulate safety, other than in reference to human health. Similarly, TCC asserted that the word "safety" should be stricken from the rule, as the commission is not charged with regulating safety. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TCC. CPS stated that the language in this subparagraph is too vague, and recommended that "adverse effects" be defined, and that the rule designate who will determine whether an action has caused adverse effects. TXI recommended that the word "repeat" be added before the word "violation" in this subparagraph, asserting that a single violation falling within this category should not subject a permittee to revocation of its permit. TXOGA stated that the same language regarding "violations that cause or are expected to cause adverse effects on human health or safety or adverse effects on the environment" which could potentially subject a repeat violator to a permit revocation, is a condition for designating a violation as major. TXOGA further asserted that since a "major violation of a NOV is considered less severe than a major violation of an enforcement order," there should be a distinction made in treatment for a repeat violator. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission responds that this subparagraph has been modified to be consistent with adopted §60.2(c)(1)(C). Please see the discussion related to "adverse effects" and "safety" in the discussion of §60.2(c)(1)(C) in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble. The commission disagrees that the word "repeat" should be included in this subparagraph due to the changes made to adopted §60.3(a)(6), proposed as §60.3(a)(7), which now includes revocation of a permit of a repeat violator for cause. The commission believes that it may be appropriate for the commission to revoke a permit of a repeat violator classified as a poor performer who meets any of the criteria in subparagraph (B), even if they occur once. The commission disagrees with the TXOGA comment related to major violation of an NOV because adopted §60.3(a)(6) was modified to establish that the commission may revoke a permit of a repeat violator in two circumstances: if classified as a poor performer; or for cause.

§60.3(a)(6)(C), (proposed as §60.3(a)(7)(C))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(C) by adding the word "or" to the end of the text, as this subparagraph now precedes the final subparagraph of paragraph (6).

§60.3(a)(6)(D), (proposed as §60.3(a)(7)(D))

Proposed §60.3(a)(7)(A) has been moved to adopted §60.3(a)(6)(A), as a result of moving proposed §60.3(a)(5) to adopted §60.3(g) for better organization and clarity. The commission has modified the text of adopted §60.3(a)(6)(D) by deleting the word "or" from the end of the text, as this subparagraph is now the final subparagraph of paragraph (6).

ATINGP commented regarding proposed §60.3(a)(7)(D). ATINGP commented that the following criteria should be added to this subparagraph: "the false statements must have been intentional and have been made in an application for a permit or a permit amendment or in a record or report required by an environmental regulation."

The commission disagrees with this comment. The commission has determined that it is not appropriate to limit the class of false statements which may result in a permit revocation to

those intentional statements made in an application for a permit or permit amendment, or those in a record or report required by an environmental regulation. The commission expects that all documents submitted to it will be truthful and accurate, and that all regulated entities submitting documents to the agency will review those documents for accuracy. Thus, it is not necessary to make the modifications suggested by the commenter. No changes have been made as a result of this comment.

§60.3(a)(7)(E)

TXI, ATINGP commented regarding proposed §60.3(a)(7)(E). TXI recommended that this subparagraph be deleted from the rule, stating that the word "egregious" is "vague and undefined," and further that subparagraphs (A) - (D) are "broad enough to cover all instances where the Commission should consider revoking a permit." ATINGP commented that "the term 'egregious' should be defined and should take into account intentional and knowing disregard for compliance with an environmental regulation or requirement."

The commission responds that it agrees that subparagraphs (A) - (D) of proposed §60.3(a)(7), adopted as §60.3(a)(6), are sufficient and has deleted subparagraph (E). Further, the commission believes that as modified, subparagraphs (A) - (D), which include criminal convictions classified as major under §60.2(c)(1)(E); unauthorized releases, emissions, or discharges of pollutants classified as major under §60.2(c)(1)(C); repeatedly operating without required authorization; and documented falsification, take into account "knowing disregard for compliance with an environmental regulation or requirement." As a result, proposed subparagraph (E) has been deleted.

§60.3(b)

Adopted new §60.3(b), concerning investigations, will address investigations performed at a site which is classified as a poor performer, as described in adopted §60.2. Specifically, as adopted in §60.3(b)(1), the agency can provide technical assistance to a person, in order to assist a poor performer in improving its compliance with applicable legal requirements. Adopted new §60.3(b)(2) states that the agency can increase the number of investigations conducted at a poor performing site, to more closely monitor the person's actions and ensure that environmental compliance is being achieved. Both of these actions are currently taken by the agency in response to concerns about a regulated entity's compliance efforts. Additionally, adopted new §60.3(b)(3) states that investigations at a poor performing site shall be unannounced as required by TWC, §5.754(h)(1).

The commission has deleted the word "person's" from the text of adopted §60.3(b) for consistency with other portions of the rule, and because it was unnecessary. Additionally, the commission has changed the word "facility" to "site" in §60.3(b)(2) for consistency.

§60.3(c)

Adopted new §60.3(c), concerning enforcement, will address enforcement decisions by stating that, for enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements. The rule also provides that poor performers are subject to any additional oversight necessary to improve environmental compliance. Currently, through the development of technical requirements included in commission enforcement actions, decisions are made based on the compliance level at the site which is the subject of the enforcement action. This adopted rule will serve to enhance the existing practices by highlighting those respondents in enforcement actions who may need additional oversight.

Adopted new §60.3(c)(2) states that the commission shall consider compliance history classification when assessing an administrative penalty. This reflects the existing practice required by TWC, §7.053, Factors to be Considered in Determination of Penalty Amount, which states that, "In determining the amount of an administrative penalty, the commission shall consider ... with respect to the alleged violator ... the history and extent of previous violations...." The commission's penalty policy currently reflects the process by which a determination is made regarding the appropriateness of enhancing an administrative penalty based on compliance history. The penalty policy will be updated for consistency with this rulemaking following adoption.

Adopted new §60.3(c)(3) states that the commission shall enhance an administrative penalty assessed on a repeat violator. This requirement addresses TWC, §5.754(f), which states that "the assessment methods ... shall establish enhanced administrative penalties for repeat violators." The commission will enhance the penalty for compliance history because the respondent is a repeat violator and to deter others from becoming repeat violators. Statutory penalty maximums found in TWC, §7.052, apply and may limit the ability of the commission to enhance administrative penalties in every case.

The commission has modified the text of adopted §60.3(c) by changing "enhanced penalties" to "penalty assessment." This change has been made in conjunction with the modification made to adopted §60.3(c)(2) in response to a comment received. In essence, this modification allows for the possibility of a reduction of an administrative penalty based upon compliance history, rather than limiting it to only an enhancement of an administrative penalty.

One individual commented regarding proposed §60.3(c), "The system should provide for greater penalties for the bigger companies that have more means to comply, and more means to fight proposed violations."

The commission responds it is important to have a penalty mechanism that is consistent and fair for all to whom it applies. All persons have an obligation to comply with state law and commission rules, permits, and orders, no matter what their size. No changes have been made in response to this comment.

§60.3(c)(2)

CPS commented regarding proposed §60.3(c)(2), recommending that the rule allow for the reduction of an administrative penalty for a high, or good, performer.

The commission has modified adopted §60.3(c)(2) to read, "The commission shall consider compliance history classification when assessing an administrative penalty." The commission is declining to decide upon this issue through this rulemaking. However, the commission will consider this comment when revising the penalty policy to implement HB 2912.

TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(c)(2). TMRA stated that TWC, §5.754(e), "provides that the 'commission *by rule* shall provide for the use of compliance history *classifications* in commission decisions regarding:....(2) enforcement.' (emphasis added). TNRCC's proposed implementation of penalty adjustment portion of this directive ... allows the TNRCC to 'enhance an administrative penalty

based on compliance history.' There are three problems with this implementation attempt. First, it does not specify by rule how the compliance history enhancement factor will work, other than for repeat violators. Second, because the rule only allows for the TNRCC to enhance penalties and not to reduce them, it does not allow the TNRCC the full range of 'consideration' provided in the Sunset Bill. Third, the proposed rule in no way ties penalty adjustments to compliance history 'classification,' as mandated by the bill." As such, TMRA suggested modification to this paragraph, to better quantify how penalties will be reduced or enhanced based on classifications, distinguish between 1660 and findings orders, and allow the consideration of the method and frequency of monitoring which resulted in the documentation of repeat violations. Specifically, TMRA recommended the following:

"(2) The commission may enhance an administrative penalty based on compliance history in accordance with the following criteria: (A) If a person's site is classified as a poor performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 50%; (ii) the penalty to be assessed on the third time through enforcement shall be increased by 75%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 100%. (B) If a person's site is classified as an average performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 25%; (ii) the penalty to be assessed on the third time through enforcement shall be increased by 50%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 100%. (C) If a person's site is classified as a high performer, then (i) the penalty to be assessed on the second time through enforcement shall be increased by 10%; (ii) the penalty to be assessed on the third time through enforcement shall be increased by 25%; and (iii) the penalty to be assessed on the fourth or any additional times through enforcement shall be increased by 50%. (D) Only the issuance of an order with findings of fact and conclusions of law shall constitute a "time through enforcement" for purposes of this section, except all orders issued after February 1, 2002 shall constitute a "time through enforcement," but those orders that do not contain findings of fact and conclusions of law shall result in a 50% lower enhancement factor than would otherwise be applicable under this section. (3) The commission may reduce an administrative penalty based on compliance history in accordance with the following criteria: (A) A 10% reduction factor shall be applied to a penalty if the person has, within the previous five year period, provided notice to the executive director of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; (B) An additional 10% reduction factor shall be applied if the site has an environmental management system that is qualified to receive regulatory incentives pursuant to 30 TAC §90.32; and (C) An additional 5% reduction factor shall be applied to a penalty if any of the elements in §60.1(c)(10) - (12) applied to the site within the previous five year period. (4) The administrative penalty enhancement based on compliance history shall be multiplied by a factor of 2 for a repeat violator (as defined by §60.2(d) of this title but reduce, as appropriate, to account for the method and frequency of monitoring that identified the violation."

Allied, BFI, TxSWANA, and NSWMA provided the same comments, and the same proposed language, except that they did not recommend any modifications to proposed paragraph (3) except to renumber it as paragraph (4). Additionally, Allied, BFI, TxSWANA, and NSWMA recommended "that, for purposes of penalty enhancement, the TNRCC distinguish between findings orders and 1660 orders. Although findings orders and 1660 orders count equally in the site rating formula, we do not believe the longstanding agency practice of distinguishing between the two types of orders should be thrown out in the context of calculating enforcement penalties. To be sure, there is nothing in the Sunset Bill that in any way limits the TNRCC's authority to continue its longstanding practice of distinguishing between prior findings orders and 1660 orders when assessing administrative penalties."

The commission agrees with the statement that TWC, §5.754, requires the commission to, by rule, provide for the use of compliance history classifications in commission decisions regarding enforcement. Adopted §60.3(c)(2) has been modified to read, "The commission shall consider compliance history classification when assessing an administrative penalty." The commission does not agree that the rule must be specific as to how compliance history classification will impact the administrative penalty. The rule, as adopted, will allow the commission to modify the penalty policy to allow a reduction in penalty based upon a person's classification if the commission chooses to do so when considering revisions to its penalty policy. The commission has made no changes through this rulemaking in response to the comments regarding either penalty reductions or distinguishing between 1660 orders and findings orders as they relate to administrative penalties.

§60.3(c)(3)

TXOGA, 7-Eleven, and TCC commented regarding proposed §60.3(c)(3). TXOGA stated that doubling the administrative penalty amount for a repeat violator is arbitrary, "and should be evaluated depending on the particular incident." Further, TXOGA asserted that, generally speaking, "penalty adjustments are best handled in the penalty policy rather than in rulemaking," and as such, recommended that this paragraph be deleted from the rule and addressed in the penalty policy, where enforcement discretion can be handled on a case-by-case basis. TCC provided the same comments. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC. 7-Eleven stated, "Enhancement of administrative penalties for Repeat Violators should address site complexity and/or numerosity by providing for penalty mitigation or deferral where Repeat Violator status is demonstrated to be a site-specific aberration resulting from complexity or numerosity of facilities; i.e., the Repeat Violator's site or sites are uniformly classified as High Performers." 7-Eleven added that, in such a situation, penalty enhancement for a repeat violator should be deferred or significantly mitigated.

The commission responds that it agrees with TXOGA that penalty adjustments are best handled in the penalty policy rather than in rulemaking, and as such, has modified §60.3(c)(3) to say that the commission shall enhance an administrative penalty assessed on a repeat violator. No other changes have been made in response to these comments.

§60.3(d)

Adopted new §60.3(d), concerning participation in innovative programs, will address participation in innovative programs by a person whose site is classified as a "poor performer" as described in adopted §60.2. Specifically, adopted new

§60.3(d)(1) and (2) will reflect that the agency may, for a person's site classified as a "poor performer," recommend technical assistance, or provide assistance or oversight in development of an EMS and require specific environmental reporting to the agency as part of the EMS, either of which could assist a poor performer in improving its classification and ensure that environmental compliance is being achieved. Additionally, adopted new §60.3(d)(3) states that the agency shall prohibit a person whose site is classified as a poor performer from participating in the regulatory flexibility program at that site. This reflects the requirement in TWC, §5.754(h)(2), which states that, "The commission by rule shall, at a minimum, prohibit a person whose compliance history is classified in the lowest classification ... from ... participating in the regulatory flexibility program administered by the commission under" TWC, §5.758. Adopted new §60.3(d)(3) further states, "In addition, a poor performer is prohibited from receiving regulatory incentives under its EMS until its compliance history classification has improved to at least an average performer."

The commission has modified the text of adopted §60.3(d) by deleting the word "person's" for consistency with other portions of the rule, and because the word is unnecessary.

§60.3(d)(2)

The commission has modified the text of adopted §60.3(d)(2) by changing "assistance/oversight" to "assistance or oversight" for clarity.

§60.3(d)(3)

The commission has added the phrase "at least" in front of "an average performer" in the text of adopted §60.3(d)(3) for clarity, to reflect that a poor performer is not limited to only raising to, and maintaining a classification of, average performer in order to participate in a regulatory flexibility program. The commission has also added the phrase "at that site" to the end of the first sentence in this provision for clarity.

TXOGA commented regarding proposed §60.3(d)(3). TXOGA asserted that the proposal to restrict poor performers from participating in regulatory flexibility programs could create disincentives for high performing companies to purchase a poor performing site. As such, TXOGA recommended that language be added to proposed §60.3(d) "to provide relief in those cases of favorable new ownership." OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA.

The commission disagrees with the TXOGA recommendation because under adopted §60.2(e)(3), a poor performing site purchased by a high performing company may receive mitigating factors and be reclassified to average performer. Any disincentive creative by restriction from participating in regulatory flexibility programs should, therefore, be balanced by the mitigation available under §60.2(e)(3).

§60.3(e)

Adopted new §60.3(e) has been substantially changed from the proposal in response to comment. New §60.3 provides for appeals of person or site classifications under certain circumstances. A person or site classification of either poor performer or average performer with 30 points or more may be appealed to the executive director. Any appeal under this subsection is subject to the procedural requirements set forth in this section including procedures for providing notice of the classification; the filing and service of documents; opportunities for reply briefs; a specified time period for the executive director to modify or affirm the classification; notice of the executive director's decision; automatic denial if the executive director fails to act on the 61st day after filing of the appeal; provisions setting forth the date when the executive director decision is effective, final, and appealable; and provisions setting forth how the agency will act on matters governed by TWC, §5.754(g), during the pendency of any judicial appeal.

Regarding proposed §60.3(e), Senator Brown commented that "there is not clear process for providing input into the development of the executive director's classification of an applicant or permittee, from either the regulated entity or interested citizens. One of the hallmarks of HB 2912 was to provide opportunities for public participation, and TNRCC could benefit from a controlled and timely flow of information on compliance history from all interested parties." Senator Brown encouraged the removal of the "opportunity to challenge the executive director's classification from within the contested case hearings process, and provide instead a simpler, quicker executive determination, with an opportunity for a motion to overturn," and recommended "a process with a clear ending point." Senator Brown stated that it was not the legislature's intent to "provide an additional avenue of challenge to every permit/enforcement proceeding on the basis of the details of the executive director's classification of the regulated entity's performance." He went on to say that once a classification is made, it should not change until additional information is received, and recalculated during the next classification period. He further asserted that to "provide an opportunity to challenge the rankings in every hearing, as current provision 60.3(e) does, would create numerous and repetitious opportunities for challenges within the span of five-year compliance history. This could also necessitate the executive director's participation in every contested case hearing, which is contrary to the new hearings law that was adopted."

The commission agrees that the rules should provide avenues for input from regulated entities and interested citizens into the development of person and site classifications. The adopted rules achieve this objective by providing for the following: (i) posting of notice of the classifications on the website; (ii) a separate and defined process for appeal of those classifications where there is a regulatory impact associated with the classification; and (iii) opportunities to correct classifications based on clerical errors at any time. Generally, a person or site classification will stand unless an error in the classification has been made. Where a person or site has been classified as poor performer or average performer with 30 points or more, any person may file an appeal of that classification, but the appeal must be filed within 45 days of notice of the classification. The appeal process provides for resolution of the appeal at the agency no later than the 61st day after filing. Thus, the appeal process established for these classifications provides for timely resolution of disputes relating to classifications. The changes in §60.2 and §60.3, as adopted, also remove any dispute relating to classifications from the contested case hearing process. While the ability of any party to offer evidence relating to compliance history in a permitting or enforcement case is maintained, disputes regarding a person or site classification will not be issues that can be contested in these cases. A person or site classification will be established outside the contested case process and not litigated and re-litigated in the context of permitting and enforcement actions. Thus, the adopted rules do not provide an additional avenue of challenge to permitting and enforcement actions on the basis of person or site classifications.

C&H commented that, if a regulated entity petitions the agency to reconsider its compliance history rating prior to the six-month interval, that the agency should have the flexibility to reclassify the site at that time, rather than have to wait until the six-month interval is up. Similarly, AquaSource stated that the six-month reevaluation period may be too long for persons whose classifications were determined in error.

The commission responds that the rules, as amended, allow for an informal process for corrections of clerical errors in a person or site classification. As reflected in §60.3(f), the executive director, on his own motion or the request of any person, can at any time correct clerical errors. While the rules now provide for classifications to be made on an annual basis beginning with the September 1, 2003 classification, a person or site classification later determined to be in error can be corrected at any time. Thus, persons whose classifications are incorrect due to clerical errors do not have to wait until the next annual classification to have the error corrected.

Fort Worth COC commented regarding proposed §60.3(e), stating that there is no appeals process provided in the rule for "unique circumstances" such as the situation in which a person disagrees with, or has documentation to refute, its site's classification.

The commission responds that if errors have been made in classifications, those errors can be brought to the attention of the executive director and the correction can be made at any time under the provisions of adopted §60.3(f). Where there is a dispute about a classification or the classification that would result if a challenge was successful has actual regulatory consequences, adopted §60.3(e) provides a limited appeal process.

Regarding proposed §60.3(e), AquaSource stated that "there is no economic or legal justification for requiring a regulated entity to request a contested case hearing and/or file a motion to overturn to have the executive director review or evaluate his initial classification." AquaSource further stated that any such review should be handled in a less formal, less costly, and less time-consuming manner.

While the commission does not agree that §60.3(e), as proposed, required regulated entities to file hearing requests or motions to overturn for executive director evaluation of classifications, this subsection has been changed significantly in response to comment. The commission agrees that the rules should provide for informal mechanisms for review where appropriate. The adopted rules provide for an informal and simple process for correction of error in a site or person classification. Where a mistake has been made in the classification, such as where a clerical error results in an incorrect database entry or where errors are made in adding the points in a ranking, these errors should be ones that can be brought to the attention of the executive director at any time and corrected as part of the executive director's ministerial functions. The adopted rule also provides for notice of any corrected classification to be promptly provided. A more formal, but straightforward process, is provided for appeals to certain classifications. As previously discussed, a challenge to a classification of poor performer or average performer with 30 points or more may be filed within 45 days of notice of the classification for consideration by the executive director. Thus, where there is a regulatory impact associated with the classification itself and where there is a reasonable likelihood that a successful challenge may result in regulatory impact, a timely and expeditious mechanism for challenge of the classification is provided.

V&E, WM, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(e), suggesting the addition of the phrase "in a contested case hearing" prior to "only as follows."

The commission has not made the change suggested by the commenters because the commission has made other changes in response to comments which have resulted in a significant revision to §60.3(e) as previously noted in this preamble.

Regarding proposed §60.3(e), AECT and Reliant recommended striking "classification or" from the catchline of this subsection, and further striking "classification of a person's site or" from the text of this subsection. TXU supported the comments made by AECT.

The commission responds that adopted §60.3(e) now provides that classifications may not be contested issues in permitting or enforcement hearings. This subsection has been significantly revised from the proposal as noted earlier in this preamble.

TXI, T&K, and Chaparral commented regarding proposed §60.3(e). TXI restated that it is opposed to the routine reevaluation of compliance history classifications every six months, but stated that if this approach is maintained in the adopted rule, then this subsection should be modified to allow regulated entities the ability to appeal the executive director's classification to the commission. TXI asserted that this is particularly true in the case of sites classified as poor performers, and notes that TWC, §5.754(b)(1), defines poor performers as "regulated entities that in the commission's judgment perform below average." TXI added that a contested case hearing is not necessarily required, "but an appeal process to the Commission appears to be required by statute and is reasonable given the dire regulatory consequences associated with a 'poor performer' classification." TXI went on to say that being classified as a poor performer "will have indirect consequences on issues such as public relations and potential liability that merit an appeal to the Commission." Finally, TXI stated, "If classifications are only developed in the context of individual applications or enforcement actions, then the review of such classifications can be addressed under proposed §60.3(e) as written." Similarly, T&K stated that there should be a process for a regulated entity to appeal the executive director's classification to the commission. T&K added that such a process "is imperative, given the fact that the classification can affect inspections, regulatory flexibility, penalties, and other programs that do not fall into the three categories for which review of the classification is provided in the proposal." In a similar vein, Chaparral stated, "Because the actual workings and integrity of the formula is not known at this time, we believe that, should a site's compliance history be classified as 'poor' the regulated entity should have an opportunity to review this classification by the Commission. The standard for such review should be whether the facility generally does not comply with environmental regulations, pursuant to TWC §5.754."

The commission notes that the rules now provide for annual person and site classifications beginning September 1, 2003, rather than every six months as originally proposed. Nonetheless, the commission agrees with the commenters that in the case of any classification of a site or person as poor, it is reasonable to provide for an appeal process given, in particular, the requirements of TWC, §5.754, that among other things, limits the availability of announced investigations and flexible permits where a classification of poor is established. Given the statutory constraints of TWC, §5.754, the commission has also provided for an appeal process for those low average classifications for average

performers with 30 points or more. The commission has provided for appeal of classifications for average performers in this lower range because in this range there is a reasonable likelihood that a successful appeal would result in a change of classification from average to poor. As adopted, the rules provide a mechanism for changing classification from poor to average and average to poor.

The commission does not agree, however, that the appeal of such classifications requires commission rather than executive director review. The commission notes that there are several regulatory processes where executive director determinations are final, for example, water quality certifications under §401 of the federal Clean Water Act and selections of remedial actions under 30 TAC §335.347. The commission also notes that an appeal under §60.3(e) will generally be based on a factual dispute that, if considered by the commission, might require the offer of testimony and evidence necessary to support a commission finding. Given the foregoing considerations, the commission supports establishing a finite, simple, and expedited mechanism for resolving classification disputes that benefits both the public and the regulated community, while limiting the impact on agency resources.

ATINGP commented regarding proposed §60.3(e). ATINGP stated that this subsection should be expanded to include an abbreviated review process, because due process concerns dictate that an opportunity for review of the classification of a person's site should be provided for in other instances besides those proposed in §60.3(e). ATINGP further stated that a "site's classification will become an intangible asset of the regulated entity," with its site classification directly impacting the site's market value and marketability. ATINGP suggested that, for example, a site owner might want to "seek review of a site's ranking in contemplation of a transaction transferring ownership of the site."

The commission does not agree that an avenue for a formal appeal should be established for all person and site classifications due to perceived impact on market value or marketability. The commission has provided for formal appeals only for site or person classifications of poor performers or average performers with 30 points or more. That is, a formal appeal is provided for those classifications rated as poor and for those classifications in the lower range of average whose rankings are sufficiently close to poor that it is reasonably likely that a successful appeal would result in a change of classification from average to poor. The commission has limited formal appeals to the classifications identified since it is only in these circumstances where the classification itself results in adverse regulatory consequences. However, the commission is retaining the flexibility for the correction of clerical errors by the executive director at any time if it is discovered that there was a clerical error in the completion of the classification.

BP commented regarding proposed §60.3(e). BP reiterated its position that a person should be allowed the opportunity to review its classification and correct inaccuracies, but went on to say that once the agency and the person agree that the data is correct, and that no mitigating factors should be considered, the compliance history ranking should be final. BP asserted that it is at this time that the ranking could be published for public view. BP also asserted that the statute does not mandate a procedural addition to the permitting process, which would happen if compliance history ranking is allowed to become an issue in a contested case hearing, and as such, BP encouraged the commission to review this subsection to "disallow the compliance history to be used solely as the basis for a contested case hearing. Even if TNRCC allows some opportunity for hearing, it should only be for those operators with a 'poor' compliance history ranking."

The commission responds that the rules, as adopted, provide for a mechanism for correction of clerical errors at any time. While the rules provide for notice of the classification to be posted on the website within 30 days of completion of the classification, and there is no additional process established for the agency and regulated entity to come to an agreement about the data used to calculate the classification, the underlying compliance data held by the agency is generally available to any interested person as provided by the Texas Public Information Act. Further, any correction to a classification or reclassification is also posted on the website. In response to the comments requesting that a procedural addition to the permitting process be avoided, the commission notes that the adopted rules do not allow for site or person classifications to be contested issues in permitting or enforcement hearings. While the commission will use classification and compliance history in its decisions as required by statute, generally the executive director's classification of sites and persons will be dispositive. However, parties will continue to be allowed to present evidence on compliance history in agency proceedings just as they did before enactment of HB 2912.

Regarding proposed §60.3(e), Brown McCarroll provided modified language for this subsection, stating that it is similar to language submitted by AECT. Brown McCarroll asserted that it does not believe there should be a continuing opportunity for anyone to challenge a site's classification, which, as envisioned in the proposal would include a separate proceeding, for which there is no legislative intent of statutory authority. Additionally, Brown McCarroll asserted that there should be a mechanism for the site owner or operator to comment on a draft classification prior to its finalization. As such, Brown McCarroll provided the following language:

"(e) Review of classification or use. The executive director's classification of a person's site or use of a person's compliance history is subject to review only as follows. (1) Classification of compliance history. (A) Once the executive director has developed a draft classification for a site's compliance history, he shall provide written notice to the owner or operator of the proposal and of the compliance history information that supports such classification. (B) The owner or operator of the site shall have 14 days from the date of receipt of the draft classification to file comments on or to context the executive director's draft classification. (C) After consideration of any comments or contests to the draft classification by the owner or operator of the site, the executive director shall revise, as appropriate, the draft classification and issue a final compliance history classification for the site. (D) The executive director shall provide written notice of his final classification of the site to the owner or operator. The executive director shall also cause to be published in the Texas Register notice of the availability of the compliance history classification for the site and contact information for requesting more information regarding such classification. (E) Any person who disputes the executive director's classification of a site's compliance history may file with the Office of the Chief Clerk a motion to overturn the executive director's classification. A motion to overturn must be filed in accordance with the procedure set out in §50.139 of

this title (relating to Motion to Overturn Executive Director's Decision), except that the deadline for filing the motion to overturn is 30 days after notice of the availability of the final draft compliance history classification is published in the Texas Register. Such a dispute may not be addressed or decided through a contested case hearing. (F) The executive director's annual compliance history classification may be contested only if the compliance history information that was considered as part of the classification process was different than the compliance history information that was considered as part of the classification process that led to the prior compliance history classification, or if new information is provided that would cause the site to change classifications and was not considered in the prior compliance history classification. (2) Use of compliance history. (A) For permit applications or enforcement matters where an opportunity for a contested case hearing exists under other law, a hearing may be requested by a person that otherwise has standing in the permit matter under consideration or is a party to the enforcement matter, as provided in the applicable rules, based on issues related to the use of the applicant's or respondent's compliance history. (B) For permit applications where an opportunity for a contested case hearing does not exist under other law, the applicant, public interest counsel, or other person disputes the executive director's use of the applicant's compliance history, may file with the Office of the Chief Clerk a motion to overturn the executive director's action on the application. A motion to overturn must be filed in accordance with the procedure set out in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), except that the deadline for filing the motion to overturn is 30 days after the agency mails notice of its use of the applicant's compliance history. (C) In any contested case hearing where compliance history use is under review, the party disputing the use shall bear the burden of proof."

TXOGA endorsed the comments submitted by Brown McCarroll.

The commission has not made the changes to the rule as proposed by the commenters. However, the adopted rules have been substantially changed from the proposed rules. The process in the adopted rule will provide an efficient method for review of classifications. While the adopted process does not include many of the suggested steps, it does set forth a process that will afford interested persons the opportunity to contest classifications under specified circumstances.

§60.3(e)(1)

Representative Chisum commented regarding proposed §60.3(e)(1). Representative Chisum expressed concern about how the proposed rules "would broaden, deepen and further complicate the contested case process. The legislature clearly intends for compliance history to be a factor in permitting and enforcement actions, but we never intended to allow parties in a contested case hearing to fight about whether the agency properly ranked or classified an entity." Representative Chisum stated that as he understands the proposal, it would allow parties in a contested case hearing the opportunity to litigate whether the agency properly classified a person's compliance history, in effect creating a trial within a trial. He further asserted that the rules "could even be read to say we are allowing the initiation of a contested case solely on the issue of compliance history *classification*. This is certainly not the intention of the legislature, especially in light of ongoing efforts to streamline the permitting process and especially the contested case aspect." Representative Chisum did allow that the "legislature does intend that the concept of compliance history be open for input from the public as well as the entity whose compliance history is in question, but certainly not in a contested case hearing" and stated that he is aware that other alternatives have been suggested to the commission.

The commission has made significant revisions to this subsection in response to comment. The commission agrees that a person or site classification itself should not be litigated in contested case hearings and has modified the rule accordingly.

AECT, Reliant, TXOGA, and TCC commented regarding proposed §60.3(e)(1). AECT and Reliant suggested the addition of "use of the" prior to "applicant's or respondent's compliance history" at the end of this paragraph. TXU supported the comments made by AECT. TXOGA stated that there should not be a continuing opportunity for challenge of the executive director's classification of a site, although this paragraph appears to allow for a contested case hearing based only on compliance history. TXOGA asserted that there is no statutory authority for such a requirement, and as such, encouraged the commission to adopt the suggestions regarding this issue made by AECT and endorsed by Brown McCarroll. TCC provided similar comments to those of TXOGA, adding that it strongly believes the compliance history ranking determinations should be final, and that it believes the determination should be reviewable for a finite period of time, perhaps 30 days; that there should be some threshold for persons other than the regulated entity; and that the review should be conducted by either the executive director or the commission, with no further consideration until the next interval. OxyChem and Oxy Permian, Huntsman, and BP supported the comments submitted by TXOGA and TCC.

The commission responds that the rules, as modified from the proposal, do not allow a challenge to a classification itself in the contested case hearing process. Instead, classifications will be established for set intervals of time, unless a correction of error is made or the classification is one that is subject to challenge under the provisions of adopted §60.3(e), which provides for challenges to be filed with the executive director within 45 days of notice of the classification. Thus, the rules provide for certainty and finality in the classification, avoid litigating the classification in permitting and enforcement hearings, and establish opportunities for executive director review within a finite period of time where there is a regulatory impact associated with the classification. The commission has not included a distinct threshold for persons other than the regulated entity to appeal the classification and finds no basis for doing so. Instead, any person filing an appeal must demonstrate that if the specific relief sought is granted, a change in person or site classification will result. That is, whether the person filing the challenge to the classification is the regulated entity or a member of the public, the appeal must demonstrate that the challenge will result in reclassification of a site from poor to average or average to poor. Given that there are no regulatory impacts associated with a particular score within a category, the commission believes that appeals should be limited to those circumstances where it can be demonstrated that a change from one category to another will result.

§60.3(e)(2)

Regarding proposed §60.3(e)(2), Reliant and AECT recommended striking "classification of the applicant's site, or" from the text of paragraph (2), and further recommended the addition of "except that the deadline for filing the motion to overturn is 30 days after the agency mails notice of its use of the applicant's compliance history" to the end of the paragraph. TXU supported the comments made by AECT.

The commission has substantially revised §60.3(e) in response to comment. Specifically, the adopted rules now provide that a person or site classification may not be a contested issue in a permitting or enforcement hearing.

§60.3(e)(3)

Reliant and AECT commented regarding proposed §60.3(e)(3), recommending striking "classification or" from the text of this paragraph. TXU supported the comments made by AECT.

As previously noted, the commission has substantially revised §60.3(e) in response to comment. In particular, the rules now provide that a person or site classification may not be a contested issue in a permitting or enforcement hearing.

§60.3(e)(3) and (4)

V&E, WM, TAB, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(e)(3) and (4). V&E and WM suggested the addition of a new §60.3(e)(3), which would read: "A request for a contested case hearing based solely on issues related to the applicant's or respondent's compliance history or motion to overturn the executive director's action based solely on compliance history classification or use shall be denied unless the requestor or movant demonstrates that the classification or use, applying the formula provided in §60.2(f) and subject to the limitations of §60.2(a)(1), was based on incomplete or inaccurate information or misapplication of the formula and that the error, if corrected, will result in a change in the site classification." Allied, BFI, TxSWANA, and NSWMA made the same recommendation, except that they left out the phrase "and subject to the limitations of §60.2(a)(1)." As a result of this addition, V&E, Allied, BFI, TxSWANA, and NSWMA further suggested the renumbering of proposed §60.3(e)(3) to §60.3(e)(4), and replacing the phrase "is under review," with "is an issue, the limitations of §60.2(a)(1) shall apply and." The addition of another sentence, to read, "Issues regarding compliance history that do not alter the site classification using the formula provided in §60.2(f) are not relevant for purposes of §80.127." was also suggested. V&E stated that the suggested changes would: "1) settle disputes about the evaluation of items considered in the compliance history classification with certainty and finality; 2) prevent potentially inconsistent results from litigating the same matters in different contested case hearings; and 3) focus compliance history classification issues in contested case hearings on items that were not previously considered or that have arisen since the last classification and potentially make a difference in the compliance history classification." Further, V&E asserted that the changes would limit to relevant matters the scope of compliance history classification issues in hearings, while they would not preclude discussion of a person's or site's compliance record in examining permit provisions nor would they prevent consideration of §60.1 components not previously considered. Allied, BFI, TxSWANA, and NSWMA stated that the proposed modifications would limit the admissibility and use of compliance history in TNRCC proceedings to a known standard. TAB commented that it supports V&E's comments regarding establishing a process to challenge a site's compliance history classification and setting up a finite amount of time for such a consideration, adding that "it would be unfair and duplicitous to continue to subject companies to review of their 5-year compliance history every time they come before the agency for a permit or other authorization." TMRA stated that, as proposed, this paragraph fails to establish a more consistent and predictable evidentiary standard for evaluating compliance history in contested case hearings on permit matters--a main purpose of HB 2912. TMRA quoted from the *Texas Sunset Commission Staff Report on the Sunset Review of TNRCC*, "{a}nother benefit of a consistent definition {of compliance history} is removing the unnecessary debate as to what constitutes a compliance history in contested cases. This should decrease the time and resources spent determining what evidence can be submitted in contested case hearings." TMRA asserted that the proposed language is open-ended, and the final rule should include language limiting the admissibility and use of compliance history in commission proceedings to a known standard so members of the regulated community can identify and prepare for the resource-consuming proceedings with an understanding of the standard for such evidence. As such, TMRA recommended almost the exact same changes as V&E's, with the following exceptions: 1) omitted the words and terms "solely," "based solely," and "and subject to the limitations of §60.2(a)(1)," from the proposed new §60.3(e)(3); 2) did not recommend replacing the phrase "is under review," in what was proposed as §60.3(e); and 3) included the phrase "in any commission proceeding" prior to "for purposes of §80.127" in the sentence added to the end of what would now be new §60.3(e)(4).

The commission has not made the changes suggested by the commenters, but has made substantial revisions to the provisions of this subsection as discussed previously in this preamble. The commission finds that many of the objectives sought by the commenters are satisfied by the revised rule. The commission agrees that there should be certainty and finality in classifications, that potential inconsistencies in litigating classifications in different contested case hearings should be avoided, and that discussion of compliance history should not be precluded in permitting decisions. These objectives are achieved by the rule as adopted.

AECT recommended a review of the classification rule that allows for a motion to overturn the executive director's decision on a classification. Such a motion would be filed with the Office of the Chief Clerk, and must specify the new or different compliance history information and any other reason that the person reasonably believes supports a reclassification of the compliance history. AECT also recommended that a classification may only be challenged if the compliance history information that was considered as part of such classification process was different than the compliance history information that was considered as part of the classification process that led to the prior compliance history classification, and if the person challenging the classification reasonably believes that such different information is significant enough to support a change in the classification. TXU supported the comments made by AECT, as do Garland, San Antonio, GEUS, and SMEC.

The commission responds that, as discussed in this preamble, the rule, as adopted, no longer includes provisions for filing motions to overturn the executive director's classification. Instead, an informal process has been established for corrections of errors and a limited and expedited formal appeal process has been established for classifications for which there are regulatory impacts associated with the classification itself. Appellants who choose to avail themselves of the limited appeal process must demonstrate that if the specific relief sought is granted, a change in person or site classification will result.

§60.3(f)

Section 60.3(f) was added subsequent to proposal to provide that the executive director may correct clerical errors which are defined to include typographical and mathematical errors. Such corrections may be made at any time, not just during the annual

classification, to negate any potential for a mis-classification that may otherwise result. New subsection (f) also provides that an appeal may be filed if such correction results in a change of classification but must be filed no later than 45 days after the correction is posted on the commission's website. The site owner and permit holder must be notified of any change of classification as provided by §60.3(e)(6).

§60.3(g), (proposed as §60.3(a)(5))

The commission has moved the provision proposed as §60.3(a)(5) and adopted it as §60.3(g). Additionally, the commission has modified the language proposed as §60.3(a)(5). The proposed language could have been interpreted to provide that the issue of compliance history could be raised in the context of a permitting hearing in situations where the compliance history issue had not been referred to the State Office of Administrative Hearings (SOAH). This would not have been consistent with the commission's intent.

Adopted new §60.3(g) provides that any party to a contested case hearing may submit information pertaining to compliance history, including the underlying components of classifications, subject to the requirements of 30 TAC §80.127. However, the rule now provides that a person or site classification itself shall not be a contested issue in a permitting or enforcement hearing. Therefore, the rule as adopted removes the ability to challenge a person or site classification in the course of a contested case hearing, but allows the parties to offer evidence of noncompliance in the proceeding. This means that parties will not be able to litigate whether a classification should be poor, average, or high during the course of a permitting or enforcement hearing. However, the opportunity to present evidence relating to previous violations documented at the site, for example, will be maintained.

The modified language has been moved and adopted as §60.3(g) for better and more appropriate organization of the rule, as this provision applies to both permit and enforcement hearings. As proposed, it was erroneously placed under the subsection dealing solely with permitting issues.

NTMWD, V&E, WM, TXI, T&K, TMRA, Allied, BFI, TxSWANA, and NSWMA commented regarding proposed §60.3(a)(5). NTMWD, TMRA, Allied, BFI, TxSWANA, and NSWMA stated that, as proposed, paragraph (5) failed to establish a more consistent and predictable evidentiary standard for evaluating compliance history in contested case hearings on permit matters--a main purpose of HB 2912. NTMWD, TMRA, Allied, BFI, TxSWANA, and NSWMA quoted from the *Texas Sunset Commission Staff Report on the Sunset Review of TNRCC,* "{a}nother benefit of a consistent definition {of compliance history} is removing the unnecessary debate as to what constitutes a compliance history in contested cases. This should decrease the time and resources spent determining what evidence can be submitted in contested case hearings." Both NTMWD and TMRA asserted that the proposed language is open-ended, and the final rule should include language limiting the admissibility and use of compliance history in commission proceedings to a known standard so members of the regulated community can identify and prepare for the resource-consuming proceedings with an understanding of the standard for such evidence. As such, TMRA, Allied, BFI, TxSWANA, and NSWMA recommended adding the phrase "and the limitations of paragraph (e) of this section" to the end of this paragraph, as did V&E and WM. T&K stated that the final rule should limit the admissibility and use of compliance history in commission proceedings to the components listed in §60.1(c). TXI recommended that this provision be revised to limit the submission of information pertaining to a site's compliance history, rather than to a person's compliance history, to ensure that a contested case hearing on a permit application is as focused as possible. Further, T&K supported the comments provided by TMRA and TXI.

The commission responds that adopted §60.3(g), proposed as §60.3(a)(5), specifically ties the offer of compliance history evidence to the admissibility requirements of §80.127. Thus, the rule sets forth the standard for such evidence, and that standard is the one uniformly used by the commission in contested case hearings. The commission has also modified the rule, as proposed, to reflect that person or site classifications may not be litigated in permitting or enforcement hearings. Thus, the issues that can be raised in contested case hearings are now focused on compliance history itself rather than classifications. However, the commission does not agree that it is appropriate to limit the admissibility and use of compliance history in agency proceedings to the components listed in §60.1(c). The commission may consider information related to environmental compliance relevant to the proceeding whether or not it is included in §60.1(c). For example, if a party were to seek to introduce evidence related to actions taken to improve environmental compliance at the site, this evidence would be admissible under the adopted rules even if it were not identified as a component in §60.1(c). With regard to the recommendation that offers of evidence related to compliance history be limited to compliance history pertaining to the site rather than the person is contrary to the statutory framework for consideration of compliance history. Therefore, no change has been made to the rule in response to this recommendation.

AquaSource commented regarding proposed §60.3(a)(5). AquaSource stated that the proposed language in this paragraph stating "any party to a contested case hearing may submit *any* information pertaining to a person's compliance history" will "change the complexion of contested case hearings, as we know them." AquaSource contended that there are burden of proof and relevance issues, and that it is not clear how such evidence could be introduced in a permit hearing, "in light of the commission's recent rulemaking on the role of the executive director in hearings." AquaSource stated that "change in roles" would: require protestants to subpoena TNRCC regional staff who would then end up spending more time dealing with hearings and less time on investigations; lengthen the permitting process for everyone; result in high costs for applicants and the agency; and likely result in a backlog in the permitting process.

The commission first notes that this provision, adopted as §60.3(g), has been amended from the proposal to remove disputes relating to classifications from the contested case hearing process. In addition, to be admitted, information relating to compliance history must also meet the standard in §80.127, which provides that compliance history evidence is subject to the Texas Rules of Civil Evidence. The commission further responds that commission rules provide that certified copies of agency compliance summaries are included in the chief clerk's files, forwarded to SOAH upon referral, and included in the administrative record of permitting proceedings. Thus, the compliance summary information compiled by the agency is included in the record of the proceeding. Whether or not the executive director participates as a party in a permit hearing, the compliance history information compiled for that permit action is available to the parties, the judge, and the commission. The commission recognizes that there may be circumstances where the actual testimony of commission staff may be sought

for purposes of elaboration of the compliance summary just as it may also be sought for elaboration of other elements of permit review. However, the commission does not agree that adopted §60.3(g) will require that result.

Miscellaneous Comments

In order to provide grammatical correctness and clarity, as well as to improve readability, the commission has made non-substantive modifications to adopted §60.2 and §60.3 not specifically mentioned in the SECTION BY SECTION DISCUSSION/RESPONSE TO COMMENTS section of this preamble.

V&E, WM, Allied, BFI, TxSWANA, and NSWMA recommended the addition of a new subsection (f) regarding a change of ownership moratorium. Specifically, V&E, Allied, BFI, TxSWANA, and NSWMA recommended the following language:

"(f) Change of ownership moratorium. The classification of compliance history pursuant to §60.2 for a recently acquired site shall not be included or considered as part of the classification of compliance history for the new owner. (1) Pursuant to §60.1(d), a distinction of compliance history of the site under each owner during the compliance period shall be made. (2) A site rated as a poor performer pursuant to §60.2 under a prior owner shall not be subject to the provision of §60.3(a)(3) for a period of three years after a change of ownership. (3) If after three years the site achieves a compliance history rating of average or high performer pursuant to §60.2, the compliance history components resulting from the prior ownership shall be deleted from the site compliance history and the site shall then be considered as part of the new owner's compliance history rating for all purposes. (4) If after three years the site fails to achieve a compliance history rating of average or high performer pursuant to §60.2, the compliance history components resulting from the prior ownership shall not be deleted from the site compliance history and the site shall then be considered as part of the new owner's compliance history rating for all purposes."

The commenters asserted that the rule as proposed would deter a responsible, average performing person from acquiring a poor performing site, which could result in such a site not being rehabilitated. V&E, Allied, BFI, TxSWANA, and NSWMA further asserted that limiting the mitigating factor in proposed §60.2(f)(3)(B) and (C) to only high performers "is contrary to the goal of improving the compliance of poor performers." WM stated that the uncertainty of mitigation makes it unlikely that high performers will want to acquire poor sites. V&E stated that the "rules should facilitate beneficial changes in ownership and provide clear and certain relief for high and average performing new owners with a distinct period to restore compliance." V&E and WM recommended the deletion of proposed §60.2(f)(3)(B) and (C) along with the inclusion of the new language recommended for §60.3(f). Allied, BFI, TxSWANA, and NSWMA offered the addition of this language as an alternative to modifications it suggested for proposed §60.2(a) and (d).

The commission has determined that the changes adopted in §60.2(e)(3) sufficiently address the concerns expressed by commenters related to beneficial changes in ownership. The commission believes that it is more prudent to allow the executive director to evaluate the facts and circumstances concerning the change in ownership, including an evaluation of the new owner and any new trends occurring since the time of purchase. The commission encourages the rehabilitation of poor performing sites, and anticipates that the executive director will exercise good judgment when considering the use of the mitigating factor to change the classification of a site. Additionally, by evaluating the site annually with the rest of the regulated community, the executive director will have an opportunity to look for the positive influence of the new owner.

Examples

The following paragraphs provide some examples of compliance histories and site ratings calculated according to the adopted formula.

Person 1 has a wastewater permit, Permit No. 22222-001. Person 1 has no other authorizations at this site and owns no other sites in the State of Texas. It has owned and operated the permitted site for the entire five-year compliance period. A review of commission compliance and enforcement information indicates that Person 1 was issued a Findings Order on July 10, 1999 for violations of: 1) 30 TAC §319.7(a), failure to maintain records; and 2) §305.125(1), Permit No. 22222-001, Effluent Limitations; and TWC, §26.121, failure to comply with permitted effluent limitations. Person 1 had 45 investigations during the compliance period; the agency conducted five physical investigations and 36 discharge monitoring reports were evaluated for compliance. Since September 1, 1999, Person 1 reported effluent violations for the following four months: November 30, 1999; August 31, 2000; December 31, 2001; and March 31, 2002.

Each violation was evaluated in order to classify it as major, moderate, or minor. Both the violations in the order were classified as moderate because the record violation involved a total lack of required records, and the effluent violation did not involve adverse effects to human health, safety, or the environment. Because these violations are included in a Findings Order, they are assigned 60 points each. The violations reported on the discharge monitoring report forms were assigned three points each, because they did not involve adverse effects. In summary, the points assigned to Person 1 are 60 points from the order and 12 points from the NOVs (discharge monitoring reports) or a total of 132 points.

Because there are no major violations, Person 1 is not a repeat violator and receives no additional points. There are no chronic excessive emissions events related to this site; thus, no additional points. Person 1 has no criminal convictions to contribute additional points.

Under the site rating formula, the site rating for Person 1 would be determined by adding all the applicable points for each violation in enforcement order, court orders, NOVs, criminal convictions, and chronic excessive emissions events. In this case the points total 132. This sum is then divided by the 46 investigations plus one to obtain a value of 2.87. There are no audits, EMS, or mitigating factors on record for this site which would effect the calculation; thus, the site rating remains at 2.87. Person 1 is classified as an average performer according to the ranges in adopted §60.2(e)(2).

Person 2 has three sites in Texas. Person 2 at Site 1 has a wastewater permit, operates hazardous waste units, and has an air permit. Person 2 has owned this site for the entire five-year compliance period under evaluation. A review of compliance and enforcement information indicates two effluent violations both cited as §305.125(1); Permit No. 3333-001, Effluent Limitations; and TWC, §26.121, failure to comply with permitted effluent limitations, reported in discharge monitoring reports. The reports were for December 11, 1999 and February 28, 2002. There is also an NOV for §335.69, failure to properly label a hazardous waste container. Additionally, there is an NOV for air

violations including: §101.20(1) and (3) and §116.115; Permit No. 3322A Special Provision 3; USEPA Permit No. PSD-TX-323C2; 40 CFR §60.592(a); and THSC, §382.085(b), failure to equip each opened line or valve with a cap, plug, flange, or second valve; and §§101.20(1), 115.324(2)(C), and 116.115; Permit No. 3322A Provision 7F; 40 CFR §60.592(a); and THSC, §382.085(b), failure to monitor the emissions from two of 15 pipelines in liquid service.

The two wastewater violations are classified as moderate because the discharges did not result in adverse effects. The hazardous waste violation is classified as a minor violation, because only the date that accumulation began was missing on the label. The air violation concerning capping the line is a moderate violation, because it involves failing to maintain equipment in a way that could result in a release of pollutants. The air violation concerning failure to monitor two of 15 lines in liquid service is a minor violation, because most (87%) of the monitoring requirement was met.

On April 17, 1998, the commission issued a Findings Order against Person 2 at Site 1. This order contained three violations. The first violation addressed in the Order is §115.324(a)(7) and THSC, §382.085(b), failure to attach a weatherproof and visible tag with an identification number and the date the leak was discovered to a leaking component. This violation is classified as a minor violation, because Person 2 had checked 312 valves, noted ten leaking valves, and tagged nine valves resulting in most (90%) of the requirement being met. The second violation addressed in the Order is §§101.20(1), 115.112(a)(1), and 116.116; 40 CFR §60.112(a)(2), Standard Exemption 86(b); and THSC, §382.085(b), failure to store a volatile organic compound in a stationary tank, reservoir, or other container without the container being capable of maintaining working pressure to prevent any vapor gas loss or being equipped with at least a control device. This violation is classified as a moderate violation, because it includes maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants. The third violation addressed in the Order is §101.20(1); 40 CFR §60.7(c)(2) and (3); and THSC, §382.085(b), failure to submit an excess emissions report. This violation is classified as moderate, because it involves the complete failure to submit a report (100% of the requirement is not met).

Person 2 has no record of criminal convictions for this site. There are no major violations; thus, Person 2 at Site 1 is not a repeat violator. There are no chronic excessive emissions events at this site. Person 2 implemented an EMS three years ago that has not been certified by the executive director under Chapter 90.

Under the site rating formula, the Site 1 rating for Person 2 would be determined by adding all the applicable points for each violation in enforcement orders, court orders, NOVs, criminal convictions, and chronic excessive emissions events. In this case, there are two moderate violations in the Findings Order (60 points each) resulting in 120 points, and one minor violation in the Findings Order resulting in 20 points. There are three moderate violations in NOVs (three points each) resulting in nine points, and two minor violations in NOVs (one point each) resulting in two points. The total points resulting from the violations are 151. This value is then divided by the three investigations conducted by the agency, plus the 36 evaluations of discharge monitoring reports, plus one, or 151 divided by 40, resulting in a site rating of 3.75. Based on this site rating, Person 2 at Site 1 is an average performer.

Person 2 at Site 2 has two enforcement orders. The first order was issued as a Findings Order on April 2, 1999, and contains one violation. This violation is §305.125(1); TPDES Permit No. 11111-001, Effluent Limitations; and TWC, §26.121, failure to comply with the permitted effluent limitations. This violation is classified as a major because the dissolved oxygen in the receiving stream was measured at 0.5 milligrams per liter for the first 150 yards downstream of the point of discharge, and there were no aquatic animals observed for this distance.

The second enforcement order is a 1660 Order, was issued on June 25, 2002, and contains two violations. The first violation is§335.69(a)(4), failure to remove hazardous waste within 90 days. This violation is classified as a moderate violation, because the facility is not prepared for long-term storage and management of hazardous waste, and, thus, a release of pollutants could occur. The second violation is §335.4; and TWC, §26.121, unauthorized discharge of 10,000 gallons of a hazardous waste with a pH of 13 into an estuary resulting in a fish kill. This violation is classified as a major violation, because aquatic life was adversely impacted by the discharge.

Since September 1, 1999, Person 2 at Site 2 has reported 12 months of effluent violations cited as §305.125(1); TPDES Permit No. 11111-001, Effluent Limitations; and TWC, §26.121. These violations are classified as moderate because there is no information to indicate that human health, safety, or the environment was impacted.

Person 2 at Site 2 has no criminal convictions and no chronic excessive emissions events.

Person 2 at Site 2 must be evaluated to determine whether the person should be considered a repeat violator. Under the complexity criteria, Person 2 at Site 2 receives four points for the TPDES permit, and two points for the New Source Review permit. Under the number of sites criteria, Person 2 at Site 2 receives three points, because Person 2 owns or operates three sites in the State of Texas. Based upon the size criteria, Person 2 at Site 2 receives one point for having less than 44 FINs; one point for one external permitted wastewater outfall; and one point for having fewer than ten active hazardous waste management units. The site is located in Brazoria County, which is part of a nonattainment area and, therefore, receives one point for the nonattainment area criteria. The total number of criteria points is 13. Based upon the ranges in adopted §60.2(d)(1), Person 2 at Site 2 is not a repeat violator.

Under the site rating formula, the Site 2 rating for Person 2 would be determined by adding all the applicable points for each violation in enforcement orders, court orders, NOVs, criminal convictions, and chronic excessive emissions events. In this case there is one major violation in the Findings Order resulting in 100 points. There is one moderate violation in the 1660 Order resulting in 45 points, and one major violation in the 1660 Order resulting in 80 points. There are 12 moderate violations in NOVs (three points each) resulting in 36 points. The total points resulting from the violations is 261. This value is then divided by the five investigations conducted by the agency, plus 36 evaluations of discharge monitoring reports, plus one, or 261 divided by 42, resulting in a site rating of §6.21. Based on this site rating, Person 2 at Site 2 is an average performer.

Person 2 has a third site that is very small. This site has not been investigated by the agency during the five-year period. It is an

average performer by default by definition and is assigned 3.01 points.

Each site has a site rating developed by using the site rating formula or the default value. Person 2 has an aggregate rating of 4.32 points which was obtained by summing the three site ratings (3.75 + 6.21 + 3.01 = 12.97), and then dividing by 3. Therefore, Person 2 is an average performer.

STATUTORY AUTHORITY

The new sections are adopted under THSC, §361.017 and §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The new sections are also adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule, and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

§60.2. Classification.

(a) Classifications. Beginning September 1, 2002, the executive director shall evaluate the compliance history of each site and classify each site and person as needed for the actions listed in §60.1(a)(1) of this title (relating to Compliance History). On September 1, 2003, and annually thereafter, the executive director shall evaluate the compliance history of each site, and classify each site and person. For the purposes of classification in this chapter, and except with regard to portable units, "site" means all regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. Site includes any property identified in the permit or used in connection with the regulated activity at the same street address or location. A "site" for a portable regulated unit or facility is any location where the unit or facility is or has operated. Each site and person shall be classified as:

(1) a high performer, which has an above-average compliance record;

(2) an average performer, which generally complies with environmental regulations; or

(3) a poor performer, which performs below average.

(b) Inadequate information. For purposes of this rule, "inadequate information" shall be defined as no compliance information. If there is no compliance information about the site at the time the executive director develops the compliance history classification, then the classification shall be designated as "average performer by default." The executive director may conduct an investigation to develop a compliance history.

(c) Major, moderate, and minor violations. In classifying a site's compliance history, the executive director shall determine whether a documented violation of an applicable legal requirement is of major, moderate, or minor significance.

(1) Major violations are:

(A) a violation of a commission enforcement order, court order, or consent decree;

(B) operating without required authorization or using a facility that does not possess required authorization;

(C) an unauthorized release, emission, or discharge of pollutants that caused, or occurred at levels or volumes sufficient to cause, adverse effects on human health, safety, or the environment;

(D) falsification of data, documents, or reports; and

(E) any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction.

(2) Moderate violations are:

(A) complete or substantial failure to monitor, analyze, or test a release, emission, or discharge, as required by a commission rule or permit;

(B) complete or substantial failure to submit or maintain records, as required by a commission rule or permit;

(C) not having an operator whose level of license, certification, or other authorization is adequate to meet applicable rule requirements;

(D) any unauthorized release, emission, or discharge of pollutants that is not classified as a major violation;

(E) complete or substantial failure to conduct a unit or facility inspection, as required by a commission rule or permit;

(F) any violation included in a criminal conviction, for a strict liability offense, in which the statute plainly dispenses with any intent element needed to be proven to secure the conviction; and

(G) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner that could cause an unauthorized or noncompliant release, emission, or discharge of pollutants.

(3) Minor violations are:

(A) performing most, but not all, of a monitoring or testing requirement, including required unit or facility inspections;

(B) performing most, but not all, of an analysis or waste characterization requirement;

(C) performing most, but not all, of a requirement addressing the submittal or maintenance of required data, documents, notifications, plans, or reports; and

(D) maintaining or operating regulated units, facilities, equipment, structures, or sources in a manner not otherwise classified as moderate.

(d) Repeat violator.

(1) Repeat violator criteria. A person may be classified as a repeat violator at a site when, on multiple, separate occasions, a major violation(s) occurs during the compliance period as provided in subparagraphs (A) - (C) of this paragraph. The total criteria points for a site equals the sum of points assigned to a specific site in paragraphs (2) - (5) of this subsection. A person is a repeat violator at a site when:

(A) the site has had a major violation(s) documented on at least two occasions and has total criteria points ranging from 0 to 8;

(B) the site has had a major violation(s) documented on at least three occasions and has total criteria points ranging from 9 to 24; or

(C) the site has had a major violation(s) documented on at least four occasions and has total criteria points greater than 24.

(2) Complexity points. A site shall be assigned complexity points based upon its types of permits, as follows:

(A) four points for each permit type listed in clauses (i) - (vi) of this subparagraph issued to a person at a site:

(i) Radioactive Waste Disposal;

(ii) Hazardous or Industrial Non-Hazardous Storage Processing or Disposal;

(iii) Municipal Solid Waste Type I;

(iv) Prevention of Significant Deterioration;

(v) Phase I--Municipal Separate Storm Sewer System; and

(vi) Texas Pollutant Discharge Elimination System (TPDES) or National Pollutant Discharge Elimination System (NPDES) Industrial or Municipal Major;

(B) three points for each permit type listed in clauses (i) - (v) of this subparagraph issued to a person at a site:

(i) Underground Injection Control Class I/III;

(ii) Municipal Solid Waste Type I AE;

(iii) Municipal Solid Waste Type IV, V, or VI;

(iv) Municipal Solid Waste Tire Registration; and

(v) TPDES or NPDES Industrial or Municipal Minor;

(C) two points for each permit type listed in clauses (i) and (ii) of this subparagraph issued to a person at a site or utilized by a person at a site:

(i) New Source Review individual permit or permit by rule requiring submission of a PI-7 under Chapter 106 of this title (relating to Permits by Rule); and

(ii) any other individual site-specific water quality permit not referenced in subparagraph (A) or (B) of this paragraph or any water quality general permit.

(3) Number of sites points. The following point values are assigned based on the number of sites in Texas owned or operated by a person:

(A) 1 point when a person owns or operates one site only;

(B) 2 points when a person owns or operates two sites only;

(C) 3 points when a person owns or operates three sites only;

(D) 4 points when a person owns or operates four sites only;

(E) 5 points when a person owns or operates five sites only;

(F) 6 points when a person owns or operates six to ten sites;

(G) 7 points when a person owns or operates 11 to 100 sites; and

(H) 8 points when a person owns or operates more than 100 sites.

(4) Size. Every site shall be assigned points based upon size as determined by the following:

(A) Facility Identification Numbers (FINs):

(i) 4 points for sites with 600 or more FINs;

(ii) 3 points for sites with at least 110, but fewer than 600, FINs;

(iii) 2 points for sites with at least 44, but fewer than 110, FINs; and

(iv) 1 point for sites with at least one but fewer than 44 FINs;

(B) Water Quality external outfalls:

(i) 4 points for a site with ten or more external outfalls;

(ii) 3 points for a site with at least five, but fewer than ten, external outfalls;

(iii) 2 points for sites with at least two, but fewer than five, external outfalls; and

(iv) 1 point for sites with one external outfall;

(C) Active Hazardous Waste Management Units (AHWMUs):

(i) 4 points for sites with 50 or more AHWMUs;

(ii) 3 points for sites with at least 20, but fewer than 50, AHWMUs;

(iii) 2 points for sites with at least ten, but fewer than 20, AHWMUs; and

(iv) 1 point for sites with at least one but fewer than ten AHWMUs.

(5) Nonattainment area points. Every site located in a nonattainment area shall be assigned 1 point.

(6) Repeat violator exemption. The executive director shall designate a person as a repeat violator as provided in this subsection, unless the executive director determines the nature of the violations and the conditions leading to the violations do not warrant the designation.

(e) Formula. The executive director shall determine a site rating based upon the following method.

(1) Site rating. For the time period reviewed, the following calculations shall be performed based upon the compliance history at the site.

(A) The number of major violations contained in:

(i) any adjudicated final court judgments and default judgments, shall be multiplied by 160;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 140;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 120;

(iv) any final prohibitory emergency orders issued by the commission shall be multiplied by 120;

(v) any agreed final enforcement orders without a denial of liability shall be multiplied by 100; and

(vi) any agreed final enforcement orders containing a denial of liability shall be multiplied by 80.

(B) The number of moderate violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 115;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 95;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 75;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 60; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 45.

(C) The number of minor violations contained in:

(i) any adjudicated final court judgments and default judgments shall be multiplied by 45;

(ii) any non-adjudicated final court judgments or consent decrees without a denial of liability shall be multiplied by 35;

(iii) any non-adjudicated final court judgments or consent decrees containing a denial of liability, adjudicated final enforcement orders, and default orders, shall be multiplied by 25;

(iv) any agreed final enforcement orders without a denial of liability shall be multiplied by 20; and

(v) any agreed final enforcement orders containing a denial of liability shall be multiplied by 15.

(D) The number of major violations contained in any notices of violation shall be multiplied by 5.

(E) The number of moderate violations contained in any notices of violation shall be multiplied by 3.

(F) The number of minor violations contained in any notices of violation shall be multiplied by 1.

(G) The number of counts in all criminal convictions:

(i) under Texas Water Code (TWC), §§7.145, 7.152, 7.153, 7.162(a)(1) - (5), 7.163(a)(1) - (3), 7.164, 7.168 - 7.170, 7.176, 7.182, 7.183, and all felony convictions under the Texas Penal Code, TWC, Texas Health and Safety Code (THSC), or the United States Code (USC) shall be multiplied by 500; and

(ii) under TWC, §§7.147 - 7.151, 7.154, 7.157, 7.159, 7.160, 7.162(a)(6) - (8), 7.163(a)(4), 7.165 - 7.167, 7.171, 7.177 - 7.181, and all misdemeanor convictions under the Texas Penal Code, TWC, THSC, or the USC shall be multiplied by 250.

(H) The number of chronic excessive emissions events shall be multiplied by 100.

(I) The subtotals from subparagraphs (A) - (H) of this paragraph shall be summed.

(J) If the person is a repeat violator as determined under subsection (d) of this section, then 500 points shall be added to the total in subparagraph (I) of this paragraph. If the person is not a repeat violator as determined under subsection (d) of this section, then zero points shall be added to the total in subparagraph (I) of this paragraph.

(K) If the total in subparagraph (J) of this paragraph is greater than zero, then:

(i) subtract 1 point from the total in subparagraph (J) of this paragraph for each notice of an intended audit submitted to the agency during the compliance period; or

(ii) if a violation(s) was disclosed as a result of an audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, as amended, and the site was granted immunity from an administrative or civil penalty for that violation(s) by the agency, then the following number(s) shall be subtracted from the total in subparagraph (J) of this paragraph:

(I) the number of major violations multiplied by 5;

(II) the number of moderate violations multiplied by 3; and

(III) the number of minor violations multiplied by 1.

(L) The result of the calculations in subparagraphs (I) - (K) of this paragraph shall be divided by the number of investigations conducted during the compliance period plus one. If the value is less than zero, then the site rating shall be assigned a value of zero. For the purposes of this chapter, an investigation is a review or evaluation of information by the executive director or executive director's staff or agent regarding the compliance status of a site, excluding those investigations initiated by citizen complaints. An investigation, for the purposes of this chapter, may take the form of a site assessment, file or record review, compliance investigation, or other review or evaluation of information. All sites with a classification of "average performer by default" are assigned 3.01 points.

(M) If the person receives certification of an environmental management system (EMS) under Chapter 90 of this title (relating to Regulatory Flexibility and Environmental Management Systems) and has implemented the EMS at the site for more than one year, then multiply the result in subparagraph (L) of this paragraph by 0.9.

(2) Point ranges. The executive director shall assign the site a classification based upon the compliance history and application of the formula in paragraph (1) of this subsection to determine a site rating, utilizing the following site rating ranges for each classification:

(A) fewer than 0.10 points--high performer;

(B) 0.10 points to 45 points--average performer; and

(C) more than 45 points--poor performer.

(3) Mitigating factors. The executive director shall evaluate mitigating factors for a site classified as a poor performer.

(A) The executive director may reclassify the site from poor performer to average performer with 45 points based upon the following mitigating factors:

(i) other compliance history components included in §60.1(c)(10) - (12) of this title;

(ii) implementation of an EMS not certified under Chapter 90 of this title at a site for more than one year;

(iii) a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification if the person entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance prior to the effective date of this rule; and

(iv) voluntarily reporting a violation to the executive director that is not otherwise required to be reported and that is not reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995, or that is reported under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 but is not granted immunity from an administrative or civil penalty for that violation(s) by the agency.

(B) When a person, all of whose other sites have a high or average performer classification, purchased a site with a poor performer classification or became permitted to operate a site with a poor performer classification and the person contemporaneously entered into a compliance agreement with the executive director regarding actions to be taken to bring the site into compliance, the executive director:

(i) shall reclassify the site from poor performer to average performer with 45 points until such time as the next annual compliance history classification is performed; and

(ii) may, at the time of subsequent compliance history classifications, reclassify the site from poor performer to average performer with 45 points based upon the executive director's evaluation of the person's compliance with the terms of the compliance agreement.

(f) Person classification. The executive director shall assign a classification to a person by averaging the site ratings of all the sites owned and/or operated by that person in the State of Texas.

(g) Notice of classifications. Notice of person and site classifications shall be posted on the commission's website within 30 days after the completion of the classification.

§60.3. Use of Compliance History.

(a) Permitting.

(1) Permit actions subject to compliance history review. For permit actions subject to compliance history review identified in §60.1(a) of this title (relating to Compliance History), the agency shall consider compliance history when preparing draft permits and when deciding whether to issue, renew, amend, modify, deny, suspend, or revoke a permit by evaluating the person's:

(A) site-specific compliance history and classification; and

(B) aggregate compliance history and classification, especially considering patterns of environmental compliance.

(2) Review of permit application. In the review of any application for a new, amended, modified, or renewed permit, the executive director or commission may require permit conditions or provisions to address an applicant's compliance history. Poor performers are subject to any additional oversight necessary to improve environmental compliance.

(3) Poor performers and repeat violators.

(A) If a site is classified as a poor performer, the agency shall:

(i) deny or suspend a person's authority relating to that site to discharge under a general permit issued under Chapter 205 of this title (relating to General Permits for Waste Discharges); and

(ii) deny a permit relating to that site for, or renewal of, a flexible permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification).

(B) If a site is classified as a poor performer, upon application for a permit, permit renewal, modification, or amendment relating to that site, the agency may take the following actions, including:

(i) deny or amend a solid waste management facility permit;

(ii) deny an original or renewal solid waste management facility permit; or

(iii) hold a hearing on an air permit amendment, modification, or renewal, and, as a result of the hearing, deny, amend, or modify the permit.

(C) If a site is classified as a poor performer or repeat violator and the agency determines that a person's compliance history raises an issue regarding the person's ability to comply with a material term of its hazardous waste management facility permit, then the agency shall provide an opportunity to request a contested case hearing for applications meeting the criteria in §305.65(8) of this title (relating to Renewal).

(D) Upon application for permit renewal or amendment, the commission may deny, modify, or amend a permit of a repeat violator.

(E) The commission shall deny an application for permit or permit amendment when the person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process, including a failure to make a timely and substantial attempt to correct the violation(s). This includes violation of provisions in commission orders or court injunctions, judgments, or decrees designed to protect human health or the environment.

(4) Additional use of compliance history.

(A) The commission may consider compliance history when:

(i) evaluating an application to renew or amend a permit under Texas Water Code (TWC), Chapter 26;

(ii) considering the issuance, amendment, or renewal of a preconstruction permit, under Texas Health and Safety Code (THSC), Chapter 382; and

(iii) making a determination whether to grant, deny, revoke, suspend, or restrict a license or registration under THSC, Chapter 401.

(B) The commission shall consider compliance history when:

(i) considering the issuance, amendment, or renewal of a permit to discharge effluent comprised primarily of sewage or municipal waste;

(ii) considering if the use or installation of an injection well for the disposal of hazardous waste is in the public interest under TWC, Chapter 27;

(iii) determining whether and under which conditions a preconstruction permit should be renewed; and

(iv) making a licensing decision on an application to process or dispose of low-level radioactive waste from other persons.

(5) Revocation or suspension of a permit. Compliance history classifications shall be used in commission decisions relating to the revocation or suspension of a permit.

(6) Repeat violator permit revocation. In addition to the grounds for revocation or suspension under TWC, §7.302 and §7.303, the commission may revoke a permit of a repeat violator if classified as a poor performer, or for cause, including:

(A) a criminal conviction classified as major under §60.2(c)(1)(E) of this title (relating to Classification);

(B) an unauthorized release, emission, or discharge of pollutants classified as major under §60.2(c)(1)(C) of this title;

(C) repeatedly operating without required authorization; or

(D) documented falsification.

(b) Investigations. If a site is classified as a poor performer, then the agency:

(1) may provide technical assistance to the person to improve the person's compliance with applicable legal requirements;

(2) may increase the number of investigations performed at the site; and

(3) shall perform any investigations unannounced.

(c) Enforcement. For enforcement decisions, the commission may address compliance history and repeat violator issues through both penalty assessment and technical requirements.

(1) Poor performers are subject to any additional oversight necessary to improve environmental compliance.

(2) The commission shall consider compliance history classification when assessing an administrative penalty.

(3) The commission shall enhance an administrative penalty assessed on a repeat violator.

(d) Participation in innovative programs. If the site is classified as a poor performer, then the agency:

(1) may recommend technical assistance; or

(2) may provide assistance or oversight in development of an environmental management system (EMS) and require specific environmental reporting to the agency as part of the EMS; and

(3) shall prohibit that person from participating in the regulatory flexibility program at that site. In addition, a poor performer is prohibited from receiving regulatory incentives under its EMS until its compliance history classification has improved to at least an average performer.

(e) Appeal of classification. A person or site classification may be appealed only if the person or site is classified as either a poor performer or average performer with 30 points or more. An appeal under this subsection shall be subject to the following procedures.

(1) An appeal shall be filed with the executive director no later than 45 days after notice of the classification is posted on the commission's website.

(2) An appeal shall state the grounds for the appeal and the specific relief sought. The appeal must demonstrate that if the specific relief sought is granted, a change in site or person classification will result. The appeal must also include all documentation and argument in support of the appeal.

(3) Upon filing, the appellant shall serve a copy of the appeal including all supporting documentation by certified mail, return receipt requested, as provided in subparagraphs (A) and (B) of this paragraph.

(A) If an appeal of a person's classification is filed by a person other than the person classified, a copy shall be served on the person classified.

(B) If an appeal of a site classification is filed by a person other than the permit holder(s) or the owner of the classified site, a copy shall be served on the owner and permit holder (if different) of the classified site.

(4) Any replies to an appeal must be filed no later than ten days after the filing of the appeal.

(5) In response to a timely filed appeal and any replies, the executive director may affirm or modify the classification.

(6) The executive director shall mail notice of his decision to affirm or modify the classification to the appellant, any person filing a reply, and the persons identified in paragraph (3)(A) and (B) of this subsection no later than 60 days after the filing of the appeal. An appeal is automatically denied on the 61st day after the filing of the appeal unless the executive director mails notice of his decision before that day.

(7) The executive director's decision is effective and for purposes of judicial review, constitutes final and appealable commission action on the date the executive director mails notice of his decision or the date the appeal is automatically denied.

(8) During the pendency of an appeal to the executive director or judicial review of the executive director's decision under this subsection, the agency shall not, for the person or site for which the classification is under appeal or judicial review:

(A) conduct an announced investigation;

(B) grant or renew a flexible permit under THSC, Chapter 382;

(C) allow participation in the regulatory flexibility program under TWC, §5.758; or

(D) grant authority to discharge under a general permit under TWC, §26.040(h).

(f) Corrections of classifications. The executive director, on his own motion or the request of any person, at any time may correct any clerical errors in person or site classifications. If a person classification is corrected, the executive director shall notify the person whose classification has been corrected. If a site classification is corrected, the executive director shall notify the site owner and permit holder (if different). If the correction results in a change to a classification that is subject to appeal under subsection (e) of this section, then an appeal may be filed no later than 45 days after posting of the correction on the commission's website. Clerical errors under this section include typographical errors and mathematical errors.

(g) Compliance history evidence. Any party in a contested case hearing may submit information pertaining to a person's compliance history, including the underlying components of classifications, subject to the requirements of §80.127 of this title (relating to Evidence). A person or site classification itself shall not be a contested issue in a permitting or enforcement hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205180

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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §116.110 and §116.730; new §116.773 and §116.915; and the repeal of §§116.11, 116.120 - 116.123, 116.125, and 116.126. The commission adopts these revisions to Chapter 116 to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 116.915 is adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2945). Sections 116.11, 116.110, 116.120 - 116.123, 116.125, 116.126, 116.730, and 116.773 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES AND REPEALS

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history."

The commission currently has procedures for preparation of compliance summaries for new source review (NSR) permit applications for air emissions under the authority of the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), Chapter 382, and these components are specified in existing §116.122. These requirements are also referred to in existing §116.311 and §116.730. The associated procedures specify that a compliance summary shall cover five years and include the following compliance events and associated information involving the Texas facility that is the subject of the permit application: criminal convictions known to the commission and civil orders, judgments, and decrees; administrative enforcement orders; and compliance proceedings. For facilities with sites outside the State of Texas, the compliance summary shall include criminal convictions and civil judgments, administrative enforcement orders, and notices of violation issued by the United States Environmental Protection Agency (EPA). Furthermore, §116.122 specifies that violations of fugitive emission monitoring and recordkeeping requirements meeting certain criteria shall not be included in the compliance history.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002, issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* as part of this rulemaking to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. The commission proposes that Chapter 60 would be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and further that compliance history specifics currently provided for elsewhere in commission rules be deleted. For this reason, amendments to §116.110 and §116.730, the addition of new §116.773 and §116.915, and the repeal of §§116.11, 116.120 - 116.123, 116.125, and 116.126 are adopted. Other chapters of existing regulations (30 TAC Chapters 50, 55, 122, and 281) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the commission must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being adopted in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only to applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION BY SECTION DISCUSSION

The adopted changes to this chapter will remove all references to compliance summaries and the components of compliance history as currently specified in this chapter, and will, where applicable, provide references to Chapter 60. The commission adopts these modifications because, in implementing certain requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. In order to avoid redundancy or confusion, the commission is removing the compliance history discussion from this chapter.

The commission adopts the repeal of existing §116.11, Compliance History Definitions. The definitions in this section, which apply to NSR permit applications submitted under THSC, Chapter 382, have been superceded by the components specified in §60.1, as well as the adopted new sections to Chapter 60 regarding classification and use of compliance history included

in concurrent rulemaking. Therefore, it is appropriate to repeal §116.11 because it will no longer be relevant or applicable with the (previous) adoption of §60.1, coupled with the adoption of new §60.2 and §60.3, as part of this rulemaking.

The commission adopts an amendment to §116.110, Applicability. The adopted modification will add new §116.110(c) to reflect that compliance history reviews are required under Chapter 60 for certain authorizations listed in §116.110(a) and (b), or in §116.116 (relating to Changes to Facilities). This is a new requirement that must be added in response to implementation of HB 2912, §4.01 and is consistent with §60.1(a). As a result of this addition, existing subsections (c) - (f) of this section are re-lettered as subsections (d) - (g). No changes to the text of these subsections were proposed except for a minor formatting change in re-lettered subsection (d).

The commission adopts the repeal of all sections in Division 2, Compliance History which are: §116.120, Applicability; §116.121, Exemptions; §116.122, Contents of Compliance History; §116.123, Effective Dates; §116.125, Preservation of Existing Rights and Procedures; and §116.126, Voidance of Permit Applications. The components of compliance history as identified in these existing sections, and which apply to permit applications submitted under THSC, Chapter 382, have been superceded by the components specified in §60.1, coupled with the adopted new sections of Chapter 60 regarding classification and use of compliance history included in concurrent rulemaking.

The commission adopts an amendment to §116.730, Compliance History. The adopted modification will change the reference to compliance history requirements in §§116.120 - 116.123, 116.125, and 116.126 which are repealed through this rulemaking, to Chapter 60 in order to accurately reflect the location of applicable compliance history requirements for flexible permit applications.

The commission adopts new §116.773, Compliance History, to reflect that compliance history evaluations are required under Chapter 60 for all permit reviews conducted under Subchapter H of this chapter. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

The commission adopts new §116.915, Compliance History, to reflect that compliance history evaluations are required under Chapter 60 for all permit reviews conducted under Subchapter I of this chapter. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rules do not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of these rules is to protect the environment and reduce the risk to human health from environmental exposure, they are not "major environmental rules" because they do 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. The rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rules merely establish the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rules are designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rules do not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there is no comparable federal law. The adopted rules do not exceed an express requirement of state law, because they are consistent with the requirements of TWC, §5.754. The adopted rules do not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rules are not being adopted solely under the general powers of the agency, but are being adopted under the express requirements of TWC, §5.754. The commission invited public comment on the draft regulatory impact analysis determination and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rules is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, §5.754. Promulgation and enforcement of these adopted rules would not affect private real property which is the subject of the rules because the adopted rules set forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rules do not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking is consistent. The commission invited comment on the consistency of the proposed rulemaking with applicable CMP goals and policies and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 116 at the hearing. During the comment period Association of Electric Companies of Texas, Inc. (AECT); and Reliant Energy (Reliant) filed written comments opposing the proposal in part and suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

AECT and Reliant commented regarding proposed §116.915. AECT and Reliant both requested that the following sentence be added to the end of proposed §116.915: "The permitting of natural gas-fired grandfathered electric generating facility permits (EGFs) under §116.911(d) shall not be subject to compliance history review under Chapter 60." AECT and Reliant asserted that this is appropriate because under proposed §116.911(d), which is being developed under separate rulemaking, "all natural gas-fired EGFs that submitted a Senate Bill 7 application under

§116.911(a) will be 'considered permitted' for the emissions of all air contaminants from such EGFs." AECT and Reliant further asserted that as such, EGFs will involve substantive review and approval or disapproval by the commission, and therefore may not be subject to the compliance history requirements in Chapter 60 based on §60.1(a)(3).

The commission agrees with this comment, and §116.915 as adopted has been revised to incorporate the suggested change. The revised language acknowledges that the initial authorization of certain grandfathered natural gas-fired EGFs will not be subject to a compliance history review, but a modification, or the amendment or renewal of an EGF permit will be subject to a compliance history review under Chapter 60.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.11

STATUTORY AUTHORITY

The repeal is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The repeal is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205172
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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.110

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205173
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Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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DIVISION 2. COMPLIANCE HISTORY

30 TAC §§116.120 - 116.123, 116.125, 116.126

STATUTORY AUTHORITY

The repeals are adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The repeals are also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205174
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §116.730

STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission

to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205175
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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SUBCHAPTER H. VOLUNTARY EMISSION REDUCTION PERMITS
DIVISION 1. GENERAL APPLICABILITY

30 TAC §116.773

STATUTORY AUTHORITY

The new section is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205176
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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SUBCHAPTER I. ELECTRIC GENERATING FACILITY PERMITS

30 TAC §116.915

STATUTORY AUTHORITY

The new section is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

§116.915. Compliance History.

For all permit reviews under this subchapter, compliance history reviews are required under Chapter 60 of this title (relating to Compliance History). However, any grandfathered natural gas-fired electric generating facility (EGF) which is considered permitted for the emissions of all air contaminants under §116.911(d) of this title (relating to Electric Generating Facility Permit Application) will be subject to a compliance history review only for a modification, or the amendment or renewal of the facility's EGF 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.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205177
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Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-5017

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CHAPTER 122. FEDERAL OPERATING PERMITS
SUBCHAPTER B. PERMIT REQUIREMENTS
DIVISION 5. MISCELLANEOUS

30 TAC §122.162

The Texas Natural Resource Conservation Commission (commission) adopts new §122.162, Compliance History Requirements. The commission adopts this new section to Chapter 122, Subchapter B, Division 5, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 122.162 is adopted *with change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2952).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history."

Prior to adoption of this rule, the commission did not have procedures for evaluation of compliance histories for federal operating permit applications for air emissions.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and Texas Health and Safety Code (THSC), Chapters 361, 382, and 401. The commission proposes that Chapter 60 be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters. For this reason, new §122.162 is adopted to ensure operating permit applicants understand and are aware of these new evaluation criteria. Other chapters of existing regulations (30 TAC Chapters 50, 55, 116, and 281) are being adopted currently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasoning.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The adopted new section will specify the new requirements of compliance history evaluation and use. The commission adopts this addition because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history.

The commission adopts new §122.162, Compliance History Requirements. The adopted new section will specify the federal operating permit applications for air emissions which will require the evaluation of compliance histories in decisions pertaining to issuance, significant revisions, reopenings, and renewals of such permits, as a result of implementation of HB 2912.

Adopted new §122.162 states, "The executive director shall conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:" and then lists the specific actions in paragraphs (1) - (10). This subsection is adopted to reflect that one of the conditions which must be met prior to decisions regarding the listed actions being taken is the completion of a compliance history review, as required by Chapter 60. This is a new requirement that must be added in response to implementation of HB 2912, §4.01.

The specific actions included in adopted new paragraphs (1) - (10) include: initial permit issuances under §122.201, Initial Permit Issuance; significant permit revisions under §122.221, Procedures for Significant Permit Revisions; permit reopenings under §122.231(a) or (b), Permit Reopenings; permit renewals under Subchapter C, Division 4, Permit Renewals; initial acid rain permit issuances under §122.410, Operating Permit Interface; acid rain permit revisions for fast-track modifications under §122.414(a)(2), Acid Rain Permit Revisions; acid rain permit modifications under §122.414(a)(3); acid rain permit reopenings under §122.231(a) or (b); initial authorizations to operate under a general operating permit under §122.502, Authorization to Operate; and renewals of authorizations to operate under a general operating permit under §122.505, Renewal of the Authorization to Operate Under a General Operating Permit.

The commission has modified the rule from proposal as follows: changed the word "will" to "shall" in the first sentence for clarity and consistency with modifications made to other chapters in this rulemaking; moved proposed subsection (b) to adopted subsection (a)(9) because it was erroneously separated out in the proposal as a form of authorization not always requiring preparation and consideration of a compliance history priority to issuance; reworded the text of proposed subsection (b) as adopted in subsection (a)(9) for grammatical correctness as a result of moving it; renumbered the paragraph proposed as (a)(9) to (a)(10) as a result of inserting the paragraph before it; and, as a result of deleting proposed subparagraph (b), the "(a)" has been deleted in front of the adopted rule language, as it is now an "implied (a)."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it 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. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because it is consistent with the requirements of TWC, §5.754. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not being adopted solely under the general powers of the agency, but is being adopted under the express requirements of TWC, 5.754 The commission invited public comment on the draft regulatory impact analysis determination and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007. The specific purpose of the adopted rule is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, 5.754. Promulgation and enforcement of this adopted rule would not affect private real property which is the subject of the rule because the adopted rule sets forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking is consistent. The commission invited comment on the consistency of the proposed rulemaking with applicable CMP goals and policies and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 122 at the hearing. During the comment period Public Citizen (PC) filed written comments opposing the proposal in part and suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

PC commented regarding proposed §122.162(a)(8), stating that it believed that compliance histories should be considered not just for those operating permit reopenings considered under §122.231(a) and (b), but also for all other operating permit reopenings. PC went on to say that it "sees no explanation in the rule preamble for exempting reopenings under §122.231(c) from the compliance history rules and believes that such exemption should be eliminated."

The commission responds that §60.1(a)(3) states that the compliance history chapter only applies to forms of authorization that require the agency to make a substantive review prior to approval of the authorization. Reopenings to incorporate requirements under 30 TAC Chapter 106, Subchapter A or Chapter 116 or any term or condition of any preconstruction permit do not receive a "substantive review" as that term is defined in §60.1(a)(3). Therefore, Chapter 60 compliance history review requirements do not apply to reopenings under §122.231(c). No changes have been made in response to this comment.

STATUTORY AUTHORITY

The new section is adopted under THSC, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The new section is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

§122.162. Compliance History Requirements.

The executive director shall conduct compliance history reviews under Chapter 60 of this title (relating to Compliance History) for the following actions:

(1) initial permit issuances under §122.201 of this title (relating to Initial Permit Issuance);

(2) significant permit revisions under §122.221 of this title (relating to Procedures for Significant Permit Revisions);

(3) permit reopenings under §122.231(a) or (b) of this title (relating to Permit Reopenings);

(4) permit renewals under Subchapter C, Division 4 of this chapter (relating to Permit Renewals);

(5) initial acid rain permit issuances under §122.410 of this title (relating to Operating Permit Interface);

(6) acid rain permit revisions for fast-track modifications under §122.414(a)(2) of this title (relating to Acid Rain Permit Revisions);

(7) acid rain permit modifications under §122.414(a)(3) of this title;

(8) acid rain permit reopenings under §122.231(a) or (b) of this title; and

(9) authorizations to operate under a general operating permit under §122.502 of this title (relating to Authorization to Operate); and

(10) renewals of authorizations to operate under a general operating permit under §122.505 of this title (relating to Renewal of the Authorization to Operate Under a General Operating 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.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205178
Stephanie Bergeron
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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
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CHAPTER 281. APPLICATIONS PROCESSING
SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.21

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §281.21, Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary. The commission adopts these revisions to Chapter 281, Subchapter A, to implement certain requirements of House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, regarding compliance history. Section 281.21 is adopted *without change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2959).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

HB 2912, §4.01, amended Texas Water Code (TWC), Chapter 5, Texas Natural Resource Conservation Commission, by adding Subchapter Q, Performance-Based Regulation. New Subchapter Q of TWC, §5.753, Standard For Evaluating Compliance History, requires the commission to "develop a uniform standard for evaluating compliance history." Section 5.754, Classification and Use of Compliance History, goes on to require the commission to "establish a set of standards for the classification of a person's compliance history."

The commission currently has procedures for preparation of compliance summaries for permit applications for waste disposal activities conducted under the authority of TWC, Chapters 26 and 27; the Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; and the Texas Radiation Control Act, THSC, Chapter 401, which are specified in existing §281.21(d). These current procedures specify that a compliance summary shall cover at least the two-year period preceding the date on which the technical review is completed and shall include: 1) the date(s) and descriptions of any citizen complaints received; 2) the date(s) of all agency inspections, and for each inspection, whether a condition of noncompliance was alleged by the inspector and a brief description of the resulting environmental impact; 3) the date(s) of any agency enforcement action and the applicant's response to such action; 4) the date(s) and description of any incident the applicant reported to the agency which required implementation of the facility contingency plan, if applicable; and 5) the name and telephone number of a person to contact for additional compliance history.

30 TAC Chapter 60, Compliance History, §60.1, was adopted December 19, 2001 and published in the January 4, 2002 issue of the *Texas Register* (27 TexReg 191). Section 60.1 specifies the components to be considered in evaluating compliance history for permit decisions, as well as other specified types of authorizations, including licenses, certificates, registrations, approvals, permits by rule, standard permits, or other forms of authorization requiring agency approval, to implement the requirement of HB 2912, §4.01 to "develop a uniform standard for evaluating compliance history." New sections to Chapter 60 are being adopted concurrently in this issue of the *Texas Register* as part of this rulemaking to implement further requirements of HB 2912, §4.01 to establish rules for the classification and use of compliance history. HB 2912 limits the use of compliance history to programs under the jurisdiction of the commission under TWC, Chapters 26 and 27, and THSC, Chapters 361, 382, and 401. The commission proposes that Chapter 60 would be the one location in commission rules for compliance history requirements pertaining to programs under the jurisdiction of these chapters, and further that compliance history specifics currently provided for elsewhere in commission rules be deleted. For this reason, the amendment to §281.21 is adopted. Other chapters of existing regulations (30 TAC Chapters 50, 55, 116, and 122) are being adopted concurrently in this issue of the *Texas Register* for modification as part of this rulemaking for similar reasons.

The commission adopted a compliance period of five years in §60.1. The period of time will be based on the five-year period preceding the date the permit application is received by the executive director. According to HB 2912, §18.05, the agency must begin using the new components of compliance history for actions taken by the agency on or after February 1, 2002. Additionally, §18.05 specifies that classification and use rules, which are currently being adopted in Chapter 60, will apply in the consideration of compliance history for decisions by the agency relating to the issuance, amendment, modification, or renewal of permits under TWC, §§5.754, 26.028, 26.0281, 26.040, and 27.018, and THSC, §§361.084, 361.088, 361.089, 382.0518, 382.055, 382.056, 401.110, and 401.112, only for applications submitted on or after September 1, 2002; in the consideration of compliance history for actions taken by the agency relating to inspections and flexible permitting, effective September 1, 2002; and in the consideration of compliance history in decisions of the commission relating to the suspension or revocation of a permit or the imposition of a penalty in a matter under the jurisdiction of the commission, only to a proceeding that is initiated or an action that is brought on or after September 1, 2002. Use of compliance history for innovative programs (except flexible permits) and other forms of authorization will begin September 1, 2002. These applicability dates are specified in §60.1.

SECTION DISCUSSION

The adopted changes to §281.21 will remove all references to compliance summaries and the components of compliance history. The commission adopts these modifications because, in implementing the requirements of HB 2912, it has created a new chapter to contain the regulations pertaining to compliance history. In order to avoid redundancy or confusion, the commission is removing the compliance history discussion from §281.21, leaving only a reference to the fact that, upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60, together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person.

The commission adopts modification of the title of §281.21 from "Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary" to "Draft Permit, Technical Summary, Fact Sheet, and Compliance History" to reflect the change in terminology from "compliance summary" to "compliance history" to comport with Chapter 60.

The commission adopts minor administrative changes to §281.21(a) to use the acronyms for the Texas Solid Waste Disposal Act and the Texas Radiation Control Act because they are spelled out in 30 TAC Chapter 3, Definitions. No changes to §281.21(b) - (c) were proposed.

The commission adopts modification to §281.21(d) by deleting all but one sentence from this subsection. Additionally, the remaining sentence is modified to reflect the change in terminology from "compliance summary" to "compliance history" and to reference, with regard to compliance history, Chapter 60. This modification is adopted because the components of compliance history identified in this subsection which apply to permit applications submitted under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 401, have been superceded by the components specified in §60.1. Specifically, adopted §281.21(d) will read, "Upon completion of technical review and prior to issuance of public notice, the executive director shall send the compliance history prepared under Chapter 60 of this title (relating to Compliance History), together with the draft permit, technical summary if applicable, and environmental analysis if applicable, to the applicant and on request, to any other person."

The commission adopts minor administrative changes to §281.21(e) to spell out Texas Pollutant Discharge Elimination Systems, and in subsection (e)(2) to lower case the word "program" for consistency. No changes to §281.21(f) were proposed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because the adopted rule does not meet the definition of a "major environmental rule" as defined in that statute. Although the intent of this rule is to protect the environment and reduce the risk to human health from environmental exposure, it is not a "major environmental rule" because it 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. The rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rule merely establishes the standards for the classification and use of a person's compliance history. The requirements of establishing standards for the classification and use of a person's compliance history are contained in TWC, §5.754. The reason there is no adverse effect in a material way on the environment, or the public health and safety of the state or a sector of the state is because the adopted rule is designed to protect the environment, the public health, and the public safety of the state and all sectors of the state. Furthermore, the adopted rule does not meet any of the four applicability requirements listed in §2001.0225(a). The adopted rule does not exceed a standard set by federal law, because there is no comparable federal law. The adopted rule does not exceed an express requirement of state law, because it is consistent with the requirements of TWC, §5.754. The adopted rule does not exceed the requirements of a delegation agreement because there is no applicable delegation agreement. The rule is not being adopted solely under the general powers of the agency, but under the express requirements of TWC, §5.754. The commission invited public comment on the draft regulatory impact analysis determination and received no comments in response.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adopted rule in accordance with Texas Government Code, §2007.043. The specific purpose of the adopted rule is to establish a set of standards for the classification and use of a person's compliance history, as required by TWC, 5.754. Promulgation and enforcement of the adopted rule would not affect private real property which is the subject of the rule because the adopted rule sets forth the standards for the classification and use of a person's compliance history, as required by TWC, §5.754. The subject adopted rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the rulemaking will not have direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. The commission invited public comment on the CMP determination and received no comments in response.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on May 1, 2002, at the Texas Natural Resource Conservation Commission complex. No individuals provided oral comments related to Chapter 281 at the hearing.

STATUTORY AUTHORITY

The amendment is adopted under THSC, §361.017 and §361.024, which provides the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act; and THSC, §401.051, which provides the commission with authority to adopt rules and guidelines relating to the control of sources of radiation under the Texas Radiation Control Act. The amendment is also authorized under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.754, which requires the commission to adopt rules establishing the classification and use of compliance history.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205179
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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
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CHAPTER 285. ON-SITE SEWAGE FACILITIES

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §285.10, Delegation to Authorized Agents, §285.12, Review of Locally Administered Programs, and §285.33, Criteria for Effluent Disposal Systems. The commission also adopts new §285.13, Revocation of Authorized Agent Delegation and §285.14, Charge-back Fee. Sections 285.12 - 285.14 are adopted *with changes* to the proposed text as published in the March 29, 2002 issue of the *Texas Register* (27 TexReg 2403). Sections 285.10 and 285.33 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Charge-back fee

Texas Health and Safety Code (THSC), §366.059(b), as amended by House Bill (HB) 2912, §3.09, 77th Legislature, 2001, provides the commission with the authority to charge local governmental entities a charge-back fee if the local

governmental entity repeals its order, ordinance, or resolution that established the entity as an authorized agent (AA). Section 366.059(b) also provides the commission with the authority to charge a local governmental entity a charge-back fee if its authorization as an AA is revoked by the commission. HB 2912, §3.09, mandates that the charge-back fee be reasonable and appropriate and not exceed $500 per on-site sewage facility (OSSF) permit. Finally, HB 2912, §3.09, does not allow the commission to assess a charge-back fee to local governmental entities that, due to a material change in the commission's rules under this chapter, have repealed their order, ordinance, or resolution or have lost their delegation as an AA.

The charge-back fee will cover some of the administrative costs that are not covered by the fees collected by the executive director and that are incurred by the agency when the executive director administers the OSSF program in a local governmental entity's area of jurisdiction. Until now, the commission has not defined its authority nor specified the situations under which the agency will assess charge-back fees. The purpose of §366.059(b) is to ensure that the agency is able to recover the actual cost of implementing the program in areas that the agency does not currently manage. For communities that have not received delegation, the agency covers the cost of managing the program. Conversely, AAs must cover their own costs.

In many cases, local administration of the program is more efficient and more responsive than it is when the agency administers the program. Because local administration of the program requires less travel, it is more timely and cost-efficient. THSC, Chapter 366 provides for the delegation of the program to local governmental entities if they meet the requirements for implementing the program. This has been reinforced by legislative actions in the last several years. A legislative review of the program by the House of Representatives Committee on Natural Resources (Committee) in 1996 emphasized that the intent of the law is that the program be delegated to local governmental entities. In its Interim Report to the 75th Texas Legislature, Finding No. 2, the Committee determined that, barring significant appropriations increases, the commission does not have the ability to adequately administer the program in local areas. The Committee found that delegation of the OSSF program should not be compelled until the executive director has had an opportunity to encourage local entities to seek regional cooperative programs. In response to the recommendations, the executive director has visited 104 local governmental entities throughout the state to encourage local assumption of the program. The commission recognizes the financial burdens that come with implementing the program. As a result, the major focus of these meetings has been to explore the possibility of local governments working together to implement the OSSF program or to participate in interlocal agreements with regional authorities to implement the program. As a result of these efforts, 15 additional counties have become AAs since 1997. The executive director continues to work with local entities to develop fiscally sound options.

Since the committee report, the legislature has continued to limit appropriations to the commission for the implementation of the program, expecting the commission to oversee local programs, instead of administering local programs from the state level. The legislature's expectation that the OSSF program will be administered on the local level was also seen in a 1997 amendment to the OSSF law. In HB 1785 of the 75th Legislative Session, 1997, the legislature amended the law to require electric utilities to provide a weekly list of new service connections in unincorporated areas to the county judge. Thus, since the local utility must be notified, it follows that the legislature intended that the OSSF program be overseen at the local level.

Language has been included in adopted §285.14 limiting the fee, which must be reasonable and appropriate, to a maximum of $500 that may be charged to local governments for each OSSF permit issued by the executive director. This fee is intended to help cover the difference between the permit fee charged by the executive director and the executive director's actual cost of issuing a permit. This fee will provide the executive director with the ability to cover the costs incurred for issuing permits where the local governmental entities have chosen to cease to administer a local program or the commission has revoked their delegation because of noncompliance with the rules. The rule specifies that the amount of the charge-back fee will be based on the type and number of OSSFs typically installed and inspected in the local governmental entity's jurisdiction, along with expected travel expenses for the executive director.

THSC, §366.059, provides in part that "The commission may assess a reasonable and appropriate charge-back fee, not to exceed $500, to a local governmental entity for which the commission issues permits for administrative costs relating to the permitting function that are not covered by the permit fees collected." The executive director determined that it is necessary for the agency to recover the costs of implementing the OSSF program. Because the charge-back fee is simply a mechanism for the executive director to recover some administrative costs, there will be no additional full-time equivalents added to the OSSF program as a direct result of the charge-back fee. Therefore, the charge-back fee is not expected to have a substantial impact on the time it takes the executive director to process a permit. If the commission determines that a charge-back fee to local governmental entities is appropriate, the fee will not exceed $500 per OSSF permit.

The billing process for these charge-back fees is provided.

Tire Chips

In 1992, the commission implemented the Waste Tire Program to address problem stockpiles of scrap tires that were creating health or safety hazards in Texas. Many of the tires that had been stockpiled were chipped or shredded tires. One of the end uses for the tire shreds or chips has been as media for OSSF systems. In February 1997, a set of OSSF rules became effective that allowed chipped tires to be used as media in standard absorptive drainfields. While §285.33(a)(1)(B) of the 1997 rules required the size of the media used in standard absorptive drainfields to range from 0.75 inches to 2.0 inches, §285.33(b)(1)(B)(i)(II) of the 1997 rules allowed tires chips larger than two inches as measured along their greatest dimension to be used on a case-by-case basis.

In May 2001, the commission adopted a new set of OSSF rules. In this rulemaking, the use of a tire chip larger than two inches as measured along its greatest dimension was dropped from the rule. As a result, no tire chips larger than two inches as measured at their greatest dimension can be used as media in standard absorptive drainfields. Currently, there are approximately 59 million waste tire units (WTUs) stored in stockpiles in Texas. A large percentage of these WTUs are three-inch by three-inch chips which could be used as an acceptable medium in OSSF systems.

Therefore, to allow the larger tire chips to be used as media in standard absorptive drainfields, language has been included in this adopted rulemaking in §285.33(b)(1)(B) to allow use of a

tire chip that does not exceed three inches as measured along its greatest dimension.

SECTION BY SECTION DISCUSSION

Section 285.10, Delegation to Authorized Agents, is adopted without changes to the proposed rule. This section adds the word "written" to subsection (b)(4)(B) to clarify that the executive director will review the draft order, ordinance, or resolution and will provide written comments to the local governmental entity within 30 days of receipt. Additionally, a new subsection (d)(5) is added to incorporate the charge-back fee language from HB 2912, Article 3, which allows an AA to relinquish its OSSF authority due to a material change as described in Chapter 285. The existing language in subsection (e)(1) - (5) is moved to new §285.13 for better organization of Subchapter B. Further, the commission defined the acronyms for "on-site sewage facility" and "Texas Health and Safety Code" the first time they are used in this section and deleted the word "the" in front of both "Texas Health and Safety Code" and "THSC" throughout this section to bring this section into agreement with the remainder of Chapter 285. Finally, the commission made additional administrative changes in subsection (b) to bring the subsection into agreement with the remainder of Chapter 285.

Section 285.12, Review of Locally Administered Programs, is adopted with changes to the proposed rule. This section adds language to existing subsection (a) and adds new subsection (b) to outline the process the executive director will follow to perform a compliance review of an AA's program. This new language provides more detail to AAs about the process they can expect the executive director to follow. Subsection (a) provides that the executive director will review the AA's administrative, planning materials review, permitting, inspection, and complaint resolution processes; will meet with the AA at the end of the review to discuss the findings; and will prepare a report of the findings and send a copy to the AA by certified mail within 60 days after completing the review.

The commission also made an administrative change by deleting the word "the" from in front of "Texas Health and Safety Code" in subsection (a) to bring this subsection into agreement with the remainder of Chapter 285.

Subsection (b) provides that the AA will have 45 days from the date of the executive director's letter to respond to the executive director on how the AA will address all deficiencies noted during the review. The commission made grammatical changes to subsection (b) to clarify that the AA must respond in writing within 45 days after the date of the executive director's report. Additionally, the executive director will offer to assist the AA, including providing the AA an opportunity for training. Subsection (b) also provides that if the executive director finds that the AA's program is deficient because it does not consistently provide required documentation of the permitting, inspection, and complaint processes and the AA's response to the executive director's findings is not adequate or if the AA fails to respond, the executive director will continue to work with the AA until the deficiencies are resolved. The commission added language to clarify that all communication between the executive director and AAs will be made through additional letters or by telephone. If the executive director finds that the AA's response to the executive director's findings is adequate, the executive director will take no further action. Further, subsection (b) allows the executive director to begin the process of revoking an AA's delegation under §285.13 if the executive director finds that the AA's program does not consistently enforce the permitting, planning, construction, operation, and maintenance of OSSF systems and the AA's response to the executive director's findings is not adequate to correct the deficiencies or is endangering human health or safety. For clarity, the commission changed, "...after one year of the first review..." to "...one year after the first review...." Finally, subsection (b) provides that the executive director will schedule another review of the AA's program one year after the first compliance review if the executive director finds that the response to the executive director's findings is adequate to correct the deficiencies.

New §285.13, Revocation of Authorized Agent Delegation, is adopted with changes to the proposed rule. This section allows the commission to revoke an AA's delegated authority for failure to implement, administer, or enforce Chapter 285. For clarity, the commission added the words "the authorized agent's" in front of the words "failure to implement, administer, or enforce..." and deleted the word "and" at the end of §285.13(b)(1).

This section also provides the process the executive director will follow when revoking an AA's delegation. If the executive director determines that there is a reason to revoke an AA's delegation, the executive director will meet with the AA's mayor, county judge, general manager, chairman of the board, or other authorized person to discuss the executive director's findings, the AA's response, and possible revocation. The executive director will prepare a letter documenting the meeting and forward it to the AA within ten days after the meeting. The executive director will also provide the AA 60 days from the date of the letter documenting the meeting to allow other AAs to review the executive director's decision. The AA must respond to the executive director in writing within 90 days of the date of the letter documenting the meeting. To clarify that the AA must respond within 90 days after the date of the executive director's letter, the commission replaced the word "of" with the word "after." If the executive director determines that the AA will take appropriate corrective action, the executive director will respond to the AA in writing that the revocation process will be discontinued and will schedule another review of the AA's program one year after the first compliance review. To clarify that the executive director will schedule another review of the AAs program one year after the first review, the commission changed "...after one year of the first review..." to "...one year after the first review...." If the executive director determines that the AA will not take appropriate corrective action, the executive director will file a petition with the commission seeking revocation of the AA's program and initiate the hearing process with the State Office of Administrative Hearings (SOAH). This subsection also outlines the details the executive director will follow for a hearing. To clarify that the notice for the public hearing must be published in a regularly published newspaper of general circulation in the local governmental entity's area of jurisdiction, the commission added the words "local governmental" before the word "entity's" in subsection (e)(3).

In subsection (e)(4), the commission removed the word "its" for clarity. After the hearing, the commission may either issue an order to revoke the delegation, issue an order requiring the AA to take certain action, or take no action. If the commission revokes the AA's delegation, the commission must determine, on a case-by-case basis, if a charge-back fee will be assessed. If the commission assesses a charge-back fee, the order must include the charge-back fee amount. If the commission revokes the AA delegation, the executive director will assume responsibility for the OSSF program in the AA's jurisdiction on the date of the revocation. The commission added language to §285.13(h)

to clarify that assumption of the OSSF program by the executive director will be effective on the date of the revocation. In the event that an AA consents to revocation of its delegation in writing before the hearing, the executive director may revoke the delegation without a hearing.

New §285.14, Charge-back Fee, is adopted with changes to the proposed rule. This section allows the commission to assess a reasonable and appropriate charge-back fee, not to exceed $500 per permit, to local governmental entities that either have repealed an OSSF order, ordinance, or resolution, or have their delegation revoked by the commission according to §285.13. The charge-back fee will be assessed for all OSSF permits issued within that entity's area of jurisdiction and will be based on the executive director's actual cost of issuing a permit in that jurisdiction and on the number and type of OSSF systems being installed and inspected, travel expenses, and time spent on the review of planning materials. For clarity, the commission added the words "local governmental" in front of the word "entity" in §285.14(a) and added an "s" to "OSSF" in §285.14(a)(1)(A). This section provides that if the local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity agrees to the amount of the charge-back fee, the executive director will recommend the commission approve the charge-back fee. Further, this section provides that if the local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity does not agree to the amount of the charge-back fee, the commission will refer the charge-back fee to SOAH for a contested case hearing. The charge-back fee will not exceed $500 per permit. The charge-back fee is authorized under THSC, §366.059. The executive director will bill the local governmental entities for charge-back fees no more than quarterly and no less than annually. Because the commission would not be able to determine when the local governmental entity received the invoice, the commission changed the due date from "...within 30 days after the receipt of invoice..." to "...within 30 days from the invoice date." Late payments are subject to penalties and interest according to 30 TAC Chapter 12.

Section 285.33, Criteria for Effluent Disposal Systems, is adopted without changes to the proposed rule. This section adds new language to §285.33(b)(1)(B) and (B)(i)(II) that allows chipped tires that do not exceed three inches as measured along their greatest dimension to be used as media in a standard absorptive drainfield. Additionally, grammatical changes were made in §285.33(b)(1)(B) to accommodate the new language in this section.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule. "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 major purpose of this rulemaking is to provide a mechanism for the commission to partially recover costs incurred when the commission assumes responsibility for administering a program that was previously administered by a local governmental entity. The second purpose of this rulemaking is to delineate the size of chipped tires that can be used as media in excavations. The existing rule provided that chipped tires measuring 0.75 inches to 2.0 inches could be used as media in excavations; the adopted rule provides that the tire chips can be up to three inches. Protection of the environment may be a result of this rulemaking, but it is not the specific intent.

The adopted rules clarify and incorporate charge-back fee provisions from HB 2912, §3.09, 77th Legislature, 2001, into Subchapter B. These adopted rules are not a major environmental rule and do not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, §2001.0225, these rules do not exceed a standard set by federal law or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because there is no federal authorization for OSSFs. The United States Environmental Protection Agency does not have a federal program for OSSFs and does not establish any requirements for states implementing their own OSSF program.

These rules are not adopted solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements that will be implemented through these rules are expressly defined under THSC, Chapter 366, which requires the commission to enact rules governing the installation of OSSFs.

TAKINGS IMPACT STATEMENT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.43. The purpose of these revisions is to delineate the commission's authority to impose a charge-back fee on local governmental entities that have either repealed their order, ordinance, or resolution or to local governmental entities that have had their delegation repealed by the commission.

The specific purpose of the adopted rules is to clarify and incorporate charge-back fee provisions from HB 2912, §3.09, 77th Legislature, 2001, into Subchapter B and to allow chipped tires that do not exceed three inches as measured along their greatest dimension to be used as media in a standard absorptive drainfield.

These rules are adopted in an effort to reasonably fulfill an obligation mandated by state law to implement the OSSF program and will substantially advance the implementation of the requirements under THSC, Chapter 366. Promulgation and enforcement of these adopted rules will not affect private real property. Therefore, the commission has determined that these adopted rules will not result in a takings.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the adopted rules and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). The Coastal Coordination Act requires that applicable goals and policies of the CMP be considered during the rulemaking process. The commission has prepared a consistency determination for the adopted rules pursuant to 31 TAC §505.22 and has found that the adopted rulemaking is consistent with the applicable CMP goals and policies.

The goals of the CMP are: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP goals applicable to these adopted rules state that rules governing OSSFs shall require those systems to be located, designed, operated, inspected, and maintained so as to prevent release of pollutants that may adversely affect coastal waters. Promulgation and enforcement of these adopted rules will not violate any standards identified in the applicable CMP goals because the adopted rules seek only to incorporate the charge-back fee provisions in HB 2912 and more clearly define the process the executive director will have to follow when reviewing and revoking an AA's delegated authority and to allow chipped tires that do not exceed three inches as measured along their greatest dimension to be used as media in a standard absorptive drainfield.

PUBLIC COMMENT

A public hearing was held in Austin on April 23, 2002 at the Texas Natural Resource Conservation Commission complex. No comments were received at the hearing. The comment period closed on Monday, April 29, 2002. The commission received written comments from the County Judges and Commissioners Association of Texas (CJCAT), the Texas Association of Counties (TAC), and the Texas Conference of Urban Counties (TCUC).

TAC generally supported, in part, certain provisions of the proposed rulemaking. CJCAT, TAC, and TCUC are generally opposed to the concept of a charge-back fee. TCUC is generally opposed to the charge-back fee proposal. CJCAT suggested changes to the proposal as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General

CJCAT commented that the proposed rules are an improved effort to implement the requirements of HB 2912.

The commission appreciates the comment in support of the rule.

TAC commented that it appreciates the professionalism, the cooperation, and the assistance of the staff that they have worked with and "the willingness of agency staff to listen to our concerns and to draft rules that at least limit the applicability of the fee."

The commission appreciates the comments in support of its staff.

TAC commented that it supports the new provision of the rule that directs the executive director to provide training to AAs on how to comply with the rules. Additionally, TAC supports the new provisions that allow the executive director's findings, regarding an AA's possible revocation, to be reviewed by other AAs.

The commission appreciates the comment in support of these provisions of the rule.

CJCAT requests that the commission establish an "Authorized Agent Review Committee to consider all proposed revocations of authorized agent status."

The commission declines to create an "Authorized Agent Review Committee." Section 285.13(b)(3) provides AAs with the opportunity to have other AAs review the executive director's findings. CJCAT did not explain the concept of an AA review committee in its comment letter; therefore, the executive director determined that §285.13(b)(3) provides adequate review. This section provides that if the executive director determines that cause exists for revocation, the executive director shall provide the AA 60 days after the date of the letter described in §285.13(b)(2) to allow other AAs to review the executive director's findings if requested by the AA. No change has been made in response to this comment.

CJCAT commented that many counties are not participating in the OSSF program because the counties do not feel that the commission's staff will fairly and reasonably administer the AA program and that a review committee could increase confidence in the process.

The commission disagrees that the staff does not fairly and reasonably administer the AA program. Of the 254 counties in Texas, 180 counties (71%) are AAs. Additionally, there are 115 cities and 16 river authorities or water districts that are AAs. Local governmental entities that do not participate in the program have indicated to the commission that they have not become AAs for the OSSF program because of insufficient staff and financial resources. The executive director has not received any other complaints that the commission's staff cannot fairly and reasonable administer the AA program. No change has been made in response to this comment.

TAC commented that they are "opposed to the concept and reality of a charge-back fee." TAC stated that the OSSF Program "is a state program that counties and other local governments agree to administer locally by voluntarily becoming authorized agent." TAC also commented that "{T}o introduce into this voluntary, cooperative system something coercive like a charge-back fee strikes us as being at cross-purposes to this voluntary arrangement."

Serving as an AA is voluntary; however, legislative intent is clear that the commission delegate the OSSF program to local governmental entities that meet the requirements in THSC, Chapter 366.

Delegation to local governmental entities has been reinforced by legislative actions in the last several years. A legislative review of the program by the House of Representatives Committee on Natural Resources (Committee) in 1996 emphasized that the intent of the law is that the program be delegated to local governmental entities. In its Interim Report to the 75th Texas Legislature, Finding No. 2, the Committee determined that, barring significant appropriations increases, the commission does not have the ability to adequately administer the program in local areas. Since the Committee report, the legislature has continued to limit appropriations to the commission for the implementation of the program, expecting the commission to oversee local programs, instead of implementing local programs from the state level.

The legislature's expectation that the OSSF program will be implemented on the local level was also emphasized in a 1997 amendment to the OSSF law. In HB 1785 of the 75th Legislative Session, the legislature amended the law to require electric utilities to provide a weekly list of new service connections in unincorporated areas to the county judge. This provision assumes that the program will be locally administered, so electric utilities

are only required to provide the lists to the county, not to the executive director.

Finally, in 2001 during the 77th Legislative Session, the legislature again considered delegation to local governmental entities by looking specifically at the charge-back fee. HB 2912, §3.09, modified the existing statutory provisions relating to the charge-back fee but did not remove them from the statute. No changes have been made in response to these comments.

TAC commented that the charge-back fee adds to the financial burden of counties.

The commission recognizes that there are financial burdens that come with a charge-back fee. Unless the commission makes a material change to the rules, the commission will only assess a charge- back fee to local governmental entities that either relinquish the OSSF program or have the program revoked. No change has been made in response to this comment.

TCUC commented that they are opposed to a charge-back fee and believe that a charge-back fee is "counter-productive and hostile to any concept of mutual interest or partnership."

The commission responds that the legislature provided the charge-back fee as a mechanism for the commission to recover its actual costs for implementing the OSSF program in jurisdictions where the executive director implements the program. The charge-back fee will be an incentive to local governmental entities that received delegation to continue to run the program according to the rules. Further, the commission does not agree that a charge-back fee is hostile to any concept of mutual interest or partnership.

These rules will encourage cooperation between the executive director's staff and the AAs because these rules included provisions that require the commission and the local governmental entities to work together before the commission reaches the revocation stage. If the executive director finds that the AA's program is deficient, the executive director is required by §285.12(b) to offer assistance, including additional training, to the AA. Specifically, §285.12(b)(1) requires the executive director to work with the AA until deficiencies relating to required documentation of the permitting, inspection, and compliance investigation processes are resolved. Section 285.13(b)(1) requires the executive director to meet with the AA's county judge, mayor, general manager, or chairman of the board, or other authorized individual to discuss the executive director's findings, the AA's response to the findings, and the possible revocation.

Thus, §285.12 and §285.13 provide numerous opportunities for the AA and the executive director to work together to resolve any deficiencies the executive director may have found relating to the AA's program. No change has been made in response to this comment.

§285.10, Delegation to Authorized Agents

CJCAT commented that the proposed rule does not address the loss of AA status by commission action as a result of a material change in the rules.

The commission will not initiate revocation of an AA's delegation of the OSSF program until the executive director and the AA have worked through the processes outlined in §285.12, Review of Locally Administered Programs and §285.13, Revocation of Authorized Agent Delegation. The processes in these sections provide ample opportunity for an AA to notify the executive director that the reason the AA cannot comply with Chapter 285 is because the commission made a material change to Chapter 285. No change has been made in response to this comment.

TCUC commented that the proposed rule exceeds statutory authority because it limits the ability of a local government to avoid a charge back fee by relinquishing the program due to a material change in the program. CJCAT requests that the commission withdraw the definition of "Material change" in §285.10(d)(5) and substitute the language in THSC, §366.059(d). CJCAT commented that the definition of "Material change" in the rule is limited and not supported by the statute. TCUC stated that the definition of "Material change" is not found in the statute. CJCAT commented that the definition of "Material change" would deny counties the ability to withdraw, without penalty, from the program if the commission completely revised the OSSF program.

The commission disagrees that the rule exceeds statutory authority. THSC, §366.05(d) limits the commission's authority to assess a charge-back fee to local governmental entities that have repealed their order, ordinance, or resolution or that have lost their designation as an AA due to a material change in the commission's rules under THSC, Chapter 366. The commission included these limits in §285.10(d)(5). The commission, however, removed the definition of "Material change" in response to comments, to continue to foster a cooperative relationship with AAs.

TCUC commented that the "statute limits the commission's authority to assess fees against a local entity that decides to drop the program for any material change in Chapter 285, TAC. The statute contemplates a material change that may or may not directly impact local agent financial or human resources, and may simply be a change in policy by the commission."

A review of the legislative history does not indicate what the legislature intended by the term, "material change." Additionally, §366.059(d) states, "...lost its designation as an authorized agent due to a material change in the commissions *rules*...." *Emphasis added*. Thus, the commission may not charge a charge-back fee based on a change in its policy that does not result in a corresponding rule change. The commission included the definition of "Material change" in the rule to clarify what conditions constitute a material change. No change has been made in response to this comment.

SUBCHAPTER B. LOCAL ADMINISTRATION OF THE OSSF PROGRAM

30 TAC §§285.10, 285.12 - 285.14

STATUTORY AUTHORITY

The amendments and new sections are adopted under the authority granted to the commission by the Texas Legislature in THSC, §366.011. The new and amended sections implement THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in THSC, §366.001. The commission has authority to adopt rules to implement the requirements of THSC, §366.053(b), which requires the adoption of rules for permitting; THSC, §366.059, which requires adoption of rules addressing permit fees; and THSC, §366.072, which provides for the adoption of rules for registration.

The amendments and new sections are also adopted under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over

other areas of responsibility as assigned to the commission under TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(15); TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC; and TWC, §5.311, which authorizes the commission to delegate its hearing responsibilities to SOAH.

§285.12. Review of Locally Administered Programs.

(a) Not more than once a year, the executive director shall review an authorized agent's program for compliance with requirements established by Texas Health and Safety Code, Chapter 366; this chapter; and the order, ordinance, or resolution adopted by the authorized agent.

(1) During the review the executive director shall:

(A) evaluate the authorized agent's:

(i) administrative processes;

(ii) planning material review processes;

(iii) permitting processes;

(iv) inspection processes; and

(v) complaint resolution processes;

(B) conduct an interview with the authorized agent's representative, to present the results of the executive director's review.

(2) After the executive director completes the review, the executive director shall:

(A) prepare a written report of the executive director's findings; and

(B) forward a copy of the report to the authorized agent by certified mail within 60 days after completing the review.

(b) If as a result of the executive director's review the executive director determines that the authorized agent's program is deficient, the authorized agent must respond in writing to the executive director within 45 days after the date of the executive director's report with a plan to address all deficiencies noted during the review. The executive director shall offer assistance to the authorized agent including providing training to the authorized agent's designated representative. Additionally, if the authorized agent's program is:

(1) deficient because it does not consistently provide required documentation of the permitting, inspection, and compliance investigation processes the executive director shall review the authorized agent's response and determine if the response is adequate. If the response is adequate, the executive director shall not take further action. If the authorized agent's response is not adequate, or the authorized agent fails to respond, the executive director shall continue to work with the authorized agent until the deficiencies are resolved by making contact with the authorized agent through additional letters or by telephone;

(2) deficient because it does not consistently enforce the permitting, planning, construction, operation, and maintenance of on-site sewage facility systems, the executive director shall review the authorized agent's response and determine if adequate measures will be taken to correct the deficiencies. If the response is adequate, the executive director will schedule another review of the authorized agent's program one year after the first review to verify that the deficiencies have been corrected. If the authorized agent's response is not adequate, the authorized agent fails to respond, or the executive director's next annual review determines that the authorized agent's program has the same deficiencies as noted during the previous review, the executive director will begin the process of revoking the authorized agent's delegated authority under §285.13 of this title (relating to Revocation of Authorized Agent Delegation); or

(3) endangering human health or safety, the executive director will begin the process of revoking the authorized agent's delegated authority under §285.13 of this title.

§285.13. Revocation of Authorized Agent Delegation.

(a) An authorized agent's on-site sewage facility (OSSF) order, ordinance, or resolution may be revoked by order of the commission, after notice and an opportunity for a hearing, for the authorized agent's failure to implement, administer, or enforce Texas Health and Safety Code, this chapter, or its order, ordinance, or resolution.

(b) If the executive director determines that cause exists for revocation, the executive director shall:

(1) meet with the authorized agent's county judge, mayor, general manager, or chairman of the board, or other authorized individual, to discuss the report of the executive director's findings, the authorized agent's response to the findings, and the possible revocation;

(2) prepare a letter documenting the meeting in paragraph (1) of this subsection and forward it to the authorized agent within ten days after the meeting; and

(3) provide the authorized agent 60 days after the date of the letter in paragraph (2) of this subsection to allow other authorized agents to review the executive director's findings if requested by the authorized agent.

(c) The authorized agent shall respond to the executive director's letter in subsection (b)(2) of this section in writing within 90 days after the date of the executive director's letter.

(d) If the executive director determines from the authorized agent's response that sufficient action will be taken to consistently enforce the OSSF program, the executive director will:

(1) respond to the authorized agent that the revocation process will be discontinued; and

(2) schedule another review of the authorized agent's program one year after the first review to verify that the authorized agent is consistently enforcing the OSSF program.

(e) If the executive director determines from the authorized agent's response that insufficient action will be taken, the executive director will:

(1) file a petition with the commission according to Chapter 70 of this title (relating to Enforcement) seeking revocation;

(2) initiate the hearing process with SOAH according to Chapter 80 of this title (relating to Contested Case Hearings);

(3) publish notice of a public hearing that will be held to review the commission's possible revocation of the delegated authority. The notice must be published in a regularly published newspaper of general circulation in the local governmental entity's area of jurisdiction and shall:

(A) include the time, date, and location of the public hearing; and

(B) be published at least 20 days before the public hearing; and

(4) hold a public hearing to review possible revocation of the delegated authority.

(f) An authorized agent may consent to the revocation of its OSSF delegation in writing before the public hearing. If the authorized agent consents to the revocation, the commission may revoke the authorized agent's delegated authority without a public hearing.

(g) After an opportunity for a hearing, the commission may:

(1) issue an order revoking the authorized agent's delegation, which may include a charge-back fee;

(2) issue an order requiring the authorized agent to take certain action or actions in order to retain delegation; or

(3) take no action.

(h) If the authorized agent's delegation is revoked, the executive director shall assume responsibility for the OSSF program in the former authorized agent's jurisdiction. The executive director shall implement the program on the date of the revocation.

(i) An authorized agent that has had its OSSF authority revoked may be subject to charge-back fees according to §285.14 of this title (relating to Charge-back Fee).

§285.14. Charge-back Fee.

(a) Under Texas Health and Safety Code, §366.059, the commission may assess a reasonable and appropriate charge-back fee, not to exceed $500 per permit, to local governmental entities that either have repealed an on-site sewage facility (OSSF) order, ordinance, or resolution, or have had their delegation revoked by the commission according to §285.13 of this title (relating to Revocation of Authorized Agent Delegation). The charge-back fee will be assessed for each OSSF permit issued within that local governmental entity's area of jurisdiction. The amount of the charge-back fee will be based on the executive director's actual cost of issuing an OSSF permit in that jurisdiction. The executive director's actual cost will be based on the type and number of OSSFs typically installed and inspected in the local governmental entity's jurisdiction, along with expected travel expenses for the executive director.

(1) If a local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity agrees to the amount of the charge-back fee, the executive director will recommend the commission approve the charge-back fee. In order to have legal effect as an order of the commission, the charge-back fee must be approved and ordered by the commission. The commission order must include:

(A) the type of OSSFs typically installed and inspected in the local governmental entity's jurisdiction;

(B) the number of OSSFs installed in the local governmental entity's jurisdiction over the preceding five years;

(C) the distance the county courthouse or city hall is from the nearest agency regional office;

(D) the current mileage rate set by the Comptroller of the State of Texas; and

(E) the amount of the charge-back fee.

(2) If a local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity does not agree to the amount of the charge-back fee, the commission will refer the matter to SOAH for a contested case hearing to determine the charge-back fee, according to Chapter 80 of this title (relating to Contested Case Hearings).

(b) The executive director will bill the local governmental entities for charge-back fees no more frequently than quarterly and no less than annually. Payment of charge-back fees is due within 30 days from the invoice date. Late payments are subject to penalties and interest according to Chapter 12 of this title (relating to Payment of Fees).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205208
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: March 29, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER D. PLANNING, CONSTRUCTION, AND INSTALLATION STANDARDS FOR OSSFS

30 TAC §285.33

STATUTORY AUTHORITY

The amendment is adopted under the authority granted to the commission by the Texas Legislature in THSC, §366.011. The amendment implements THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in THSC, §366.001. The commission has authority to adopt rules to implement the requirements of THSC, §366.053(b), which requires the adoption of rules for permitting.

The amendment is also adopted under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(15); and TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205209
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: March 29, 2002
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CHAPTER 291. UTILITY REGULATIONS

The Texas Natural Resource Conservation Commission (commission) adopts amendments the to Subchapter A, General

Provisions, §291.8; Subchapter B, Rates, Rate Making, and Rates/Tariff Changes, §§291.21, 291.22, 291.28, 291.29, and 291.31; Subchapter E, Customer Service and Protection, §§291.81, 291.82, 291.85, 291.87, and 291.88; Subchapter G, Certificates of Convenience and Necessity, §291.113; and Subchapter H, Utility Submetering and Allocation, §291.122 and §291.127. Sections 291.21, 291.22, 291.28, 291.29, 291.31, 291.81, 291.82, 291.85, 291.87, and 291.113 are adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2969). Sections 291.8, 291.88, 291.122, and 291.127 are adopted *without changes* and will not be republished. Sections 291.24, 291.26, 291.32, and 291.34 are being withdrawn.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these revisions to Chapter 291 in order to implement legislation from the 77th Legislature, 2001.

Although the proposal for this rulemaking included language to implement Senate Bill (SB) 2, §§10.01 and 10.03 - 10.07, these proposed amendments (i.e., §§291.24, 291.26, 291.32, and 291.34) are being withdrawn from consideration. Testimony provided at the Commission Agenda on July 24, 2002, questioned these proposed amendments in light of the legislative language in SB 2, §10.08. The commission believes that the interpretation of SB 2, §10.08 needs to be considered further and that the changes to the proposed language that were suggested would be substantive. Therefore, the amendments proposed in regards to SB 2, Article 10 are being withdrawn from consideration at this time. The commission is adopting the other proposed amendments.

House Bill (HB) 924 and SB 1444, 77th Legislature, 2001, amended Texas Water Code (TWC), §49.218, Acquisition of Property, by adding subsection (d) specifying the conditions under which a water district or water supply corporation (WSC) may require the grant of an easement as a precondition of service.

HB 2404, 77th Legislature, 2001, amended TWC, §13.502, Submetering, by adding subsections (b) - (e). The new provisions require the installation of submeters owned by the property owner or manager, or individual meters owned by the retail public utility, for any construction of an apartment house, a manufactured home rental community, a multiple use facility, or a condominium (referred to jointly as "facilities"), which begins after January 1, 2003. This section requires that if an owner or manager chooses to charge for water, the owner or manager must do so in the form of submetering or metering in facilities constructed after January 1, 2003. The section provides an exception for government assisted or subsidized housing facilities for low or very low income residents by only requiring them to install a plumbing system that is compatible with the installation of submeters as opposed to requiring that they install submeters or charge for water on a submetered or metered basis. The section also requires a retail public utility, upon the request of an owner or manager of a facility, to install individual meters owned by the retail public utility unless the utility determines that the installation of meters is not feasible, in which case the owner or manager is required to install a plumbing system that is compatible with the installation of submeters or individual meters. The section allows the owner of any of these facilities to change from submetered to allocated billing only in certain situations. This legislation also amended TWC, Chapter 13, Subchapter M, Submetering and Nonsubmetering for Apartments and Manufactured Home Rental Communities and Other Multiple Use Facilities, by adding §13.506, Plumbing Fixtures, to require the owner of an apartment house, a manufactured home rental community, a multiple use facility, or a condominium which begins construction after January 1, 2003, to meet standards prescribed by Texas Health and Safety Code (THSC), §372.002, before billing tenants for submetered or allocated water service.

HB 2912, §3.10, 77th Legislature, 2001, amended TWC, §13.187, Statement of Intent to Change Rates; Hearing; Determination of Rate Level, by amending subsection (a) to increase the number of days required for a notice involving a Statement of Intent to Change Rates (SICR).

HB 2912, §18.01, 77th Legislature, 2001, changed the name of the agency from "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality, effective January 1, 2004, and allows the commission to phase in the new name prior to the effective date. The name of the commission is updated in the sections opened in this rulemaking.

HB 2912, §20.01, 77th Legislature, 2001, amended TWC, Chapter 13, Subchapter K, Violations and Enforcement, by adding §13.4115, Action to Require Adjustment to Consumer Charge; Penalty, to allow the commission to issue an order if a public utility fails to make an adjustment to a customer's bill and to assess penalties if the utility does not make the ordered adjustment within 30 days of receiving the order.

SB 2, §2.53, 77th Legislature, 2001, provides, in part, groundwater conservation districts (GWCDs) with the authority to collect production fees based on the amount of water withdrawn from a well, not to exceed $10 per acre foot of water used for any purpose (not including agricultural uses).

SB 2, Article 9, 77th Legislature, 2001, amended TWC, Chapter 13, Subchapter G, Certificates of Convenience and Necessity, by adding §13.2541, to allow a municipality with a population of more than 1.3 million to request that the commission revoke a public utility's certificate of convenience and necessity (CCN) under certain situations.

SB 352, 77th Legislature, 2001, amended THSC, §364.034, to allow fee collection for solid waste disposal (SWD) services by an entity other than the public agency or county providing the services and to allow the termination of other utility services provided by the collecting entity if bills are not paid. A provision excluding anyone who has solid waste disposed by another service provider from being covered by the section (including the requirement to use the services of the public agency or county for SWD) is also included.

SECTION BY SECTION DISCUSSION

Section 291.8, Administrative Completeness

The amendment to subsection (b) increases from 30 days to 60 days the time lapse for a rate change to become effective after proper public notice is made of the rate change. This amendment is adopted in accordance with HB 2912, §3.10, and SB 2, §10.06.

Section 291.21, Form and Filing of Tariffs

The proposed amendments to §291.21 published on April 26, 2002, included several changes and those amendments are still being made. This section is being republished to correct a typographic error in §291.21(a) and to change the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. Per SB 352 provisions, subsection (a) is amended both to allow a utility to

enter into a contract with a county or other public agency to collect fees for SWD services provided by the county or public agency and to allow the fees to be included on the bills to customers for the water service provided by the utility. Subsection (b)(2)(A)(viii) is adopted to facilitate the collection from customers of production fees charged by a GWCD to utilities. Subsection (h)(1) is amended by removing language which requires a utility to submit a rate change application in order to pass on GWCD production fees to its customers. Subsection (k)(2) is replaced with new language to clarify the existing types of cost increases that can be passed on to customers as surcharges without being specifically listed in the tariff and to add GWCD production fees as another type of cost that may be recovered through a surcharge. This amendment provides regulatory consistency because the executive director may already allow a utility to recover other types of regulatory assessment fees either through a minor tariff change or surcharge. Requiring a utility to submit a rate/tariff change application in order to recover a GWCD production fee from its customers would be overly burdensome because the utility does not have any control over the amount of the fee or whether to pay the fee.

Section 291.22, Notice of Intent to Change Rates

Per HB 2912, §3.10 provisions, the amendments to subsections (a) and (c) - (e) change the number of days by which a utility must provide notice of a proposed rate change from 30 to 60 days prior to the proposed effective date. Because the proposed amendments related to SB 2, §10.06 are not being adopted, the proposed paragraphs (3) and (4) in §291.22(a) are deleted in the adoption.

Section 291.24, Jurisdiction Over Affiliated Interests

Because the proposed amendments related to SB 2, §10.07 are not being adopted, the proposed changes to §291.24 are withdrawn.

Section 291.26, Suspension of Rates

Because the proposed amendments related to SB 2, §10.06 are not being adopted, the proposed changes to §291.26 are withdrawn.

Section 291.28, Action on Notice of Rate Change by Ratepayers Pursuant to Texas Water Code, §13.187(b)

An amendment in §291.28(5) reflects the agency name from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. Because the proposed amendments related to SB 2, §10.06 are not being adopted, the proposed changes to §291.81(1) are deleted in the adoption.

Section 291.29, Interim Rates

For consistency, revisions are made to §291.29 to correct the TWC citation. As proposed an amendment in §291.29(h) is made because of the agency name change. Because the proposed amendments related to SB 2, §10.06 are not being adopted, the other proposed changes to §291.29 are deleted in the adoption.

Section 291.31, Cost of Service

For consistency, revisions are made to §291.31 to correct the TWC citation. Because the proposed amendments related to SB 2, §10.07 are not being adopted, the proposed changes to §291.31 are deleted in the adoption.

Section 291.32, Rate Design

Because the proposed amendments related to SB 2, §10.03 are not being adopted, the proposed changes to §291.32 are withdrawn.

Section 291.34, Alternative Rate Methods

Because the proposed amendments related to SB 2, §10.05 are not being adopted, the proposed change to §291.34 is withdrawn.

Section 291.81, Customer Relations

Revisions to the proposal language have been made incorporating the agency name change from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality and correcting another name. Because the proposed amendments related to SB 2, §10.01 are not being adopted, the proposed changes to §291.81 are deleted in the adoption.

Section 291.82, Resolution of Disputes

The amendments to §291.82 place the existing language into proposed new subsection (a) and add new subsection (b) to implement revisions from HB 2912, §20.01 provisions. These amendments allow the commission to issue orders requiring utilities to make adjustments if the executive director, in response to a customer complaint arising out of a charge made by a utility, finds that a utility has failed to make the proper adjustment to a customer's bill after completion of the complaint process.

Section 291.85, Response to Requests for Service by a Retail Public Utility Within Its Certificated Area

A revision has been made concerning the agency's name change from Texas Natural Resource Conservation Commission to Texas Commission on Environmental Quality. The amendments to subsection (d), concerning easements, divide the existing language into paragraphs (1) and (2) for clarity and limit the applicability of the section to public utilities. Revisions are made to subsection (d) in response to comments received: 1) the language in paragraphs (1) and (2) that made the rule apply to retail public utilities is changed to apply to public utilities; 2) the language in paragraphs (1) and (2) is clarified that the activities for which easements may be required apply to water "and/or" sewer facilities, which is a return to the current rule language; and 3) a new paragraph (3) is added to clarify that districts and WSCs may require an applicant for service to grant an easement as allowed under applicable law. TWC, §49.218 establishes the conditions under which districts and WSCs may require easements.

Section 291.87, Billing

Based on SB 352, a new provision is added to subsection (e)(3) to allow SWD fees collected under contract with a county or other public agency to be included on bills for water service. Because the proposed amendments related to SB 2, §10.01 are not being adopted, the proposed changes to §291.87(b) are deleted in the adoption.

Section 291.88, Discontinuance of Service

Based on SB 352 provisions, two revisions are made in §291.88. The amendment to subsection (a)(2)(F) allows disconnection of water service if payment is not made after a utility sends a bill for SWD fees charged by a county or other public agency. Subsection (h)(2)(D) is added as new language to specify that a fee cannot be charged for reconnecting water service after disconnection solely for failure to pay for SWD fees collected by the utility.

Section 291.113, Revocation or Amendment of Certificate

For consistency, revisions are made to §291.113 to correct the TWC and Texas Property Code citations. Based on SB 2, §9.01 provisions, new subsections (i) - (m) are added to §291.113. These cover the potential for certain municipalities to request that the commission revoke a certificate of public convenience and necessity if a utility has failed to provide continuous and adequate service, has been grossly or continuously mismanaged, or has grossly or continuously not complied with applicable laws, rules, or orders. If the certificate is revoked, the municipality must operate the decertified utility during an interim period while waiting for the commission to transfer the certificate of public convenience and necessity and to approve the municipality's acquisition of the decertified utility's facilities. The monetary amount to be paid for the facilities will be determined by a qualified individual or firm acting as an independent appraiser who is agreed upon by the utility and municipality. The appraiser's fee must be paid by the municipality. The appraiser must refer to Texas Property Code, Chapter 21 to determine the value of real property. The commission must determine if the compensation to the utility from the municipality will be in a lump sum or paid over a specified period of time.

Section 291.122, Owner Registration and Records

The amendment to §291.122 adds new subsections (b) - (d), and the subsequent subsections are relettered. New subsection (b) requires the manager of condominiums and the owners of apartment houses, manufactured home rental communities, or multiple use facilities, on which construction begins after January 1, 2003, to provide individual meters or submeters to measure the amount of water used in each unit. New subsection (c) requires the owners of apartment houses constructed on or after January 1, 2003, which provide government assisted or subsidized rental housing, to install plumbing systems that are compatible with the installation of submeters. New subsection (d) requires that, upon request of the property owner or manager, a public utility install at a reasonable charge individual meters in the types of multi-family residences above, unless this action is not feasible. If the installation is not feasible for the utility, the owner or manager must install a plumbing system that is compatible with the installation of submeters or individual meters.

Section 291.127, Submeters

Section 291.127 is renamed as "Submeters and Plumbing Fixtures" and the new requirements for plumbing fixtures in HB 2404 are added to this section. The existing requirements for submeters are grouped in new subsection (a), and the plumbing fixture requirements are added as new subsection (b). The new plumbing fixture subsection requires that after January 1, 2003, prior to billing tenants for water service, an owner or manager must: 1) meet the standards for all sink and lavatory faucets, faucet aerators and showerheads prescribed in THSC, §372.002; 2) perform water leak audits on all dwelling units and common areas and repair all leaks; and 3) within one year of the date that the billing starts, replace toilets exceeding the maximum flow rate of 3.5 gallons per flush (gpf) with 1.6- gallon toilets meeting the standards in THSC, §372.002. These requirements do not apply to manufactured home rental community owners who do not own the manufactured homes on the property.

FINAL REGULATORY IMPACT ANALYSIS

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. "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 rules concern the regulation of utility rates and services. The rules incorporate new legislative requirements and provide for regulatory consistency. The amendments do not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Further, this rulemaking does not meet the applicability criteria of a "major environmental rule" because the amendments do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. The proposed amendments are not adopted solely under the general rulemaking authority of the commission, but also under TWC, §§13.041(b), 13.137(b), 13.182(d), and 13.183.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these amendments in accordance with Texas Government Code, §2007.043. The specific purpose of the amendments is to implement applicable requirements of SB 2, SB 352, HB 2912, and HB 2404, 77th Legislature, 2001, relating to utility regulations; and for regulatory consistency, to amend rules to provide the executive director with the authority to allow utilities to pass through to their customers the cost of a GWCD production fee either by a minor tariff change or by surcharge. The proposed rule amendments substantially advance the stated purpose by incorporating the applicable requirements of SB 2, SB 352, HB 2912, and HB 2404 and by amending the applicable provisions regarding the recovery of GWCD production fees. Promulgation and enforcement of these amendments do not burden private real property because the actions that are required by the amendments relate primarily to the relationships between water utility operators and their customers, concerning establishment of rates, procedures for providing services, and billing for the services. The rules provide protection to both the utility operators and their customers. Therefore, this rulemaking does not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management 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. Therefore, the amendments to Chapter 291 are not subject to the CMP.

PUBLIC COMMENT

The commission held a public hearing in Austin on May 6, 2002. The public comment period closed on May 13, 2002. Texas Rural Water Association (TRWA) provided oral comments at the public hearing on Chapter 291. The following commenters provided written comments: Law Offices of Mark H. Zeppa, P.C.

(Zeppa), Lower Colorado River Authority (LCRA), Texas Apartment Association (TAA), Texas Manufactured Housing Association (TMHA), Texas Rural Water Association (TRWA), and the City of Fort Worth (Fort Worth). Related to testimony provided at Commission Agenda on July 24, 2002, Zeppa also provided additional comments on July 29, 2002, which are also addressed in the Response to Comments section.

TAA supported the proposed rulemaking. Zeppa, LCRA, TMHA, TRWA, and Fort Worth suggested revisions to the proposal as stated in the RESPONSE TO COMMENTS section of the preamble.

RESPONSE TO COMMENTS

TMHA commented that proposed §291.122 generally incorporates the provisions of HB 2404, however, TMHA is concerned that §291.122(d) is unclear. This subsection requires retail public utility, on the request of the property owner or manager of a manufactured home rental community, to install individual meters owned by the utility unless the utility determines that the installation of meters is not "feasible." TMHA commented that failure to provide guidance regarding the meaning of "feasible" may create a situation whereby a utility will be allowed to deny service despite its CCN obligation by claiming that installing the meters is not feasible. TMHA urges the commission to provide factors that a retail public utility must satisfy to demonstrate lack of feasibility. Forth Worth also requests that the commission provide guidance on how to determine if the installation of meters is or is not feasible.

RESPONSE

The commission has made no changes to the proposed rules in response to these comments. The statute clearly specifies that the feasibility determination rests with the retail public utility which has received the request to install individual meters. Pursuant to commission rules, a retail public utility which possesses a CCN may not refuse to provide service, regardless of whether it is feasible to install individual meters. Regarding factors, the diversity of types, sizes, and locations of retail public utilities and apartment complexes, manufactured home rental communities, condominium communities, and multiple-use facilities, the determination of "feasibility" is made by a retail public utility case-by-case. It is the commission's opinion that an analysis of feasibility might include, but not necessarily be limited to, a review of such issues as the ability to gain easements or access to private property, the cost of maintaining, repairing, and testing the meters, the financial condition of the utility, the size of the utility vs the size of the development, any cost participation by the developer of the property, geology, type of construction in the development, the placement of the meters, and who will be responsible for the distribution lines up to the meters. The commission further notes that the implementation of this rule is not designed to expand the authority of the commission.

TMHA requested that the commission ensure that the standards imposed by proposed §291.127 are consistent with requirements found in 24 Code of Federal Regulations (CFR) Part 3280, imposed on manufactured housing by the federal government.

RESPONSE

TMHA did not provide a specific cite, however, the commission assumes that TMHA is referring to 24 CFR §3280.607, which pertains to plumbing fixtures. These regulations do not pertain to or regulate the issue of maximum flow or gallonage standards for toilets. Therefore, the requirements are not inconsistent with the new rules. No change was made to the rules in response to this comment.

TRWA, LCRA, and Zeppa commented that proposed §291.85(d) fails to implement the provisions of HB 924 and SB 1444, and can be read to directly contradict the changes to the law. They commented that the legislative revisions expressly authorize any district or nonprofit WSC to require a reasonable right of access for systemwide service through obtaining an easement as a prerequisite to providing retail water or sewer service, but that the proposed rule implies that a district or WSC is not entitled to request a public easement. LCRA recognized that the preamble explains that the authority for districts and WSCs lies in statute, not in the new rule, however, commented that the rule as proposed has the potential to create confusion. TRWA, LCRA, and Zeppa suggested that all the new provisions of HB 924 and SB 1444 pertaining to districts and WSCs be incorporated into the final rule. In the alternative, LCRA requested that the commission reference TWC, §49.218(d) in the rules rather than in the preamble.

RESPONSE

The commission agrees that the language of the proposed rule may be unclear. To clarify, the commission changed the language in the rule adoption. First, the commission deleted the word "retail" before "public utility" in all places that the word appears in §291.85(d). Second, the commission deleted the proposed new language, "other than a district or water supply corporation" in §291.85(d)(1) and (2). Finally, the commission has added §291.85(d)(3), which provides, "A district or water supply corporation may require an applicant for service to grant an easement as allowed under applicable law."

TRWA and Zeppa commented that HB 924 and SB 1444 include the purposes of "replace" and "upgrade" among the purposes for which WSCs and districts may secure easements. They commented that these should be considered important and necessary elements of water or sewer facility easements and suggested that they be added as purposes for which easements may be required by all public utilities.

RESPONSE

The referenced legislation only intended to provide these purposes among the purposes for which WSCs and districts may secure easements. It does not address the purposes for which public utilities may require easements. No change was made to the rule in response to this comment.

TRWA and Zeppa further commented that they do not understand why the phrase "and/or" has been replaced with "or," in §291.85(d) because many retail public utilities provide either water or sewer services exclusively, but there also are many providing both water and sewer services. TRWA and Zeppa commented that the current phrase "and/or" encompasses all scenarios for which easements will be necessary under Chapter 291 rules.

RESPONSE

The commission agrees with this comment and revised the rule language to return to "and/or."

TRWA does not believe that Senate Bill 352 prohibits the assessment of reconnect fees for any utility service which is discontinued to enforce payment of solid waste disposal fees and requests that the commission not approved proposed 30 TAC §291.88(h)(D) which prohibits reconnect fees in this situation.

RESPONSE

The ability to levy fees is restricted to those contained on the utility's tariff. A tariff contains schedules of all of its rates, tolls, charges, rules, and regulations pertaining to all of the entity's utility service. Utility service includes the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the collection, transportation, treatment, or disposal of sewage.

SB352 amends THSC, §364.034 to allow a public or private utility to collect a fee for solid waste disposal fee within the bill for other utility services. Under the amendment the public or private utility may, in addition to suspending solid waste disposal service, suspend service of the utility.

TWC, §13.135 states that "{a} utility may not charge, collect, or receive any rate for utility service or impose any rule or regulation other than as provided in this chapter." SB 352 does not amend TWC, Chapter 13.

TWC, §13.136(a) states that "{e}very utility shall file with each regulatory authority tariffs showing all rates that are subject to the original or appellate jurisdiction of the regulatory authority and that are in force at the time for any utility service, product, or commodity offered. Every utility shall file with and as a part of those tariffs all rules and regulations relating to or affecting the rates, utility service, product, or commodity furnished." In this case, the utility is not providing solid waste disposal service but is merely acting as a collection agency for the solid waste disposal provider.

By definition in TWC, §13.002(17), "rate" means every compensation, tariff, charge, fare, too, rental, and classification or any items demanded, observed, charged, or collected whether directly or indirectly by any retail public utility for any service, product, or commodity described in TWC, §13.0029(23). TWC, §13.002(23) defines water and sewer utility as one owning or operating for compensation equipment or facilities for the transmission of potable water to the public. There is nothing in these definitions that could be construed to include a reconnection fee for failure to pay a solid waste disposal fee.

Since SB 352 does not expand the authority in Chapter 13, there is nothing in Chapter 13 that would allow for the collection of any rate for reconnection due to non-payment of a service not rendered by the utility. The commission has made no changes to the proposed rules in response to this comment.

TRWA commented that the provisions of SB 352 regarding the disconnection of utility service to enforce payment of SWD fees is permissive, depending on whether the county or other public agency and the utility have agreed to this enforcement measure in a contract.

RESPONSE

The commission disagrees with this interpretation of SB 352. SB 352 amended THSC, §364.034(d)(2) to read as follows:

"...a public or private utility that bills and collects solid waste disposal service fees under this section may suspend service of that utility, in addition to the suspension of solid waste disposal service, to a person who is delinquent in the payment of the solid waste disposal fee until the delinquent fee is fully paid."

The commission agrees that the disconnection of utility service is permissive, but §364.034(d)(2) does not appear to require that the authority for disconnection be included in the contract language. No change has been made to the rules in response to this comment.

In testimony at the Commission Agenda on July 24, 2002, Zeppa commented that the language of SB2, §10.08(a) exempting most utilities from the changes in the law made by Article 10, SB2 should be inserted into the rules in §§291.22(a), 291.29(c), 291.31(b)(2)(J), 291.32 (e)&(f), and 291.81(d). In the example illustrating his comments, Zeppa only includes the second part of the exemption language of §10.08(a) to these rule provisions. Zeppa also comments that the exemption language should not be added to the proposed rules dealing with the 60-day notice period for investor owned utility rate cases since that revision is also in HB 2912 which has no corresponding exemption. Zeppa also comments that the statutory language "the proposed rate may not be suspended longer than 150 days" be inserted in §291.29(c), per SB 2, §10.06.

RESPONSE

The commission is withdrawing the amendments to implement SB 2, Article 10. The commission agrees that the language in SB 2, §10.08 should be addressed in the rules, but acknowledges that there are differing legal interpretations which should be studied further before rules are adopted. Because the changes in the legislation are effective, utilities will need to follow the provisions in SB 2, Article 10 as applicable.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.8

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; §13.137(b), which provides the commission with the authority to adopt rules waiving the requirement that a utility have a local business location where customers may make payments to prevent disconnection or restore service; §13.182(d), which requires the commission to establish by rule a preference that rates under a consolidated tariff be consolidated by region; and §13.183, which provides the commission with the authority to approve rates under an alternative ratemaking methodology after certain requirements are met.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; and §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205216

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Effective date: August 29, 2002
Proposal publication date: April 12, 2002
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SUBCHAPTER B. RATES, RATE MAKING, AND RATES/TARIFF CHANGES

30 TAC §§291.21, 291.22, 291.28, 291.29, 291.31

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; §13.182(d), which requires the commission to establish by rule a preference that rates under a consolidated tariff be consolidated by region; and §13.183, which provides the commission with the authority to approve rates under an alternative ratemaking methodology after certain requirements are met.

§291.21. Form and Filing of Tariffs.

(a) Approved tariff. No utility shall directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as noted in this subsection. A utility may charge the rates proposed under Texas Water Code (TWC), §13.187(a) (relating to Statement of Intent to Change Rates) after the proposed effective date, unless the rates are suspended or the commission or a judge sets interim rates. The regulatory assessment required in TWC, §5.235(n) does not have to be listed on the utility's approved tariff to be charged and collected but shall be included in the tariff at the earliest opportunity. A person who possesses facilities used to provide water utility service or a utility that holds a certificate of public convenience and necessity to provide water service which enters into an agreement in accordance with TWC, §13.250(b)(2), may collect charges for wastewater services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement. A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for certificates of convenience and necessity.

(A) Every public utility shall file with the commission the number of copies of its tariff required in the application form containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a public utility. The tariff shall be on the form the commission prescribes or another form acceptable to the commission.

(B) Every water supply or sewer service corporation shall file with the commission the number of copies of its tariff required in the application form containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a retail public utility.

(2) Minor tariff changes. Except for an affected county, a public utility's approved tariff may not be changed or amended without commission approval. An affected county can change rates for water or wastewater service without commission approval but must file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The executive director may approve the following minor changes to tariffs:

(i) service rules and policies;

(ii) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by the applicable sections;

(iii) implementation of a purchased water or sewage treatment provision, a temporary water rate provision in response to mandatory reductions in water use imposed by a court, government agency, or other authority, or water use fee provision previously approved by the commission;

(iv) surcharges over a time period determined by the executive director to reflect the change in the actual cost to the utility for sampling costs, commission inspection fees, or at the discretion of the executive director, other governmental requirements beyond the utility's control;

(v) addition of the regulatory assessment as a separate item or to be included in the currently authorized rate;

(vi) addition of a provision allowing a utility to collect wastewater charges in accordance with TWC, §13.250(b)(2);

(vii) rate adjustments to implement authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs; or

(viii) addition of a production fee charged by a groundwater conservation district as a separate item calculated by multiplying the customer's total consumption, including the number of gallons in the base bill, by the actual production fee per thousand gallons.

(B) The addition of an extension policy to a tariff or a change to an existing extension policy does not qualify as a minor tariff change because it must be approved or amended in a rate change application.

(3) Tariff revisions and tariffs filed with rate changes. The utility shall file three copies of each revision or in the case of a rate change, the number required in the application form. Each revision shall be accompanied by a cover page which contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(4) Each rate schedule must clearly state the territory, subdivision, city, or county wherein said schedule is applicable.

(5) Tariff sheets are to be numbered consecutively. Each sheet shall show an effective date, a revision number, section number, sheet number, name of the utility, the name of the tariff, and title of the section in a consistent manner. Sheets issued under new numbers are

to be designated as original sheets. Sheets being revised should show the number of the revision, and the sheet numbers shall be the same.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, shall contain sections setting forth:

(1) a table of contents;

(2) a list of the cities and counties, and subdivisions or systems, in which service is provided;

(3) the certificate of convenience and necessity number under which service is provided;

(4) the rate schedules;

(5) the service rules and regulations, including forms of the service agreements, if any, and customer service inspection forms required to be completed under §290.46(j) of this title (relating to Minimum Acceptable Operating Practices for Public Water Systems) if the form used deviates from that specified in §290.47(d) of this title (relating to Appendices);

(6) the extension policy;

(7) an approved drought contingency plan as required by §288.20 of this title (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers); and

(8) the form of payment to be accepted for utility services.

(d) Tariff filings in response to commission orders. Tariff filings made in response to an order issued by the commission shall include a transmittal letter stating that the tariffs attached are in compliance with the order, giving the application number, date of the order, a list of tariff sheets filed, and any other necessary information. Any service rules proposed in addition to those listed on the commission's model tariff or any modifications of a rule in the model tariff must be clearly noted. All tariff sheets shall comply with all other sections in this chapter and shall include only changes ordered. The effective date and/or wording of the tariffs shall comply with the provisions of the order.

(e) Availability of tariffs. Each utility shall make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees shall lend assistance to persons requesting information and afford these persons an opportunity to examine any of such tariffs upon request. The utility also shall provide copies of any portion of the tariffs at a reasonable cost to reproduce such tariff for a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with these sections shall be so marked and returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Tariffs must be filed to reflect changes in rates or regulations set by other regulatory authorities and shall include a copy of the order or ordinance authorizing the change. Each utility operating within the corporate limits of a municipality exercising original jurisdiction must have a copy of its current tariff which has been authorized by the municipality on file with the commission.

(h) Purchased water or sewage treatment provision.

(1) A utility which purchases water or sewage treatment may include a provision in its tariff to pass through to its customers changes in such costs. The provision shall specify how it is calculated and affects customer billings.

(2) This provision must be approved by the commission in a rate proceeding. A proposed change in the method of calculation of the provision must be approved in a rate proceeding.

(3) Once the provision is approved, any revision of a utility's billings to its customers to allow for the recovery of additional costs under the provision may be made only upon issuing notice as required by paragraph (4) of this subsection. The executive director's review of a proposed revision is an informal proceeding. Only the commission, the executive director or the utility may request a hearing on the proposed revision. The recovery of additional costs is defined as an increase in water use fees or in costs of purchased water or sewage treatment.

(4) A utility that wishes to revise utility billings to its customers pursuant to an approved purchased water or sewer treatment or water use fee provision to allow for the recovery of additional costs shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(A) submit a written notice to the executive director; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and shall contain the effective date of the change, the present calculation of customer billings, the new calculation of customer billings, and the change in charges to the utility for purchased water or sewage treatment or water use fees. The notice shall include the following language: "This tariff change is being implemented in accordance with the utility's approved (purchased water) (purchased sewer) (water use fee) adjustment clause to recognize (increases) (decreases) in the (water use fee) (cost of purchased) (water) (sewage treatment). The cost of these charges to customers will not exceed the (increased) (decreased) cost of (the water use fee) (purchased) (water) (sewage treatment)."

(5) Notice to the commission shall include a copy of the notice sent to the customers, proof that the cost of purchased water or sewage treatment has changed by the stated amount, and the calculations and assumptions used to determine the new rates.

(6) Purchased water or sewage treatment provisions may not apply to contracts or transactions between affiliated interests.

(i) Effective date. The effective date of a tariff change is the date of approval by the executive director unless otherwise stated in the letter transmitting the approval or the date of approval by the commission, unless otherwise specified in a commission order or rule. The effective date of a proposed rate increase under §13.187 of the code is the proposed date on the notice to customers and the commission, unless suspended and must comply with the requirements of §291.8(b) of this title (relating to Administrative Completeness).

(j) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, one copy of its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff shall include all rules and regulations relating to or affecting the rates, utility service or extension of service or product, or commodity furnished and shall specify the CCN number and in which counties or cities it is effective.

(k) Surcharge.

(1) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(2) If specifically authorized for the utility in writing by the executive director or the municipality exercising original jurisdiction

over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(A) Sampling fees not already included in rates;

(B) Inspection fees not already included in rates;

(C) Production fees or connection fees not already included in rates charged by a groundwater conservation district; or

(D) Other governmental requirements beyond the control of the utility.

(3) A utility shall use the revenues collected pursuant to a surcharge only for the purposes noted and handle the funds in the manner specified according to the notice or application submitted by the utility to the commission, unless otherwise directed by the executive director. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the executive director.

(l) Temporary water rate.

(1) A utility's tariff may include a temporary water rate provision which will allow the utility to increase its retail customer rates during periods when a court, government agency, or other authority orders mandatory water use reduction measures which affect the utility customers' use of water service and the utility's water revenues. Implementation of the temporary water rate provision shall allow the utility to recover from customers revenues the utility would otherwise have lost due to mandatory water use reductions in accordance with the temporary water rate provision approved by the commission. If a utility obtains a portion of its water supply from another unrestricted water source or water supplier during the time the temporary water rate is in effect, the rate resulting from implementation of the temporary water rate provision must be adjusted to account for the supplemental water supply and to limit over-recovery of revenues from customers. A temporary water rate provision cannot be implemented by a utility if there exists an available, unrestricted, alternative water supply which the utility can use to immediately replace, without additional cost, the water made unavailable because of the action requiring a mandatory reduction of use of the affected water supply.

(2) The temporary water rate provision must be approved by the commission in a rate proceeding before it may be included in the utility's approved tariff or implemented as provided in this subsection. A proposed change in the temporary water rate must be approved in a rate proceeding. A utility that has filed a rate change within the last 12 months may file a request for the limited purpose of obtaining a temporary water rate provision.

(3) A utility may request a temporary water rate provision using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions through a limited rate proceeding. The formula for a temporary water rate provision under this paragraph is:
Figure: 30 TAC §291.21(l)(3) (No change.)

(A) The utility must file a temporary water rate application prescribed by the executive director and provide customer notice as required in the application, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the classes of customers affected, the rates affected, information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission and the time frame for protests and any other information which is required by the executive director in the temporary water rate application. The utility's existing rates will not be subject to review in the proceeding and the utility will only be required to support the need for the temporary rate. A request for a temporary water rate provision under this paragraph is not considered a statement of intent to increase rates subject to the 12 month limitation in §291.23 of this title, (relating to Time Between Filings.)

(B) The utility must be able to prove that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision using the formula in paragraph (3) of this subsection or any other method acceptable to the commission to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues it must submit financial data to support its existing rates as well as the temporary water rate provision even if no other rates are proposed to be changed. The utility must complete a rate application and provide notice in accordance with the requirements of §291.22 of this title (relating to Notice of Intent To Change Rates). The utility's existing rates will be subject to review in addition to the temporary water rate provision.

(B) The utility must be able to prove that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the commission in the utility's last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and revenues generated by existing rates do not exceed reasonable cost of service.

(5) The utility may place the temporary water rate into effect only after:

(A) the temporary water provision has been approved by the commission and included in the utility's approved tariff in a prior rate proceeding;

(B) there is an action by a court, government agency, or other authority requiring mandatory water use reduction measures which affect the utility's customers' use of utility services; and,

(C) issuing notice as required by paragraph (7) of this subsection.

(6) The utility can readjust its rates using the temporary water rate provision as necessary to respond to modifications or changes to the original order requiring mandatory water use reductions by reissuing notice as required by paragraph (7) of this subsection. The executive director's review of the proposed implementation of an approved temporary water rate provision is an informal proceeding. Only the commission, the executive director, or the utility may request a hearing on the proposed implementation.

(7) A utility that wishes to place a temporary water rate into effect shall take the following actions prior to the beginning of the billing period in which the temporary water rate takes effect:

(A) submit a written notice, including a copy of the notice received from the court, government agency, or other authority requiring the reduction in water use, to the executive director; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and shall contain the effective date

of the implementation and the new rate the customers will pay after the temporary water rate is implemented. The notice shall include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Texas Commission on Environmental Quality to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from ($ per 1,000 gallons to $ per 1,000 gallons)."

(8) A utility must stop charging a temporary water rate as soon as is practical after the order which required mandatory water use reduction is ended but in no case later than the end of the billing period which was in effect when the order was ended. The utility must notify its customers of the date that the temporary water rate ends and that its rates will return to the level authorized before the temporary water rate was implemented.

(9) If the commission initiates an inquiry into the appropriateness or the continuation of a temporary water rate, it may establish the effective date of its decision on or after the date the inquiry is filed.

§291.22. Notice of Intent To Change Rates.

(a) In order to change rates which are subject to the commission's original jurisdiction, the applicant utility shall file with the commission an original completed application for rate change with the number of copies specified in the application form and shall give notice of the proposed rate change by mail or hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Notice shall be provided on the notice form included in the commission's rate application package and shall contain the following information:

(1) the utility name and address, current rates, the proposed rates, the effective date of the proposed rate change, the increase or decrease requested over test year revenues as adjusted for test year customer growth and annualization of test year rate increases, stated as a dollar amount, and the classes of utility customers affected. The effective date of the new rates must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the new rates may not apply to service received before the effective date of the new rates;

(2) information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, and the time frame for protests;

(3) any other information which is required by the executive director in the rate change application form.

(b) The governing body of a municipality or a political subdivision which provides retail water or sewer service to customers outside the boundaries of the municipality or political subdivision shall mail or hand deliver individual written notice to each affected ratepayer eligible to appeal who resides outside the boundaries within 30 days after the date of the final decision on a rate change. The commissioners court of an affected county which provides water or sewer service shall mail or hand deliver individual written notice to each affected ratepayer eligible to appeal within 30 days after the date of the final decision on a rate change. The notice must include at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained.

(c) Notices may be mailed separately, or may accompany customer billings. Notice of a proposed rate change by a utility must be mailed or hand delivered to the customers at least 60 days prior to the effective date of the rate increase.

(d) The applicant utility shall mail or deliver a copy of the statement of intent to change rates to the appropriate officer of each affected municipality at least 60 days prior to the effective date of the proposed change. If the utility is requesting a rate change from the commission for customers residing outside the municipality, it must also provide a copy of the rate application filed with the commission to the municipality. The commission may also require that notice be mailed or delivered to other affected persons or agencies.

(e) Proof of notice in the form of an affidavit stating that proper notice was mailed to customers and affected municipalities, and stating the dates of such mailing, shall be filed with the commission by the applicant utility as part of the rate change application. Notice to customers is sufficient if properly stamped and addressed to the customer and deposited in the United States mail at least 60 days before the effective date.

(f) Standby Fees. A utility may request in a rate change application that standby fees be approved for property or lots for which the utility has previously entered into an agreement to serve or construction of water or sewer utility facilities has already begun or been completed if the developer owning the property at the time the rate change application is filed is given individual written notice by certified mail of the request and an opportunity to protest.

(g) Emergency rate increase in certain circumstances. After receiving a request, the commission or executive director may authorize an emergency rate increase under Texas Water Code, §5.508 and §13.4133 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) for a utility:

(1) for which a person has been appointed under Texas Water Code, §13.4132; or

(2) for which a receiver has been appointed under Texas Water Code, §13.412; and

(3) if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(h) Line extension and construction charges. A utility shall request in a rate change application that its extension policy be approved or amended. The application shall show the proposed tariff, and other information requested by the executive director. The request may be made with a request to change one or more of the utility's other rates.

§291.28. Action on Notice of Rate Change Pursuant to Texas Water Code, §13.187(b).

The commission may conduct a public hearing on any application.

(1) If, within 60 days after the effective date of the rate change, the commission receives a complaint from any affected municipality, or from the lesser of 1,000 or 10% of the ratepayers of the utility over whose rates the commission has original jurisdiction, or on its own motion, the commission shall set the matter for hearing. If after hearing, the commission finds the rates currently being charged or those proposed to be charged are unreasonable or in violation of law, the commission shall determine the rates to be charged by the utility and shall fix the rates by order.

(2) If a hearing is scheduled, the commission may require the utility to provide notice of the time and place of the hearing to its customers through a billing insert or separate mailing.

(3) If the commission does not receive sufficient customer complaints or if the executive director does not request a hearing within

120 days after the effective date, the utility's proposed tariff will be reviewed for compliance with the code and the provisions of this chapter. If the proposed tariff complies with the code and the provisions of this chapter, it shall be stamped approved by the executive director or his designated representative and a copy returned to the utility. The executive director may require the utility to notify its customers that sufficient complaints were not received to schedule a hearing and the proposed rates were approved without hearing.

(4) The executive director or commission may request additional information from any utility in the course of evaluating the rate/tariff change request, and the utility is required to provide that information within 20 days of receipt of the request, unless a different time is agreed to. If the utility fails to provide within a reasonable time after the application is filed the necessary documentation or other evidence that supports the costs and expenses that are shown in the application, the commission may disallow the nonsupported expenses.

(5) If the commission sets a rate different from that proposed by the utility in its notice of intent, the utility shall include in its first billing at the new rate a notice to the customers of the rate set by the commission including the following statement: "The Texas Commission on Environmental Quality, after public hearing, has established the following rates for utility service:".

(6) If the commission conducts a hearing, it may establish rates different from those currently being charged or proposed to be charged by the utility, but the total annual revenue increase resulting from the commission's rates shall not exceed the greater of the annual revenue increase provided in the customer notice or revenue increase that would have been produced by the proposed rates except for the inclusion of reasonable rate case expenses. The commission may reclassify a portion of a utility's proposed rates as a capital improvement surcharge if the revenues are to be used for capital improvements or are to service debt on capital items.

§291.29. Interim Rates.

(a) The commission or judge may on a motion by the executive director or by the appellant under Texas Water Code (TWC), §13.043(a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.

(b) At any time after the filing of a statement of intent to change rates under TWC, §13.187, as amended, the executive director may petition the commission or judge to set interim rates to remain in effect until further commission action or a final rate determination is made. After a hearing is convened, any party may petition the judge or commission to set interim rates.

(c) Interim rates may be established by the commission or judge in those cases under the commission's original or appellate jurisdiction where the proposed increase in rates could result in an unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.

(d) In making a determination under subsection (d) of this section:

(1) The commission or judge may limit its consideration of the matter to oral arguments of the affected parties and may:

(A) set interim rates not lower than the authorized rates prior to the proposed increase nor higher than the requested rates;

(B) deny interim rate relief;

(C) require that all or part of the requested rate increase be deposited in an escrow account in accordance with rules set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase); or

(2) The commission may remand the request for interim rates to SOAH for an evidentiary hearing on interim rates. The presiding judge will issue a non-appealable interlocutory ruling setting interim rates to remain in effect until a final rate determination is made by the commission.

(e) The establishment of interim rates does not preclude the commission from establishing, as a final rate, a different rate from the interim rate.

(f) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall refund or credit against future bills all sums collected in excess of the rate finally ordered plus interest as determined by the commission in a reasonable number of monthly installments.

(g) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall be authorized by the commission to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

(h) The retail public utility must provide a notice to its customers including the interim rates set by the commission or judge with the first billing at the interim rates with the following wording: "The commission (or judge) has established the following interim rates to be in effect until the final decision on the requested rate change (appeal) or until another interim rate is established."

(i) If the commission or judge establishes interim rates or an escrow account in a proceeding under Texas Water Code, §13.187, the commission must make a final determination on the rates within 335 days after the effective date of the interim rates or escrowed rates or the rates are automatically approved as requested by the utility in its application.

§291.31. Cost of Service.

(a) Components of cost of service. Rates are based upon a utility's cost of rendering service. The two components of cost of service are allowable expenses and return on invested capital.

(b) Allowable expenses. Only those expenses which are reasonable and necessary to provide service to the ratepayers shall be included in allowable expenses. In computing a utility's allowable expenses, only the utility's historical test year expenses as adjusted for known and measurable changes will be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense shall not be allowed as an expense for cost of service except as provided in Texas Water Code (TWC), §13.185(e));

(B) depreciation expense based on original cost and computed on a straight line basis over the useful life of the asset as approved by the commission. Depreciation shall be allowed on all currently used depreciable utility property owned by the utility except for property provided by explicit customer agreements or funded by customer contributions in aid of construction. Depreciation on all currently used and useful developer or governmental entity contributed property shall be allowed in the cost of service;

(C) assessments and taxes other than income taxes;

(D) federal income taxes on a normalized basis (federal income taxes shall be computed according to the provisions of TWC, §13.185(f), if applicable);

(E) the reasonable expenditures for ordinary advertising, contributions, and donations; and

(F) funds expended in support of membership in professional or trade associations provided such associations, contribute toward the professionalism of their membership.

(2) Expenses not allowed. The following expenses shall not be allowed as a component of cost of service:

(A) legislative advocacy expenses, whether made directly or indirectly, including, but not limited to, legislative advocacy expenses included in professional or trade association dues;

(B) funds expended in support of political candidates;

(C) funds expended in support of any political movement;

(D) funds expended in promotion of political or religious causes;

(E) funds expended in support of or membership in social, recreational, fraternal, or religious clubs or organizations;

(F) funds promoting increased consumption of water;

(G) additional funds expended to mail any parcel or letter containing any of the items mentioned in subparagraphs (A) - (F) of this paragraph;

(H) costs, including, but not limited to, interest expense of processing a refund or credit of sums collected in excess of the rate finally ordered by the commission;

(I) any expenditure found by the commission to be unreasonable, unnecessary, or not in the public interest, including, but not limited to, executive salaries, advertising expenses, rate case expenses, legal expenses, penalties and interest on overdue taxes, criminal penalties or fines, and civil penalties or fines

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) Rate of return. The commission shall allow each utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital, and shall fix the rate of return in accordance with the following principles.

(A) The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

(B) The commission shall consider the efforts and achievements of the utility in the conservation of resources, the quality of the utility's services, the efficiency of the utility's operations, and the quality of the utility's management, along with other relevant conditions and practices.

(C) The commission may, in addition, consider inflation, deflation, the growth rate of the service area, and the need for the utility to attract new capital. In each case, the commission shall consider the utility's cost of capital, which is the composite of the cost of the various classes of capital used by the utility.

(i) Debt capital. The cost of debt capital is the actual cost of debt.

(ii) Equity capital. The cost of equity capital shall be based upon a fair return on its value. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock.

(I) Common stock capital. The cost of common stock capital shall be based upon a fair return on its value.

(II) Preferred stock capital. The cost of preferred stock capital is its annual dividend requirement, if any, plus an adjustment for premiums, discounts, and cost of issuance.

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property and equipment used by and useful to the utility in providing service:

(i) Original cost shall be the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it shall have been dedicated to public use, whether by the utility which is the present owner or by a predecessor;

(ii) Reserve for depreciation is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life of the asset. Depreciation shall be computed on a straight line basis over the expected useful life of the item or facility;

(iii) The original cost of plant, property, and equipment acquired from an affiliated interest shall not be included in invested capital except as provided in TWC, §13.185(e);

(iv) Utility property funded by explicit customer agreements or customer contributions in aid of construction such as surcharges may not be included in original cost or invested capital.

(B) working capital allowance to be composed of, but not limited to the following:

(i) reasonable inventories of materials and supplies, held specifically for purposes of permitting efficient operation of the utility in providing normal utility service;

(ii) reasonable prepayments for operating expenses (prepayments to affiliated interests shall be subject to the standards set forth in TWC, §13.185(e); and

(iii) a reasonable allowance up to one-eighth of total annual operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, and prepayments (operations and maintenance expense does not include depreciation, other taxes, or federal income taxes).

(3) terms not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

(A) Miscellaneous items. Certain items which include, but are not limited to, the following:

(i) accumulated reserve for deferred federal income taxes;

(ii) unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(iii) contingency and/or property insurance reserves;

(iv) contributions in aid of construction; and

(v) other sources of cost-free capital, as determined by the commission.

(B) Construction work in progress. Under ordinary circumstances the rate base shall consist only of those items which are used and useful in providing service to the public. Under exceptional circumstances, the commission may include construction work in progress in rate base to the extent that the utility has proven that:

(i) the inclusion is necessary to the financial integrity of the utility; and

(ii) major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress shall not be allowed for any portion of a major project which the utility has failed to prove was efficiently and prudently planned and managed.

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale, merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers of the acquiring utility's other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources which achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired which is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the executive director and were conducted at arm's length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and, the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the executive director in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997, and the effective date of these rules is exempt from the requirement for executive director notification at the time of the approval of the initial sale, but must provide such notification within 60 days of the effective date of these rules; and

(G) the rates charged by the acquiring utility to its preacquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority, shall be amortized using a straight line method over a period equal to the weighted average remaining useful life of the acquired plant, property, and equipment, at an interest rate equal to the rate of return determined under subsection (c) of this section. The acquisition adjustment may be treated as a surcharge and may be recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in rates as a part of a rate change application.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205217
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-6087

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SUBCHAPTER E. CUSTOMER SERVICE AND PROTECTION

30 TAC §§291.81, 291.82, 291.85, 291.87, 291.88

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; and §13.137(b), which provides the commission with the authority to adopt rules waiving the requirement that a utility have a local business location where customers may make payments to prevent disconnection or restore service.

§291.81. Customer Relations.

(a) Information to customers.

(1) Upon receipt of a request for service or service transfer, the utility shall fully inform the service applicant or customer of the cost of initiating or transferring service. The utility shall clearly inform the service applicant which service initiation costs will be borne by the utility and which costs are to be paid by the service applicant. The utility shall inform the service applicant if any cost information is estimated. Also see §291.85 of this title (relating to Response to Requests for Service by a Retail Public Utility Within Its Certificated Area).

(2) The utility shall notify each service applicant or customer who is required to have a customer service inspection performed. This notification must be in writing and include the applicant's or customer's right to get a second customer service inspection performed by a qualified inspector at their expense and their right to use the least expensive backflow prevention assembly acceptable under §290.44(h) of this title (relating to Water Distribution) if such is required. The utility will ensure that the customer or service applicant receives a copy of the completed and signed customer service inspection form and information related to thermal expansion problems which may be created if a backflow prevention assembly or device is installed.

(3) Upon request, the utility shall provide the customer or service applicant with a free copy of the applicable rate schedule from its approved tariff. A complete copy of the utility's approved tariff shall be available at its local office for review by a customer or service applicant upon request.

(4) Each utility shall maintain a current set of maps showing the physical locations of its facilities. All facilities (production, transmission, distribution or collection lines, treatment plants, etc.) shall be labeled to indicate the size, design capacity, and any pertinent information which will accurately describe the utility's facilities. These maps, and such other maps as may be required by the commission, shall be kept by the utility in a central location and will be available for commission inspection during normal working hours.

(5) Each utility shall maintain a current copy of the commission's substantive rules, Chapter 291 of this title (relating to Utility Regulations) at each office location and make them available for customer inspection during normal working hours.

(6) Each water utility shall maintain a current copy of §§290.38 - 290.47 of this title (relating to Rules and Regulations for Public Water Systems), at each office location and make them available for customer inspection during normal working hours.

(b) Customer complaints. Customer complaints are also addressed in §291.82 of this title (relating to Resolution of Disputes).

(1) Upon receipt of a complaint from a customer or service applicant, either in person, by letter or by telephone, the utility shall promptly conduct an investigation and report its finding(s) to the complainant.

(2) In the event the complainant is dissatisfied with the utility's report, the utility must advise the complainant of recourse through the Texas Commission on Environmental Quality Texas complaint process, and that such process can be initiated by contacting the Consumer Assistance Coordinator, Water Supply Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087. The commission encourages all complaints to be made in writing to assist the commission in maintaining records on the quality of service of each utility.

(3) Each utility shall make an initial response to the executive director within 15 days of receipt of a complaint from the commission on behalf of a customer or service applicant. The commission or the executive director may require a utility to provide a written response to the complainant, to the commission, or both. Pending resolution of a complaint, the commission or the executive director may require continuation or restoration of service.

(4) The utility shall keep a record of all complaints for a period of two years following the final settlement of each complaint. The record of complaint shall include the name and address of the complainant, the date the complaint was received by the utility, a description of the nature of the complaint, and the adjustment or disposition of the complaint.

(c) Telephone number. For each of the systems it operates, the utility must maintain and note on the customer's monthly bill either a local or toll free telephone number (or numbers) to which a customer can direct questions about their utility service.

(d) Local Office. Unless authorized by the executive director pursuant to a written request, each utility shall have an office in the county or immediate area (within 20 miles) of a portion of its utility service area in which it keeps all books, records, tariffs, and memoranda required by the commission and at which it will accept customer payments or applications for service. Unless authorized by the executive director pursuant to a written request, each utility shall make available and notify customers of a location within 20 miles of each of its utility service facilities where payments can be made to restore service after disconnection for nonpayment, nonuse, or other reasons specified in §291.88 of this title (relating to Discontinuance of Service).

§291.82. Resolution of Disputes.

(a) Any customer or service applicant requesting the opportunity to dispute any action or determination of a utility under the utility's customer service rules shall be given an opportunity for a review by the utility. If the utility is unable to provide a review immediately following the customer's request, arrangements for the review shall be made for the earliest possible date. Service shall not be disconnected pending completion of the review. The commission may require continuation or restoration of service pending resolution of a complaint. If the customer will not allow an inspection or chooses not to participate in such review or not to make arrangements for such review to take place within five working days after requesting it, the utility may disconnect service for the reasons listed in §291.88 of this title (relating to Discontinuance of Service), provided notice has been given in accordance with that section.

(b) In regards to a customer complaint arising out of a charge made by a public utility, if the executive director finds that the utility has failed to make the proper adjustment to the customer's bill after the conclusion of the complaint process established by the commission, the commission may issue an order requiring the utility to make the adjustment. Failure to comply with the order within 30 working days of receiving the order is a violation for which the commission may impose an administrative penalty under Texas Water Code, §13.4151.

§291.85. Response to Requests for Service by a Retail Public Utility Within Its Certificated Area.

(a) Except as provided for in subsection (e) of this section, every retail public utility shall serve each qualified service applicant within its certificated area as soon as is practical after receiving a completed application. A qualified service applicant is an applicant who has met all of the retail public utility's requirements contained in its tariff, schedule of rates, or service policies and regulations for extension of service including the delivery to the retail public utility of any service connection inspection certificates required by law.

(1) Where a new service tap is required, the retail public utility may require that the property owner make the request for the tap to be installed.

(2) Upon request for service by a service applicant, the retail public utility shall make available and accept a completed written application for service.

(3) Except for good cause, at a location where service has previously been provided the utility must reconnect service within one working day after the applicant has submitted a completed application for service and met any other requirements in the utility's approved tariff.

(4) A request for service that requires a tap but does not require line extensions, construction, or new facilities shall be filled within five working days after a completed service application has been accepted.

(5) If construction is required to fill the order and if it cannot be completed within 30 days, the retail public utility shall provide a written explanation of the construction required and an expected date of service.

(b) Except for good cause shown, the failure to provide service within 30 days of an expected date or within 180 days of the date a completed application was accepted from a qualified applicant may constitute refusal to serve, and may result in the assessment of administrative penalties or revocation of the certificate of convenience and necessity or the granting of a certificate to another retail public utility to serve the applicant.

(c) The cost of extension and any construction cost options such as rebates to the customer, sharing of construction costs between the utility and the customer, or sharing of costs between the customer and other applicants shall be provided to the customer in writing upon assessment of the costs of necessary line work, but before construction begins. Also see §291.81(a)(1) of this title (relating to Customer Relations).

(d) Easements.

(1) Where recorded public utility easements on the service applicant's property do not exist or public road right-of-way easements are not available to access the property of a service applicant, the public utility may require the service applicant or land owner to grant a permanent recorded public utility easement dedicated to the public utility which will provide a reasonable right of access and use to allow the public utility to construct, install, maintain, inspect and test water and/or sewer facilities necessary to serve that applicant.

(2) As a condition of service to a new subdivision, public utilities may require developers to provide permanent recorded public utility easements to and throughout the subdivision sufficient to construct, install, maintain, inspect, and test water and/or sewer facilities necessary to serve the subdivision's anticipated service demands upon full occupancy.

(3) A district or water supply corporation may require an applicant for service to grant an easement as allowed under applicable law.

(e) Service Extensions by a Water Supply or Sewer Service Corporation or Special Utility District.

(1) A water supply or sewer service corporation or a special utility district organized under Chapter 65 of the code is not required to extend retail water or sewer utility service to a service applicant in a subdivision within its certificated area if it documents that:

(A) the developer of the subdivision has failed to comply with the subdivision service extension policy as set forth in the tariff of the corporation or the policies of the special utility district; and

(B) the service applicant purchased the property after the corporation or special utility district gave notice of its rules which are applicable to service to subdivisions in accordance with the notice requirements in this subsection.

(2) Publication of notice, in substantial compliance with the form notice in Appendix A, in a newspaper of general circulation in each county in which the corporation or special utility district is certificated for utility service of the requirement to comply with the subdivision service extension policy constitutes notice under this subsection. The notice must be published once a week for two consecutive weeks on a biennial basis and must contain information describing the subdivision service extension policy of the corporation or special utility district. The corporation or special utility district must be able to provide proof of publication through an affidavit of the publisher of the newspaper that specifies each county in which the newspaper is generally circulated:
Figure: 30 TAC §291.85(e)(2)

(3) As an alternative to publication of notice, a corporation or special utility district may demonstrate by any reasonable means that a developer has been notified of the requirement to comply with the subdivision service extension policy, including:

(A) an agreement executed by the developer;

(B) correspondence with the developer that sets forth the subdivision service extension policy; or

(C) any other documentation that reasonably establishes that the developer should be aware of the subdivision service extension policy.

(4) For purposes of this subsection:

(A) "Developer" means a person who subdivides land or requests more than two water or sewer service connections on a single contiguous tract of land.

(B) "Service applicant" means a person, other than a developer, who applies for retail water or sewer utility service.

§291.87. Billing.

(a) Authorized rates. Bills shall be calculated according to the rates approved by the regulatory authority and listed on the utility's approved tariff. Unless specifically authorized by the commission, a utility may not apply a metered rate to customers in a subdivision or geographically defined area unless all customers in the subdivision or geographically defined area are metered.

(b) Due date. The due date of the bill for utility service shall not be less than 16 days after issuance unless the customer is a State Agency. If the customer is a State Agency, the due date for the bill shall be not less than 30 days after issuance unless otherwise agreed to by the State Agency. The postmark on the bill or the recorded date of mailing by the utility if there is no postmark on the bill, shall constitute proof of the date of issuance. Payment for utility service is delinquent if the full payment, including late fees and regulatory assessments, is not received at the utility or at the utility's authorized payment agency by 5:00 p.m. on the due date. If the due date falls on a holiday or weekend, the due date for payment purposes shall be the next work day after the due date.

(c) Penalty on delinquent bills for retail service. Unless otherwise provided, a one-time penalty of either $5.00 or 10% for all customers may be made on delinquent bills. If, after receiving a bill including a late fee, a customer pays the bill in full except for the late fee, the bill may be considered delinquent and subject to termination after proper notice under §291.88 of this title (relating to Discontinuance of Service). An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The penalty on delinquent bills may not be applied to any balance to which the penalty was applied in a previous billing. No such penalty may be charged unless a record of the date the utility mails the bills is made at the time of the mailing and maintained at the principal office of the utility. Late fees may not be charged on any payment received by 5:00 p.m. on the due date at the utility's office or authorized payment agency. The commission may prohibit a utility from collecting late fees for a specified period if

it determines that the utility has charged late fees on payments which were not delinquent.

(d) Deferred payment plan. A deferred payment plan is any arrangement or agreement between the utility and a customer in which an outstanding bill will be paid in installments. The utility shall offer a deferred payment plan to any residential customer if the customer's bill is more than three times the average monthly bill for that customer for the previous 12 months and if that customer has not been issued more than two disconnection notices at any time during the preceding 12 months. In all other cases, the utility is encouraged to offer a deferred payment plan to residential customers who cannot pay an outstanding bill in full but are willing to pay the balance in reasonable installments. A deferred payment plan may include a finance charge which shall not exceed an annual rate of 10% simple interest. Any finance charges must be clearly stated on the deferred payment agreement.

(e) Rendering and form of bills.

(1) Bills for water and sewer service shall be rendered monthly unless otherwise authorized by the commission, or unless service is terminated before the end of a billing cycle. Service initiated less than one week before the next billing cycle begins may be billed with the following month's bill. Bills shall be rendered as promptly as possible following the reading of meters. One bill shall be rendered for each meter.

(2) The customer's bill shall show all the following information, if applicable, and shall be arranged so as to allow the customer to readily compute the bill with a copy of the applicable rate schedule:

(A) if the meter is read by the utility, the date and reading of the meter at the beginning and at the end of the period for which the bill is rendered;

(B) the number and kind of units metered;

(C) the applicable rate class or code;

(D) the total amount due for water service;

(E) the amount deducted as a credit required by a commission order;

(F) the amount due as a surcharge;

(G) the total amount due on or before the due date of the bill;

(H) the due date of the bill;

(I) the date by which customers must pay the bill in order to avoid addition of a penalty;

(J) the total amount due as penalty for nonpayment within a designated period;

(K) a distinct marking to identify an estimated bill;

(L) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill;

(M) the total amount due for sewer service;

(N) the gallonage used in determining sewer usage;

(O) the local telephone number or toll free number where the utility can be reached.

(3) Except for an affected county or for solid waste disposal fees collected under a contract with a county or other public agency, charges for nonutility services or any other fee or charge not specifically authorized by the code or these rules or specifically listed on the utility's approved tariff may not be included on the bill.

(f) Charges for sewer service. Utilities are not required to use meters to measure the quantity of sewage disposed of by individual customers. When a sewer utility is operated in conjunction with a water utility which serves the same customer, the charge for sewage disposal service may be based on the consumption of water as registered on the customer's water meter. Where measurement of water consumption is not available, the utility shall use the best means available for determining the quantity of sewage disposal service used. A method of separating customers by class shall be adopted so as to apply rates which will accurately reflect the cost of service to each class of customer.

(g) Overbilling and underbilling. If billings for utility service are found to differ from the utility's lawful rates for the services being provided to the customer, or if the utility fails to bill the customer for such services, a billing adjustment shall be calculated by the utility. If the customer is due a refund, an adjustment shall be made for the entire period of the overcharges. If the customer was undercharged, the utility may backbill the customer for the amount which was underbilled. The backbilling shall not exceed 12 months unless such undercharge is a result of meter tampering, bypass, or diversion by the customer as defined in §291.89 of this title (relating to Meters). If the underbilling is $25 or more, the utility shall offer to such customer a deferred payment plan option for the same length of time as that of the underbilling. In cases of meter tampering, bypass, or diversion, a utility may, but is not required to, offer a customer a deferred payment plan.

(h) Estimated bills. When there is good reason for doing so, a water or sewer utility may issue estimated bills, provided that an actual meter reading is taken every two months and appropriate adjustments made to the bills.

(i) Prorated charges for partial-month bills. When a bill is issued for a period of less than one month, charges should be computed as follows:

(1) Metered service. Service shall be billed for the base rate, as shown in the utility's tariff, prorated for the number of days service was provided; plus the volume metered in excess of the prorated volume allowed in the base rate.

(2) Flat-rate service. The charge shall be prorated on the basis of the proportionate part of the period during which service was rendered.

(3) Surcharges. Surcharges approved by the commission do not have to be prorated on the basis of the number of days service was provided.

(j) Prorated charges due to utility service outages. In the event that utility service is interrupted for more than 24 consecutive hours, the utility shall prorate the base charge to the customer to reflect this loss of service. The base charge to the customer shall be prorated on the basis of the proportionate part of the period during which service was interrupted.

(k) Disputed bills.

(1) A customer may advise a utility that a bill is in dispute by written notice or in person during normal business hours. A dispute must be registered with the utility and a payment equal to the customer's average monthly usage at current rates must be received by the utility prior to the date of proposed discontinuance for a customer to avoid discontinuance of service as provided by these sections.

(2) Notwithstanding any other section of this chapter, the customer shall not be required to pay the disputed portion of a bill

which exceeds the amount of that customer's average monthly usage at current rates pending the completion of the determination of the dispute. For purposes of this section only, the customer's average monthly usage shall be the average of the customer's usage for the preceding 12-month period. Where no previous usage history exists, consumption for calculating the average monthly usage shall be estimated on the basis of usage levels of similar customers under similar conditions.

(3) Notwithstanding any other section of this chapter, a utility customer's service shall not be subject to discontinuance for nonpayment of that portion of a bill under dispute pending the completion of the determination of the dispute. The customer is obligated to pay any billings not disputed as established in §291.88 of this title (relating to Discontinuance of Service).

(l) Notification of alternative payment programs or payment assistance. Any time a customer contacts a utility to discuss their inability to pay a bill or indicate that they are in need of assistance with their bill payment, the utility or utility representative shall provide information to the customer in English and in Spanish if requested of available alternative payment and payment assistance programs available from the utility and of the eligibility requirements and procedure for applying for each.

(m) Adjusted bills. There shall be a presumption of reasonableness of billing methodology by a sewer utility for winter average billing or by a water utility with regard to a case of meter tampering, bypassing, or other service diversion if any one of the following methods of calculating an adjusted bill is used:

(1) estimated bills based upon service consumed by that customer at that location under similar conditions during periods preceding the initiation of meter tampering or service diversion. Such estimated bills shall be based on at least 12 consecutive months of comparable usage history of that customer, when available, or lesser history if the customer has not been served at that site for 12 months. This subsection, however, does not prohibit utilities from using other methods of calculating bills for unmetered water when the usage of other methods can be shown to be more appropriate in the case in question;

(2) estimated bills based upon that customer's usage at that location after the service diversion has been corrected;

(3) calculation of bills for unmetered consumption over the entire period of meter bypassing or other service diversion, if the amount of actual unmetered consumption can be calculated by industry recognized testing procedures; or

(4) a reasonable adjustment is made to the sewer bill if a water leak can be documented during the winter averaging period and winter average water use is the basis for calculating a customer's sewer charges. If the actual water loss can be calculated, the consumption shall be adjusted accordingly. If not, the prior year average can be used if available. If the actual water loss cannot be calculated and the customer's prior year's average is not available, then a typical average for other customers on the system with similar consumption patterns may be used.

(n) Equipment damage charges. A utility may charge for all labor, material, equipment, and all other actual costs necessary to repair or replace all equipment damaged due to negligence, meter tampering or bypassing, service diversion, or the discharge of wastes which the system cannot properly treat. The utility may charge for all actual costs necessary to correct service diversion or unauthorized taps where there is no equipment damage, including incidents where service is reconnected without authority. An itemized bill of such charges must be provided to the customer. A utility may not charge any additional penalty or any other charge other than actual costs unless such penalty has been expressly approved by the commission and filed in the utility's tariff. Except in cases of meter tampering or service diversion, a utility may not disconnect service of a customer refusing to pay damage charges unless authorized to in writing by the executive director.

(o) Fees. Except for an affected county, utilities may not charge disconnect fees, service call fees, field collection fees, or standby fees except as authorized in this chapter.

(1) A utility may only charge a developer standby fees for unrecovered costs of facilities committed to a developer's property under the following circumstances:

(A) under a contract and only in accordance with the terms of the contract; or

(B) if service is not being provided to a lot or lots within two years after installation of facilities necessary to provide service to the lots has been completed and if the standby fees are included on the utility's approved tariff after a rate change application has been properly filed. The fees cannot be billed to the developer or collected until the standby fees have been approved by the commission or executive director.

(C) for purposes of this subsection, a manufactured housing rental community can only be charged standby fees under a contract or if the utility installs the facilities necessary to provide individually metered service to each of the rental lots or spaces in the community.

(2) Except as provided in §291.88(h)(2) of this title (relating to Discontinuance of Service) and §291.89(c) of this title (relating to Meters) other fees listed on a utility's approved tariff may be charged when appropriate. Return check charges included on a utility's approved tariff may not exceed the utility's documentable cost.

(p) Payment with cash. When a customer pays any portion of a bill with cash, the utility must issue a written receipt for the payment.

(q) Voluntary contributions for certain emergency services.

(1) A utility may implement as part of its billing process a program under which the utility collects from its customers a voluntary contribution including a voluntary membership or subscription fee, on behalf of a volunteer fire department or an emergency medical service. A utility that collects contributions under this section shall provide each customer at the time the customer first becomes a customer, and at least annually thereafter, a written statement:

(A) describing the procedure by which the customer may make a contribution with the customer's bill payment;

(B) designating the volunteer fire department or emergency medical service to which the utility will deliver the contribution;

(C) informing the customer that a contribution is voluntary;

(D) if applicable, informing the customer the utility intends to keep a portion of the contributions to cover related expenses; and

(E) describing the deductibility status of the contribution under federal income tax law.

(2) A billing by the utility that includes a voluntary contribution under this section must clearly state that the contribution is voluntary and that it is not required to be paid.

(3) The utility shall promptly deliver contributions that it collects under this section to the designated volunteer fire department

or emergency medical service, except that the utility may keep from the contributions an amount equal to the lesser of:

(A) the utility's expenses in administering the contribution program; or

(B) 5.0% of the amount collected as contributions.

(4) Amounts collected under this section are not rates and are not subject to regulatory assessments, late payment penalties, or other utility related fees, are not required to be shown in tariffs filed with the regulatory authority, and non-payment may not be the basis for termination of service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205218
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Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-6087

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SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

30 TAC §291.113

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; and §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

§291.113. Revocation or Amendment of Certificate.

(a) A certificate or other order of the commission does not become a vested right and the commission at any time after notice and hearing may revoke or amend any certificate of public convenience and necessity if it finds that:

(1) The certificate holder has never provided, is no longer providing service or has failed to provide continuous and adequate service in the area, or part of the area covered by the certificate;

(2) In an affected county, the cost of providing service by the certificate holder is so prohibitively expensive as to constitute denial of service, provided that, for commercial developments or for residential developments started after September 1, 1997, in an affected county, the fact that the cost of obtaining service from the currently certificated retail public utility makes the development economically unfeasible does not render such cost prohibitively expensive in the absence of other relevant factors;

(3) The certificate holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate; or

(4) The certificate holder has failed to file a cease and desist action pursuant to Texas Water Code (TWC), §13.252 within 180 days of the date that it became aware that another retail public utility was providing service within its service area, unless the certificate holder demonstrates good cause for its failure to file such action within the 180 days.

(b) Upon written request from the certificate holder, the executive director may cancel the certificate of a utility or water supply corporation authorized by rule to operate without a certificate of public convenience and necessity under TWC, §13.242(c).

(c) If the certificate of any retail public utility is revoked or amended, the commission may require one or more retail public utilities to provide service in the area in question. The order of the commission shall not be effective to transfer property.

(d) A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section without providing compensation for any property that the commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

(e) The determination of the monetary amount of compensation, if any, shall be determined at the time another retail public utility seeks to provide service in the previously decertified area and before service is actually provided.

(f) The monetary amount shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified retail public utility and the retail public utility seeking to serve the area. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the retail public utility seeking to serve the area.

(g) For the purpose of implementing this section, the value of real property shall be determined according to the standards set forth in Texas Property Code, Chapter 21, governing actions in eminent domain and the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility for the taking, damaging, or loss of personal property, including the retail public utility's business, is just and adequate shall at a minimum include: the impact on the existing indebtedness of the retail public utility and its ability to repay that debt; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues and expenses of the retail public utility; necessary and reasonable legal expenses and professional fees; factors relevant to maintaining the current financial integrity of the retail public utility; and other relevant factors.

(h) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time. If there were no current customers in the area decertified and no immediate loss of revenues or if there are other valid reasons determined by the commission, installment payments as new customers are added in the decertified area may be an acceptable method of payment.

(i) On the request of a municipality with a population of more than 1.3 million served by a public utility, the commission at any time after notice and hearing may revoke the public utility's certificate of public convenience and necessity if it finds that the public utility:

(1) has never provided, is no longer providing, or has failed to provide continuous and adequate service as defined in §291.93 of this title (relating to Adequacy of Water Service) or §291.94 of this title

(relating to Adequacy of Sewer Service) in the municipality requesting the revocation; or

(2) has been grossly or continuously mismanaged or has grossly or continuously not complied with applicable statutes, commission rules, or commission orders.

(j) If the certificate is revoked under subsection (i) of this section, the municipality that requested the revocation shall operate the decertified public utility for an interim period necessary for the municipality to gain commission approval to acquire the decertified public utility's facilities and to transfer the decertified public utility's certificate of public convenience and necessity. The municipality must apply in accordance with commission rules.

(k) The monetary amount to be paid for the facilities of a public utility decertified under subsection (i) of this section shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified public utility and the municipality. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the municipality.

(l) For the purpose of implementing subsection (k) of this section, the value of real property shall be determined according to the standards set forth in Texas Property Code, Chapter 21, governing actions in eminent domain.

(m) The commission shall determine whether payment of compensation shall be in a lump sum or paid out over a specified period of time.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205219
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 12, 2002
For further information, please call: (512) 239-6087

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SUBCHAPTER H. UTILITY SUBMETERING AND ALLOCATION

30 TAC §291.122, §291.127

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC; and §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction.

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 293. WATER DISTRICTS
SUBCHAPTER B. CREATION OF WATER DISTRICTS

The Texas Natural Resource Conservation Commission (commission) adopts amendments to Subchapter B, Creation of Water Districts, §293.12; and Subchapter L, Dissolution of Districts, §293.131 and §293.132. The commission also adopts the repeal of Subchapter B, Creation of Water Districts, §293.16; Subchapter C, Creation of Groundwater Conservation Districts in Priority Groundwater Management Areas, §293.21; Subchapter D, Appointment of Directors, §293.36 and §293.37; and Subchapter L, Dissolution of Districts, §293.137. The commission also adopts new Subchapter C, Special Requirements for Groundwater Conservation Districts, §§293.17 - 293.23. Sections 293.18 - 293.20 and 293.22 are adopted *with changes* to the proposed text as published in the May 10, 2002 issue of the *Texas Register* (27 TexReg 3939). Sections 293.12, 293.16, 293.17, 293.21, 293.23, 293.36, 293.37, 293.131, 293.132, 293.137 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The revisions implement portions of Senate Bill (SB) 2, 77th Texas Legislature, 2001, which amended Texas Water Code (TWC), Chapters 35 and 36 relating to priority groundwater management areas (PGMAs), groundwater management areas (GMAs), and groundwater conservation districts (GCDs). The revisions to Chapter 293 implement SB 2, §§2.26, 2.28, 2.34 - 2.40, 2.48, and 2.55 - 2.57. In a related rulemaking, revisions to 30 TAC Chapter 294, Underground Water Management Areas, which implement SB 2, §§2.22 - 2.29, 2.32, 2.33, and 13.02, also appear in this issue of the *Texas Register*.

Adopted modifications to Chapter 293 implement SB 2 provisions that change commission processes and procedures for the creation of GCDs in GMAs and in PGMAs, and commission enforcement options and procedures relating to GCD management planning and joint planning. The adopted rules revise agency processes to streamline creation of GCDs in response to landowner petitions in accordance with TWC, §§36.013 - 36.016 as amended by SB 2. These adopted changes provide for commission certification of a complete petition submittal replacing a detailed engineering report evaluation; provide for a public hearing replacing a contested case hearing; and provide specific, limited bases for commission rejection of a landowner GCD-creation petition.

The adopted rules also implement TWC, §36.0151, by revising agency processes on the commission-creation of GCDs in a designated PGMA. In the streamlined PGMA designation process, the commission may create a GCD on its own motion under certain situations. The adopted rules change GCD creation in PGMAs designated after September 1, 2001 from a contested case hearing to a commission order without hearing. The adopted

rules provide a procedure for creation of GCDs in a PGMA designated before September 1, 2001, that includes a district creation hearing process.

The adopted rules implement TWC, §§36.108, 36.3011, 36.303, and 36.3035 by amending and developing new rules relating to commission enforcement responsibilities associated with existing GCD management planning requirements and new joint management planning requirements for GCDs in a common GMA. Under TWC, §36.108, as amended by SB 2, §2.47, a GCD with good cause may petition for a peer panel review of a GCD if the GCD refused to join in the joint planning process or the GCD has failed to adopt, implement, or enforce its rules to protect groundwater resources. The new rules follow the statute and provide for developing a peer review process with review panel findings subject to commission enforcement actions, add procedures for requesting the Texas attorney general to place a GCD into receivership, and repeal provisions for removing a GCD's taxing authority as an enforcement action.

The commission adopts the repeal of existing GCD-specific provisions in §§293.16, 293.21, 293.36, 293.37, and 293.137, and adopts new Subchapter C, Special Requirements for Groundwater Conservation Districts, with new provisions that are specific to GCDs. The adopted rules in new Subchapter C consolidate existing GCD-specific provisions that implement existing statutes and implement the new provisions of SB 2. The commission adopts this consolidation of GCD-specific provisions for three reasons. First, all types of water districts are subject to TWC, Chapter 49, Provisions Applicable to All Districts, except for GCDs which are specifically exempted from other laws governing the administration or operation of districts under TWC, §36.052. Secondly, hearings for the creation of all other types of water districts are upon request except for GCDs where public meetings are required by the statute. Lastly, a consolidation of the GCD-specific provisions will allow the public to more easily understand commission processes and commission, landowner, and GCD groundwater management responsibilities.

These adopted revisions are being coordinated with an ongoing rulemaking in Chapter 293 under Rule Log Number 2001-054-293-WT for the implementation of SB 1444; House Bill (HB) 2992; 702; and 2912, Article 20.2, 77th Legislature, 2001. Proposed revisions to Chapter 293 in that rulemaking were published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2984).

SECTION BY SECTION DISCUSSION

Subchapter B: Creation of Water Districts

Section 293.12, Creation Notice Actions and Requirements, is amended to remove GCD-specific provisions in subsections (a) and (d) and to reletter the remaining sections. The removed provisions are amended to implement statutory changes and are moved to new §293.18.

Section 293.16, Expansion of an Existing Groundwater Conservation District's Management Authority, is repealed. Language addressing expansion of an existing GCD's management authority is adopted as new §293.21.

Adopted New Subchapter C: Special Requirements for Groundwater Conservation Districts

New §293.17, Purpose, states that the purpose of the new subchapter is to implement TWC, Chapter 36 provisions for commission implementation relating to GCD creation and requirements of GCDs. The new subchapter provides the processes and requirements specific to the creation of GCDs on landowner petitions; commission-initiated creation of GCDs in PGMAs; and noncompliance review and enforcement relating to GCD failure to meet requirements for management planning and joint planning within a GMA.

New §293.18, Creation of a Groundwater Conservation District in a Groundwater Management Area, provides procedures for landowner petition submittal and commission action for the creation of GCDs in GMAs. New subsection (a) provides for the filing and contents of a complete GCD creation submittal. New subsection (b) provides the requirements and contents of a landowner petition for the creation of a GCD in a GMA. New subsection (c) provides the requirements for supporting information for the GCD creation submittal. The supporting information is needed by the executive director to evaluate the boundaries, proposed groundwater management projects, temporary director qualifications, petition signatures, financial information for the proposed district, and statements that indicate that copies of the petition have been distributed. The commission has revised §293.18(c)(1)(A) to require the petitioners to provide a metes and bounds description of the proposed boundaries of the proposed GCD if those boundaries differ from a political subdivision boundary. The commission removed proposed language that exempted this requirement if the proposed district boundaries were based on the boundaries of a designated GMA. This revision was made because the commission does not know at this time if the Texas Water Development Board (TWDB) will use a metes and bounds description in its GMA designations and such boundary descriptions are necessary for the executive director to verify petition signatures and for the commission to delineate GCD boundaries. New subsection (d) provides the procedures for executive director review of landowner petitions for the creation of a GCD in a GMA. New subsection (e) provides for the publication and direct mailing of notice of a complete GCD creation submittal and the time and place of the public meeting to receive comments on a landowner GCD creation petition. The subsection provides that the public meeting must be conducted within 60 days of the notice.

In order to ensure that landowner petitions are accessible to the public, subsections (c) and (e) have been revised to require petitioners to make a copy of the petition and supporting information available for public inspection. Subsection (c) has been revised to require that petitioners provide access to the petition and supporting information to all interested individuals and entities at the earliest feasible time. The notice requirements of subsection (e) have been revised to clarify the availability of the petition and supporting information for public inspection and to require the petitioners to provide proof of notice posting. These revisions will assure that a copy of the petition and supporting information is available for public inspection during the executive director's review and during the time period leading up to the public meeting on the issue.

New subsection (f) provides for executive director actions following the public meeting. The commission has revised the subsection to be more consistent with the statute by clarifying language relating to the executive director recommendation on the petition. As revised, the executive director will summarize the public meeting comments and make a recommendation to the commission on whether the petition, not the submittal, is administratively complete and should be certified. New subsection (g) provides a 90-day time frame after the public meeting for commission action on a landowner petition; certification of a complete GCD creation

petition that meets statutory requirements; and appointment of temporary directors. The new subsection provides the statutory findings necessary for the commission certification or denial of a GCD creation petition and landowner opportunity to resubmit a denied petition.

New §293.19, Commission-Initiated Creation of a Groundwater Conservation District in a Priority Groundwater Management Area, provides commission procedures for the creation of GCDs in designated PGMAs. New subsection (a) provides procedures for commission creation of GCDs in PGMAs designated after September 1, 2001, subject to statutory provisions amended by SB 2. The subsection implements new statutory requirements to identify areas in the PGMA that have not created a GCD and recommend GCD creation consistent with the PGMA designation order. The subsection provides for the executive director's recommendation, in the form of a proposed order, to be filed with the chief clerk and for the chief clerk to mail notice to water stakeholders or any other persons identified in the PGMA designation hearing of the place and time when the commission will consider the GCD-creation action. The commission will not hold an evidentiary hearing on the district creation. New subsection (b) provides procedures for commission creation of GCDs in PGMAs designated before September 1, 2001. The new section provides for an executive director report to identify areas in pre-September 1, 2001 PGMAs that have not created a GCD and a recommendation of whether to create one or more GCDs, to add the identified areas to an existing GCD, or a combination of these actions. The new subsection provides for mailed and published notice of the executive director's report and recommendations and date, time, and location of a contested case hearing on the report and recommendations. The new subsection is adopted to develop the evidentiary record necessary for commission creation of a GCD in a PGMA. Under the statute prior to SB 2, this evidentiary record was not developed in the PGMA designation process or hearing. The subsection defines the scope of evidentiary hearing considerations on GCD-creation action. New subsection (c) provides for commission action to create GCDs in PGMAs. The subsection implements new SB 2 requirements and provides for the contents of a commission order; for the appointment of temporary directors by county commissioners courts; and for the temporary directors to call an election to authorize the district, to assess taxes, and to elect permanent directors. The commission corrected a typographical error in §293.19(c)(3) to make one of the references of this subsection read "36.059(b)" instead of "36.059(c)." New subsection (d) provides for commission action to recommend that areas in a PGMA designated before September 1, 2001 be added to an existing GCD. The new section refers to procedures provided in new §294.44, Adding a PGMA to an Existing Groundwater Conservation District, which implement SB 2 changes.

New §293.20, Records and Reporting, provides guidance to GCDs related to recordkeeping and reporting. New subsection (a) provides that GCDs are subject to the requirements of TWC, Chapter 36 and/or the special law if created in such a manner. The commission adopts the new subsection to provide requirements in the statute that the State Auditor's Office and the commission have identified as common areas of noncompliance during recent GCD management plan audits and are subject to enforcement action by the commission. New subsection (b) provides a listing of documentation that GCDs are required to submit to the commission. This documentation is required by statute or is necessary for the commission to implement its requirements under the statute for enforcement of GCD management plan requirements. The new provision will enable the commission to maintain accurate supervision files of GCDs for the statutory implementation and public inspection. Requirements of the new provision include documentation relating to the creation of the GCD, the election of directors for the GCD, and the changing of boundaries by the GCD. New subsection (c) provides requirements for the filing of GCD management plans necessary for commission oversight. The new subsection implements existing and new statutes and provides that a GCD must forward a copy of its certified groundwater management plan or amended plan to the regional water planning groups that the GCD is located within, to other GCDs that are located in a common GMA, and to the executive director. The subsection provides that GCDs must provide documentation to the executive director that such action has been taken. This documentation is necessary for the commission to implement its statutory responsibilities relating to GCD management plan enforcement and maintenance of accurate district supervision files for public inspection. New subsection (d) provides for documentation requests from the executive director to GCDs to determine statutory compliance relating to noncompliance review under TWC, Chapter 36. In this subsection, the commission has corrected the name of referenced §293.22 to read "Noncompliance Review and Commission Action" to be consistent with the name of the section. New subsection (e) provides that a district shall provide documentation upon request from the executive director to determine compliance with statutory provisions such as management plan enforcement and response to citizen complaints.

New §293.21, Expansion of an Existing Groundwater Conservation District's Management Authority, provides procedures for amending a commission order creating a GCD. New §293.21 contains the language of repealed §293.16 with revisions. The new section provides the procedures and requirements for a commission-created GCD to petition for the expansion of groundwater management authority to other water-bearing formations within the GCD's boundaries.

New §293.22, Noncompliance Review and Commission Action, sets out procedures for commission review of GCD noncompliance with requirements of TWC, Chapter 36. New subsection (a) provides the purpose of the section to set out processes for a GCD to achieve compliance and for commission enforcement procedures and actions if compliance is not achieved. The adopted section is applicable if a GCD fails to: 1) adopt a groundwater management plan within two years of the date the GCD was confirmed; 2) achieve certification of a groundwater management plan or amended plan from the executive administrator of the TWDB; 3) forward a copy of its certified groundwater management plan to the other GCDs included in a common GMA; 4) be actively engaged and operational in achieving the objectives of its groundwater management plan based on the State Auditor's Office audit of the GCD's performance under its plan; or 5) adopt, implement, or enforce rules to protect groundwater as evidenced in a report prepared by a peer-review panel. The commission corrected §293.22(a)(3) TO read "...common groundwater management area" instead of groundwater management plan. New subsection (b) provides the executive director's noncompliance review process including requirements for a GCD to achieve voluntary compliance though a compliance agreement. New subsection (c) provides procedures if the executive director and the GCD are not able to resolve noncompliance issues through a compliance agreement. The subsection provides for

the executive director to follow procedures for commission enforcement actions set out in 30 TAC Chapter 70, Subchapter C, including a written report filed with the commission and with the GCD.

New subsection (d) provides for mailed and published notice and hearing if formal enforcement action is necessary to bring a GCD into compliance. The subsection references Chapter 70 for notice procedures and provides additional procedures required by TWC, Chapter 36. New subsection (e) provides for commission enforcement actions against noncompliant GCDs. The subsection provides that the commission may take a statutorily-authorized action that it finds appropriate including issuing an order requiring the GCD to take certain actions or refrain from taking certain actions, dissolving a GCD's board of directors, requesting the attorney general to bring suit for the appointment of a receiver for the GCD, dissolving the GCD, or recommending legislative actions to address the GCD. New subsections (f), (g), and (h) provide additional commission procedures relating to GCD dissolution, dissolution of a board of directors, and receivership. These subsections provide specific procedures and actions required of the commission to implement orders taken under subsection (e) against a GCD. New subsection (i) provides for appeals of commission enforcement orders.

New §293.23, Groundwater Conservation District Petition Requesting Inquiry in Groundwater Management Area, provides procedures for commission review of GCD petitions that request a peer panel inquiry related to joint groundwater management planning in a GMA as authorized in TWC, Chapter 36. New subsection (a) provides for the purpose and applicability of the section. New subsection (b) provides for the contents of the petition and the documentation required to request a commission inquiry. The petition must provide evidence that another GCD in the GMA has failed to adopt rules, the groundwater in the GMA is not adequately protected by the rules adopted by another GCD, or the groundwater in the GMA is not adequately protected due to the failure of another GCD to enforce substantial compliance with its rules. New subsection (c) provides procedures for commission review and action relating to a petition requesting an inquiry. The subsection provides the time frame for commission review of the petition and the appointment of a review panel if the petition is not dismissed. New subsection (d) provides requirements for a review panel's report to the commission. The subsection provides that the report must include a summary of evidence taken in any review panel hearing on the petition if hearings were conducted, a list of findings and recommended actions appropriate for the commission to take regarding the petition, and any other information the review panel considers appropriate for commission consideration. New subsection (e) provides for commission action and the timing of commission action on the review panel's report. The adopted section implements TWC, Chapter 36 and changes to the statute made by SB 2.

Subchapter C: Creation of Groundwater Conservation Districts in Priority Groundwater Management Areas

Existing Subchapter C, which consists of §293.21, Commission Creation of Groundwater Conservation Districts in Priority Groundwater Management Areas, is repealed because the statute on which it was based has been changed by SB 2 and to allow consolidation and reorganization of GCD rules in a new Subchapter C. New §293.19 provides new language for commission creation of GCDs in PGMAs to address statutory changes.

Subchapter D: Appointment of Directors

Section 293.36, Appointment of Temporary Directors by Commission for a Groundwater Conservation District, is repealed. Similar language addressing the appointment of temporary directors for a GCD in a PGMA is adopted in new §293.19 that includes revisions based on SB 2 statutory changes.

Section 293.37, Estimation of Groundwater Use, is repealed. The repealed section, for purposes of the apportionment of temporary directors for a commission-created multi-county GCD in a PGMA, provided for the executive director to request the estimated groundwater usage by county from the TWDB and for the commission to apportion temporary directors based on this groundwater usage data. Similar provisions addressing estimation of groundwater use related to the appointment of temporary directors for a GCD in a PGMA are adopted in new §293.19. New §293.19(c)(2) provides for the commission to apportion temporary directors in a commission-created multi-county GCD in PGMA based on the estimated groundwater usage data and information contained in the most current version of the State Water Plan as adopted by the TWDB and other information developed during the designation of the PGMA.

Subchapter L: Dissolution of Districts

Section 293.131, Authorization for Dissolution of Water Districts by the Commission, is amended to remove GCD provisions in subsection (a) and to reletter the remaining subsections. The removed provisions are revised to implement statutory changes and are in new §293.22.

Section 293.132, Notice and Hearing, is amended to remove GCD provisions. The removed provisions are revised to implement statutory changes and are in new §293.22.

Section 293.137, Commission Action for Failure of a Groundwater Conservation District to Submit a Management Plan or to Implement a Certified Plan though its Operations, is repealed to remove GCD-specific provisions. The removed provisions are revised to implement statutory changes and are adopted in new §293.22.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. 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 section of the state. While these adopted rules will help protect groundwater, they do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety. A GCD may tax property owners and charge fees to well owners, but this will not adversely affect the economy of the area.

In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the

general powers of the agency instead of under a specific state law.

These adopted rules do not meet any of these four applicability requirements of a major environmental rule. These rules implement state legislation and do not exceed that legislation.

TAKINGS IMPACT ASSESSMENT

The commission has assessed the impact of these adopted rules under Texas Government Code, §2007.043. The purpose of the rules is to adopt new requirements relating to the administration of GCDs and the commission's supervision over their actions under TWC, Chapter 36, particularly as amended by SB 2, 77th Legislature, 2001. Specifically, the rules implement SB 2 by streamlining the process for creating GCDs where initiated by landowner petition. The rules also implement SB 2 by revising agency processes on the commission creation of GCDs in a designated PGMA. Further, the rules implement SB 2 by amending and developing new rules relating to commission enforcement responsibilities associated with existing GCD management planning requirements for GCDs in a common GMA. These rules promote TWC, Chapter 36 statutory goals of protecting and conserving groundwater and do not adversely affect private real property. If these rules did adversely affect private real property, these rules implement legislation which is action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to property, the groundwater in a district. Therefore, this rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.) and found that the rulemaking is identified in the Act's Implementation Rules, 31 TAC §505.11(b), relating to Actions and Rules Subject to the Coastal Management Program, or may affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and requires, therefore, that applicable goals and policies of the CMP be considered during the rulemaking process.

The commission determined that the adopted rules are consistent with the applicable CMP goals and policies. CMP goals applicable to the rules include the goal to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. The specific purpose of the rules is to adopt new requirements relating to the administration of GCDs and the commission's supervision over their actions under TWC, Chapter 36, particularly as amended by SB 2, 77th Legislature, 2001. Specifically, the rules implement SB 2 by streamlining the process for creating GCDs where initiated by landowner petition. The rules also implement SB 2 by revising agency processes on the commission creation of GCDs in a designated PGMA. Further, the rules implement SB 2 by amending and developing new rules relating to commission enforcement responsibilities associated with existing GCD management planning requirements for GCDs in a GMA. The promulgation and enforcement of these rules promote CMP goals and policies on management of coastal resources and will not violate or exceed any standards identified in the applicable CMP goals and policies.

PUBLIC COMMENT

A public hearing on this rulemaking was scheduled on June 4, 2002 in Austin, but a hearing was not conducted because no one asked to provide oral comments on the rulemaking. One commenter, the Texas Rural Water Association (TRWA), provided written comments on the proposed rules and suggested changes to proposed §§293.18(c)(7), 293.19(c)(1), and 293.20(c)(1). TRWA did not indicate whether it was for or against the adoption of the proposal.

RESPONSE TO COMMENTS

Proposed §293.18 - Creation of a Groundwater Conservation District in a Groundwater Management Area

As TRWA observed, proposed §293.18(c)(7) requires petitioners to provide a copy of the petition for creation of the proposed district to the appropriate county clerk or city secretary. TRWA commented that the proposed subsection inexplicably excludes the stakeholders who serve the persons for whose benefit the aquifer is to be managed and who ultimately will be asked to confirm creation of the GCD. TRWA recommended that §293.18(c)(7) be revised to require petitioners to certify "that a copy of the petition for creation of the proposed district was received by each county in whole or in part within the proposed district and by each municipality, river authority, water district, or other entity that supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission, and each irrigation district located either in whole or in part in the proposed district." TRWA argues in support of its proposed change that there is no rationale in TWC, Chapter 36 or the SB 2 amendments that supports this sort of special solicitude for counties and cities to the exclusion of other interested entities and that, other than the additional copying and delivery costs, filing a copy of the petition with other water stakeholders such as retail water utilities would impose no burden on petitioners.

The commission agrees that other water stakeholders should be provided access to the petition and supporting information once it has been filed with the executive director, but disagrees that providing a copy of the petition and supporting information to all stakeholders would not impose a burden on the petitioners. It is appropriate to require petitioners to submit copies of the petition to the counties and municipalities within the proposed district because these stakeholders have specific groundwater management authorities under Local Government Code, §212.0101 and §232.0031, relating to groundwater availability certification for platting. In contrast, the other stakeholders listed in the comment do not have express statutory authority related to the management of groundwater resources through this type of regulatory oversight. Such petitions are not considered to be valid until the executive director has completed the review under §293.18(d) and that, after a satisfactory review, all stakeholders listed in the comment are to receive written notice of the petition under §293.18(e)(2) and (3).

The commission has modified §293.18(c)(8) and §293.18(e)(1)(C) to provide access to the petition for all interested individuals and entities at the earliest feasible time. Proposed §293.18(c)(8) is renumbered as §293.19(c)(9) and new §293.18(c)(8) is changed to read as follows: "Concurrent with filing the petition and supporting information with the executive director, the petitioners shall make a copy or copies of the petition and supporting information available for public inspection during regular business hours at a centralized location or locations in each county in whole or in part within

the proposed district. The petitioners must provide the address and contact information for each location where the petition and supporting information have been made available for public inspection." In addition, §293.18(e)(1)(C) is changed to read as follows: "provide notice of availability of the petition and supporting information as established by the petitioners under subsection (c)(8) of this section and at any other location deemed appropriate by the executive director." These changes will assure that a copy of the petition and supporting information is available for public inspection during the executive director's review and during the time period leading up to the public meeting on the issue.

Proposed §293.19 - Commission-Initiated Creation of a Groundwater Conservation District in a Priority Groundwater Management Area

As TRWA noted, proposed §293.19(c)(1) requires the appropriate county commissioners court or courts to appoint temporary directors to a commission-initiated GCD following notice of the GCD creation. TRWA urges that "strong policy considerations supporting a favorable outcome of the confirmation election required for such a GCD justify including a directive that the county commissioners court(s) appoint temporary directors representative of various categories of stakeholders in the area of the proposed GCD." TRWA contends that this policy rationale was embodied in several GCDs created by Acts of the 77th Legislature, 2001 and provided reference to HB 3655, creating the Bluebonnet Groundwater Conservation District as an example. TRWA recommended that proposed §293.19(c)(1) be revised by adding the following: "In making these appointments, the county commissioners court(s) shall, to the extent they deem appropriate, appoint individuals representing the various categories of stakeholders within the district, such as municipal interests, rural interests, industrial interests, and agricultural interests."

The commission disagrees with TRWA's recommendation that §293.19(c)(1) be modified to include guidance to county commissioners courts in making appointments to temporary boards of directors for commission-initiated GCDs. If the commission creates a GCD in a designated PGMA, the temporary directors appointed by the county commissioners court(s) will be responsible for scheduling and conducting an election to authorize the GCD to assess taxes and to elect permanent directors, not for a confirmation election as TWRA appears to suggest. Moreover, the commission is directed by express statutory guidance to apportion the number of temporary directors per county based on groundwater usage if the commission is required to create a GCD in a PGMA. Under TWC, §36.016(b), relating to Appointment of Temporary Directors, and §36.0161, relating to Method for Appointing Temporary Directors for District in Priority Groundwater Management Area, county commissioners court(s) may be directed by commission order to appoint from one up to five temporary directors to at-large positions depending on the size of the commission-created GCD. If the commission creates a single-county GCD in a designated PGMA, it may be feasible for the county commissioners court to appoint temporary directors that are representative of various water interests. However, if the commission creates a multi-county GCD, with the number of directors apportioned to each county based on groundwater usage, it may be problematic for county commissioners courts to fully consider various water interests in making their appointment(s).

There are policy reasons which support both sides of the temporary director-appointment issue. HB 3655 (creating the Bluebonnet Groundwater Conservation District) and other Acts of the 77th Legislature, 2001, created GCDs with temporary boards of directors to be appointed by county commissioners courts to represent various water stakeholder interests. The commission notes that these temporary directors will be appointed to at-large positions for the counties they represent and will be responsible for scheduling and conducting the confirmation elections for the GCDs. In addition, many of these special law GCDs, including the Bluebonnet Groundwater Conservation District, will retain an appointed board of directors even after the GCDs are confirmed by the voters; however, the commission recognizes that an even greater number of the GCDs created by the 77th Legislature either have temporary directors named in the legislation or require the county commissioners court(s) to appoint temporary directors without any further stipulation. All of these new GCDs will have permanent directors who will be elected to set terms as opposed to permanent directors who will be appointed to set terms. An elected board of directors is more aligned and consistent with the general law provisions of TWC, Chapter 36. In sum, the commission finds no compelling reason to direct county commissioners courts on how to make these temporary director appointments. Accordingly, the commission has made no change to the rule in response to this comment.

Proposed §293.20 - Records and Reporting

TRWA noted that under proposed §293.20(c)(1), each GCD must, following adoption of its groundwater management plan, forward a copy of the plan to the regional water planning group for the planning region in which the district is located. TRWA believed that a copy of the groundwater management plan also should be forwarded to the water stakeholders directly interested in, and affected by, the groundwater management plan, and at the least, a GCD should make a copy available, at the expense of the GCD, to any county, adjacent GCD, municipality, river authority, water district, or other entities that supply public drinking water including each holder of a certificate of convenience and necessity issued by the commission, and each irrigation district located either in whole or in part in the GCD, at the request of the county, adjacent GCD, or other specified stakeholder.

The commission has made no change to the rule in response to this comment. Section 239.20(c)(1) is based on TWC, §36.1071(b), which requires a GCD groundwater management plan be "...forwarded to the regional water planning group for consideration in their planning process." Similarly, §239.20(c)(2) is based on TWC, §36.108(a), which requires, after plan certification under TWC, §36.1072, that "...each district shall forward a copy of the new or revised management plan to the other districts in the management area." The commission declines to require additional copies of the plan to be delivered to all water stakeholders because it would be unreasonably expensive and burdensome on a GCD.

The commission agrees, however, that a GCD groundwater management plan should be easily and readily available to anyone who wants to examine and/or copy the plan. GCD groundwater management plans are public records. Under TWC, §36.065, a GCD is required to keep a complete account of all its minutes and proceedings, and must preserve its minutes, contracts, records, notices, accounts, receipts, and other records. Under TWC, §36.065, these records are the property of the GCD and are subject to Texas Government Code, Chapter 552, relating

to Public Information. Under Texas Government Code, Chapter 552, GCDs must provide copies of public records upon request. If a request is for 50 or fewer pages of paper records, the charge for providing the copy of the public information is limited to photocopying costs that may not include costs of materials, labor, or overhead. Under the TWC, any water stakeholders may obtain a copy of the plan from a GCD upon request.

30 TAC §293.12

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and TWC, §§36.001, 36.0015, 36.002, 36.011 - 36.015, 36.0151, 36.016, 36.017, 36.0171, 36.019, 36.101, 36.102, 36.1071, 36.1072, 36.108, 36.113, 36.116, 36.117, 36.122, 36.205, 36.206, 36.3011, 36.303, and 36.3035, as amended by SB 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205197
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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30 TAC §293.16

STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state.

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 C. SPECIAL REQUIREMENTS FOR GROUNDWATER CONSERVATION DISTRICTS

30 TAC §§293.17 - 293.23

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and TWC, §§36.001, 36.0015, 36.002, 36.011 - 36.015, 36.0151, 36.016, 36.017, 36. 0171, 36.019, 36.101, 36.102, 36.1071, 36.1072, 36.108, 36.113, 36.116, 36.117, 36.122, 36.205, 36.206, 36.3011, 36.303, and 36.3035, as amended by SB 2.

§293.18. Creation of a Groundwater Conservation District in a Groundwater Management Area.

(a) Groundwater conservation district creation landowner submittal. An original and one copy of the complete groundwater conservation district (GCD) creation submittal shall be filed with the executive director on behalf of a group of landowners as provided in subsection (b) of this section and shall contain a petition as described in subsection (b) of this section, supporting information as described in subsection (c) of this section, the name and address of a representative designated by the group of landowners for contact purposes, and a $700 non-refundable submittal fee at the time the petition is filed.

(b) Groundwater conservation district petition. A complete district creation petition must be signed by the majority of the landowners in the proposed district or, if there are more than 50 landowners, at least 50 of those landowners. A complete petition must include the following:

(1) the name of the proposed GCD;

(2) the area and boundaries of the proposed district, including a map generally outlining the boundaries of the proposed district;

(3) the purpose or purposes of the proposed district;

(4) if any proposed projects are to be funded by the issuance of bonds or notes, a statement of the general nature of the projects proposed to be undertaken by the proposed district, the necessity and feasibility of the work, and the estimated cost of those projects according to the petitioners;

(5) the names of at least five individuals qualified to serve as temporary directors; and

(6) financial information, including the projected maintenance tax or production fee rate and a proposed budget of revenues and expenses for the proposed district.

(c) Supporting information. As part of the GCD creation submittal, the petitioners must include the following information.

(1) The petitioners must submit the following information about the area and boundaries of the proposed district:

(A) a metes and bounds description of the proposed boundaries of the proposed district if those boundaries differ from a political subdivision boundary which existed on the date the petition was submitted;

(B) a vicinity map outlining the boundaries of the proposed district which is 22 inches by 36 inches in size at a minimum, or in a digital data electronic format showing as appropriate the location

of municipalities, highways, roads, surface water features, and other water districts, together with the areal extent of groundwater aquifers, and showing the location of recharge (i.e., outcrops of aquifer units, karst features, etc.) and Texas Water Development Board (TWDB) located discharge (i.e., seeps, springs, etc.) features identified with state well number, the downdip limits of usable quality groundwater, and any other information the petitioners believe is pertinent to the creation of the proposed district; and

(C) an evaluation and description of how the boundaries of the proposed district will provide for effective management of the groundwater resources within the proposed district and in the GMA.

(2) If the petitioners propose projects that are to be funded by the issuance of bonds or notes, the petitioners must submit an evaluation of the general nature of the proposed projects to be undertaken by the district, the necessity and feasibility of the work, and the estimated cost of those projects according to the petitioners.

(3) The petitioners must submit affidavits from the individuals named in the petition under subsection (b)(5) of this section, establishing that these individuals are qualified to serve as temporary directors according to Texas Water Code (TWC), §§36.051(b), 36.058, and 36.059(b).

(4) The petitioners must submit financial information that includes the projected maintenance tax rate or production fee rate and a proposed budget of revenues and expenses for the proposed district, and a listing of current tax assessments within the boundaries of the proposed district.

(A) If the petitioners propose to finance the district through maintenance taxes, the petitioners must provide a certification by the central appraisal district(s) within the proposed district which indicates the total tax valuation of all land within the proposed district, as reflected on the current county tax rolls. The petitioners must evaluate the projected maintenance tax rate for the proposed district with the total tax valuation and describe how this revenue source will support the proposed budget of expenses.

(B) If the petitioners propose to finance the district through well production fees, the petitioners must provide the estimated non-exempt groundwater usage, by type, for the proposed district. The petitioners must evaluate the projected production fee rate for the proposed district with the total non- exempt groundwater usage, by type, and describe how this revenue source will support the proposed budget of expenses.

(5) The petitioners must provide a certification by the central appraisal district(s) within the proposed district which indicates that the petitioners are landowners within the proposed district on the date the petition is submitted.

(A) If the tax rolls do not show the petitioners to be the majority of the landowners within the proposed district, then the petitioners shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the county tax rolls to establish that the petitioners comprise the majority of the landowners or that at least 50 of the petitioners are landowners in the proposed district.

(B) The executive director may request any additional information to accurately show the ownership of the land to be included in the proposed district.

(6) The petitioners must provide one contact person for all correspondence from the executive director regarding the petition.

(7) The petitioners must provide a signed statement by the appropriate county clerk or city secretary that a copy of the petition for creation of the proposed district was received by each county in whole or in part within the proposed district and by each city in whose corporate limits any part of the proposed district is located.

(8) Concurrent with filing the petition and supporting information with the executive director, the petitioners shall make a copy or copies of the petition and supporting information available for public inspection during regular business hours at a centralized location or locations in each county in whole or in part within the proposed district. The petitioners must provide the address and contact information for each location where the petition and supporting information have been made available for public inspection.

(9) The executive director may request any other related information as needed to process the district creation petition.

(d) Petition review. The executive director's review of a petition for the creation of a GCD shall be governed by this subsection.

(1) Within 20 working days of receipt, the executive director shall assign the petition a number and determine if the submittal complies with the requirements in subsection (a) of this section.

(A) If a submittal is not complete, the executive director shall notify the petition contact person of the deficiencies of the submittal via certified mail postmarked no later than 20 working days after the submittal was received.

(B) If the petitioners submit additional information within 20 working days of the date of the notice of deficiencies, the executive director shall evaluate the information within 15 working days and, where applicable, shall determine if the submittal complies with subsection (a) of this section.

(C) If the petitioners do not submit the required information within 20 working days of the date of the notice of deficiencies, the executive director shall return the incomplete submittal to the petitioners, and the submittal fee is forfeited.

(2) If a petition proposes the creation of a GCD in an area, in whole or in part, that has not been designated as a GMA, the executive director shall provide notice to the petitioners and to the executive administrator of the TWDB. The commission may not certify the petition until the TWDB has adopted a rule designating a GMA that is coterminous with or includes the boundaries of the proposed district.

(e) Notice and public meeting.

(1) If the executive director determines that the submittal is complete, the executive director shall prepare a public notice for publishing or mailing. The public notice shall:

(A) state that the commission has received a complete submittal for the proposed creation of a GCD;

(B) provide notice of the date, time, and location of a public meeting to receive comments on the petition to create the district;

(C) provide notice of availability of the petition and supporting information as established by the petitioners under subsection (c)(8) of this section and at any other location deemed appropriate by the executive director; and

(D) provide a general map of the proposed district if the area is not a recognizable political subdivision boundary.

(2) The executive director shall notify the chief clerk that the submittal is complete and shall forward the draft public notice and a mailing list of water stakeholders to the chief clerk. The water stakeholders shall include the governing body of each county, regional water planning group, adjacent GCD, municipality, river authority, water district, or other entity that supplies public drinking water, including each

holder of a certificate of convenience and necessity issued by the commission and each irrigation district located either in whole or in part in the proposed district.

(3) The chief clerk shall mail the notice to the water stakeholders indicating that the petition for the creation of a GCD has been received.

(4) The chief clerk shall mail the notice to the petitioners with instructions for publishing the notice.

(5) The petitioners shall publish notice once a week for two consecutive weeks in one or more newspapers of general circulation in the area of the proposed district. The last publication shall be no later than 30 days before the public meeting. The petitioners must provide proof of publication by publishers affidavit to the chief clerk no later than one week prior to the public meeting.

(6) The petitioners shall post the notice on the bulletin board used for posting legal notices in each county in which all or part of the proposed district is located no later than ten days before the public meeting. The petitioners must provide proof of the posting to the chief clerk no later than one week prior to the public meeting.

(7) The commission or the executive director shall conduct the public meeting on the petition in a central location within the area of the proposed district. The public meeting shall be held no later than 60 days after the date the chief clerk mailed notice to the petitioners.

(f) Executive director actions. Following the public meeting, the executive director shall file recommendations regarding certification of the petition and the appointment of temporary directors with the chief clerk. The executive director shall summarize the public meeting comments and make a recommendation to the commission on whether the petition is administratively complete and should be certified.

(g) Commission actions. Not later than 90 days after the date of the public meeting, the commission shall certify the petition as administratively complete. A petition is administratively complete if it complies with the requirements of TWC, §36.013(b) and (c), and subsection (a) of this section.

(1) If the commission certifies the petition as administratively complete, the commission shall issue an order stating that the petition is administratively complete, creating the district, and appointing the temporary directors named in the petition.

(2) The commission shall appoint temporary directors according to §§293.31 - 293.35 of this title (relating to Appointment of Directors; Qualifications of Directors; Commission Appointment of Directors to Fill Vacancies; Form of Affidavit for Appointment as Director; and Reinstatement of a Board Member).

(A) If a temporary director appointed by the commission fails to qualify, or if a vacancy occurs in the office of temporary director, the commission shall appoint an individual to fill the vacancy.

(B) Temporary directors appointed under this paragraph serve until the initial directors are elected and have qualified for office or until the voters fail to approve creation of the district.

(3) The commission may not certify a petition if the commission finds that:

(A) the proposed district cannot be adequately funded to finance required or authorized groundwater management planning, regulatory, and district-operation functions under TWC, Chapter 36 based on the financial information provided by the petitioners; or

(B) the boundaries of the proposed district do not provide for the effective management of the groundwater resources.

(4) The commission may alter the boundaries if such boundaries would facilitate district creation and confirmation and may also alter boundaries to provide for more effective management of groundwater resources. The commission may give preference to boundaries that are coterminous with those of a GMA and may also consider boundaries along existing political subdivision boundaries.

(5) If the commission does not certify the petition, the executive director shall provide to the petitioners in writing the reasons for not certifying the petition. The petitioners may resubmit the petition, without paying an additional fee, if the petition is resubmitted within 90 days after the date the executive director provides the notice. The resubmitted petition will be treated as a new GCD creation submittal.

§293.19. Commission-Initiated Creation of a Groundwater Conservation District in a Priority Groundwater Management Area.

(a) In priority groundwater management areas (PGMAs) designated after September 1, 2001 under §294.42 of this title (relating to Commission Action Concerning Priority Groundwater Management Area Designation), where no groundwater conservation district (GCD) has been created, the executive director shall, after identifying the applicable areas under §294.43(d) and (e) of this title (relating to Actions Required After Priority Groundwater Management Area Designation), recommend district creation for commission action.

(1) The recommendation shall be based on and consistent with the commission's designation order under §294.42 of this title. The executive director's recommendation, in the form of a proposed order, must provide for the purpose, boundary description, minimum financing, and the number of temporary directors for each county for the district.

(2) The executive director's proposed order shall be filed with the chief clerk for commission consideration. The executive director shall prepare a notice and include a mailing list of:

(A) water stakeholders that include the governing body of each county, regional water planning group, adjacent GCD, municipality, river authority, water district, or other entity that supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission and each irrigation district located either in whole or in part in the proposed district; and

(B) any other persons identified in the PGMA designation hearing.

(3) The chief clerk shall give notice of the executive director's recommendation and proposed order and the date of the agenda when the commission will act on the district creation to the water stakeholders and other persons identified in the PGMA designation hearing. The commission shall not hold an evidentiary hearing on the district creation.

(b) In PGMAs designated before September 1, 2001, the executive director, after identifying the areas in the PGMA that have not created a district, shall petition the commission for the creation of a district by preparing a report and filing the report with the chief clerk.

(1) The report shall identify the areas not included in a district and evaluate and recommend whether one or more districts should be created in the identified areas, whether the identified areas should be added to an existing district, or whether a combination of these actions should be taken.

(2) The report shall include the following:

(A) the purpose or purposes of the recommended district creation action or actions;

(B) the name of the recommended district or districts or the name of the existing district if the recommendation is to add the identified areas to an existing district;

(C) the area and boundaries of the recommended district or districts or the recommended area to be added to an existing district, including a map generally outlining the boundaries;

(D) the number of temporary directors for each county in the recommended district or districts;

(E) the feasibility and practicability of the recommended district creation action; and

(F) a mailing list of water stakeholders including the governing body of each county, regional water planning group, adjacent GCD, municipality, river authority, water district, or other entity that supplies public drinking water, including each holder of a certificate of convenience and necessity issued by the commission and each irrigation district located either in whole or in part in the identified areas.

(3) The executive director shall prepare a public notice for publishing and mailing. The public notice shall:

(A) state that the commission has been petitioned by the executive director to create a GCD;

(B) provide notice of the date, time, and location of a contested case hearing to receive evidence on the petition;

(C) provide notice of the availability of the petition and supporting information; and

(D) provide a general map of the proposed district if the area is not a recognizable political subdivision boundary.

(4) On receipt of the report and notice, the chief clerk shall:

(A) mail notice of the petition to the water stakeholders identified in the executive director's report; and

(B) publish notice in one or more newspapers of general circulation in the area of the proposed district.

(5) The commission shall refer the petition to SOAH for a contested case hearing on the executive director's report and recommendation.

(6) The hearing shall be limited to consideration of the executive director's report and recommendation. The administrative law judge may also consider other district creation options evaluated in the executive director's report. To determine the feasibility and practicability of the recommended district creation action, the administrative law judge shall consider:

(A) whether the recommended district creation action can effectively manage groundwater resources under the authorities provided in Texas Water Code (TWC), Chapter 36;

(B) whether the boundaries of the recommended district creation action provide for the effective management of groundwater resources; and

(C) whether the recommended district creation action can be adequately funded to finance required or authorized groundwater management planning, regulatory, and district operation functions under TWC, Chapter 36.

(7) The administrative law judge shall at the conclusion of the hearing, issue a proposal for decision stating findings, conclusions, and recommendations. The administrative law judge shall file these findings and conclusions with the chief clerk with a request for the petition be set for commission consideration.

(c) If the commission finds the creation of the district or districts is feasible and practicable, it shall issue an order creating the district or districts. The order shall include the purpose of the district, boundary description, minimum maintenance tax or production fee necessary to support the district, and the number of temporary directors for each county in the district according to TWC, §36.0161. The commission order shall direct the commissioners court of the county or counties that are within the district to appoint temporary directors. The commission order shall direct the temporary directors to call and schedule an election to authorize the district to assess taxes and to elect permanent directors.

(1) The commissioners court of the county or counties within the district shall, within 90 days after receiving notification from the commission, appoint temporary directors for the district and notify the commission of the appointments. The commissioners court shall not make any appointments after the expiration of the 90-day period. If fewer temporary directors have been appointed at the expiration of the period than required, the commission shall appoint the additional directors.

(2) If the district contains two or more counties, the commission shall apportion the number of temporary directors to each county based on each county's proportionate amount, to the nearest whole number, of the total estimated groundwater use within the district. The total estimated groundwater usage within the district for each county shall be based on information and data contained in the most current version of the Texas State Water Plan as adopted by the Texas Water Development Board and other information developed under §294.41 of this title (relating to Priority Groundwater Management Area Identification, Study, and Executive Director's Report Concerning Designation).

(3) If a temporary director appointed by the commissioners court fails to qualify according to TWC, §§36.051(b), 36.058, and 36.059(b), or if a vacancy occurs in the office of temporary director, the commissioners court shall appoint an individual to fill the vacancy.

(4) Temporary directors appointed under this subsection shall serve until the initial directors are elected and have qualified for office.

(d) If the commission finds the areas identified in the report provided by subsection (b)(1) of this section should be added to an existing district, the commission shall issue an order recommending the addition of the identified areas to the existing district. The commission and the executive director shall follow the procedures provided under §294.44 of this title (relating to Adding a PGMA to an Existing Groundwater Conservation District).

§293.20. Records and Reporting.

(a) Each groundwater conservation district created according to Texas Water Code (TWC), Chapter 36 shall comply with the statute. Districts created by special acts of the Texas Legislature must comply with all statutory requirements contained in the special act and with the provisions of TWC, Chapter 36 that do not conflict with the special act.

(b) Districts are required to submit to the executive director the following documents:

(1) a certified copy of the legislative act creating the district within 60 days after the district is created;

(2) a certified copy of the order of the district's board of directors canvassing the confirmation election and declaring the confirmation election results according to TWC, §36.017(e);

(3) a certified copy of the order of the district's board of directors changing the boundaries of the district, a metes and bounds description of the boundary change, and a detailed map showing the boundary change within 60 days after the date of any boundary change; and

(4) a written notification to the executive director of the name, mailing address, and date of expiration of term of office of any elected or appointed director within 30 days after the date of the election or appointment according to TWC, §36.054(e).

(c) Each district is required under TWC, §36.1071 to adopt a comprehensive management plan and adopt rules that are necessary to implement the management plan. The management plan must be adopted within two years of the date the district was confirmed by election and certified by the executive administrator of the Texas Water Development Board.

(1) Each district must forward a copy of its certified groundwater management plan to the regional water planning group for the planning region in which the district is located and provide confirmation to the executive director that such action has been taken.

(2) Each district must forward a copy of its certified groundwater management plan to the other districts that are included with the district in a common groundwater management area and provide confirmation to the executive director that such action has been taken.

(3) Each district must provide a copy of an existing, new, or amended certified groundwater management plan to the executive director.

(d) Each district shall provide copies of district documentation or records upon request of the executive director to determine compliance with statutory provisions related to noncompliance review under TWC, Chapter 36, Subchapter I and §293.22 of this title (relating to Noncompliance Review and Commission Action).

(e) Each district shall provide copies of district documentation or records upon request of the executive director to determine compliance with statutory provisions.

§293.22. Noncompliance Review and Commission Action.

(a) Purpose. The purpose of this section is to set out procedures for commission review of groundwater conservation district (GCD) noncompliance with requirements of Texas Water Code (TWC), Chapter 36. This section provides a process for a GCD to achieve compliance, enforcement procedures if compliance is not achieved, and commission enforcement actions. A groundwater management plan noncompliance review and commission action are required under TWC as the result of a GCD's failure to:

(1) adopt a groundwater management plan within two years of the date the district was confirmed by election;

(2) achieve certification of a groundwater management plan or amendment of a groundwater management plan with the executive administrator or the Texas Water Development Board as provided by TWC, §36.1072 and §36.1073;

(3) forward a copy of its certified groundwater management plan to the other GCDs that are included with the district in a common groundwater management area;

(4) be actively engaged and operational in achieving the objectives of its groundwater management plan based on the State Auditor's Office audit of the district's performance as provided by TWC, §36.302; or

(5) adopt, implement, or enforce district rules to protect groundwater as evidenced in a report prepared by a commission-appointed review panel as provided by TWC, §36.108 and §293.23 of this title (relating to Groundwater Conservation District Petition Requesting Inquiry in Groundwater Management Area).

(b) Noncompliance review. The executive director shall investigate the facts and circumstances of any violations of this chapter or order of the commission under this chapter or provisions of TWC, §§36.301, 36.3011, and 36.302.

(1) The executive director may attempt to resolve any noncompliance set out in subsection (a) of this section with the district. After review of the facts and identification of noncompliance issues, the executive director may propose to resolve the issue with the district through a compliance agreement. The compliance agreement must clearly identify the noncompliance issue(s) and provide district actions and a schedule for the district to achieve compliance.

(2) If the executive director proposes a compliance agreement, the district shall be provided a specified time frame not to exceed 60 days after the date of receipt of the compliance agreement, to consider and agree to the terms of the compliance agreement and schedule. If the district wants to negotiate the compliance agreement, it must contact the executive director within ten days of receipt of the compliance agreement so that the final compliance agreement can be considered by the district and its board of directors within the 60-day time frame.

(3) If the district agrees with and signs the compliance agreement, the executive director shall monitor the district's implementation of agreement provisions within the agreed schedule. If the district accomplishes compliance within the agreed schedule, the executive director shall notify the district that it has achieved compliance and is no longer under review by the commission.

(c) Executive director recommendations filed with commission. If unable to resolve the violation under subsection (b) of this section, or if the facts of the noncompliance issue warrant, the executive director shall follow the procedures for commission enforcement actions set out in Chapter 70, Subchapter C of this title (relating to Enforcement). The executive director shall prepare and file a written report with the commission and the district and include any actions the executive director believes the commission should take under TWC, §36.303 and subsection (e) of this section.

(d) Notice and hearing. The commission shall provide notice in accordance with §70.104 of this title (relating to Executive Director's Preliminary Report). If the executive director's report recommends dissolution of a district or of a board of directors or the placement of a district into receivership, the commission shall hold an enforcement hearing.

(1) The commission shall publish notice once each week for two consecutive weeks before the day of the hearing to receive evidence on the dissolution of a district or of a board of directors or the placement of a district into receivership in a newspaper of general circulation in the area in which the district is located with the first publication being 30 days before the day of hearing.

(2) The commission shall give notice of the hearing by first-class mail addressed to the directors of the district according to the last record on file with the executive director.

(e) Commission enforcement actions. In accordance with TWC, §§36.108, 36.301, and 36.302, the commission, after notice and hearing, shall take all actions it considers appropriate, including:

(1) issuing an order requiring the district to take certain actions or to refrain from taking certain actions;

(2) dissolving the board in accordance with TWC, §36.305 and §36.307 and calling an election for the purpose of electing a new board;

(3) requesting the attorney general to bring suit for the appointment of a receiver to collect the assets and carry on the business of the GCD in accordance with TWC, §36.3035;

(4) dissolving the district in accordance with TWC, §§36.304, 36.305, and 36.308; or

(5) recommending to the legislature in the commission's report concerning priority groundwater management areas required by TWC, §35.018, actions the commission deems necessary to accomplish comprehensive management in the district.

(f) District dissolution. TWC, §§36.304 - 36.310 authorize the commission to dissolve any district as defined in TWC, §36.001(1), that is not operational as determined under TWC, §36.302 and has no outstanding bonded indebtedness.

(1) A district that is composed of territory entirely within one county may be dissolved even if it has outstanding indebtedness that matures after the year in which the district is dissolved. If a district is in more than one county, and has outstanding bond indebtedness, it may not be dissolved.

(2) Upon the dissolution of a district by the commission, all assets of the district shall be sold at public auction and the proceeds given to the county if it is a single county district. If it is a multi-county district, the proceeds shall be divided with the counties in proportion to the surface land area in each county served by the district.

(3) The commission shall file a certified copy of an order for the dissolution of a GCD in the deed records of the county or counties in which the district is located. If the district was created by a special Act of the legislature, the commission shall file a certified copy of the order of dissolution with the Secretary of State.

(g) Dissolution of board. If the commission enters an order to dissolve the board of a GCD, the commission shall notify the county commissioners court of each county which contains territory in the district. The commission shall appoint five temporary directors under TWC, §36.016, that shall serve until an election for a new board can be held under TWC, §36.017. However, district confirmation shall not be required for continued existence of the district and shall not be an issue in the election.

(h) Receivership. If the commission enters an order to request the attorney general to bring suit for the appointment of a receiver to collect the assets and carry on the business of a district, the executive director shall forward the order and the request to the attorney general and provide any relevant commission correspondence. The executive director shall assist the attorney general as requested and shall continue to track the status of attorney general actions.

(i) Appeals. Appeals from any commission order issued under this section shall be filed and heard in the district court of any of the counties in which the district is located.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205199

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Effective date: August 29, 2002

Proposal publication date: May 10, 2002

For further information, please call: (512) 239-4712

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30 TAC §293.21

STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state. The repealed subchapter will be replaced by a reorganized Subchapter C in implementation of SB 2, which amended TWC, Chapters 35 and 36.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205200

Stephanie Bergeron

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: August 29, 2002

Proposal publication date: May 10, 2002

For further information, please call: (512) 239-4712

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SUBCHAPTER D. APPOINTMENT OF DIRECTORS

30 TAC §293.36, §293.37

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state and SB 2, which amended TWC, Chapters 35 and 36. Similar provisions to address the repealed sections now appear in §293.19.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205201

Stephanie Bergeron

Director, Environmental Law Division

Texas Natural Resource Conservation Commission

Effective date: August 29, 2002

Proposal publication date: May 10, 2002

For further information, please call: (512) 239-4712

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SUBCHAPTER L. DISSOLUTION OF DISTRICTS

30 TAC §293.131, §293.132

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and TWC, §§36.001, 36.0015, 36.002, 36.011 - 36.015, 36.0151, 36.016, 36.017, 36. 0171, 36.019, 36.101, 36.102, 36.1071, 36.1072, 36.108, 36.113, 36.116, 36.117, 36.122, 36.205, 36.206, 36.3011, 36.303, and 36.3035, as amended by SB 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205202
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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30 TAC §293.137

STATUTORY AUTHORITY

This repeal is adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state. The repealed subchapter will be replaced by new §293.22 in implementation SB 2, which amended TWC, Chapters 35 and 36.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205203
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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CHAPTER 294. GROUNDWATER MANAGEMENT AREAS

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of Subchapter C, Designation of Groundwater Management Areas, §§294.21 - 294.25, and Subchapter D, Priority Groundwater Management Areas, §294.30 and §294.34. The commission also adopts new Subchapter D, Priority Groundwater Management Areas, §294.30, and Subchapter E, Designation of Priority Groundwater Management Areas, §294.39. The commission also adopts amendments to Subchapter E, Designation of Priority Groundwater Management Areas, §§294.40 - 294.44. Sections 294.21 - 294.25, 294.30, 294.34, 294.39, and 294.40 - 294.44 are adopted *without changes* to the proposed text as published in the May 10, 2002 issue of the *Texas Register* (27 TexReg 3953) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted revisions implement portions of Senate Bill (SB) 2, 77th Legislature, 2001, which amended Texas Water Code (TWC), Chapters 35 and 36 relating to priority groundwater management areas (PGMAs), groundwater management areas (GMAs), and groundwater conservation districts (GCDs). The adopted revisions to Chapter 294 implement SB 2, §§2.22 - 2.29, 2.32, 2.33, and 13.02. In a related rulemaking, adopted changes to 30 TAC Chapter 293, Water Districts, which implement SB 2, §§2.26, 2.28, 2.34 - 2.40, 2.48, and 2.55 - 2.57, also appear in this issue of the *Texas Register*.

The changes to Chapter 294 implement SB 2 provisions that transfer the jurisdiction to designate GMAs to the Texas Water Development Board (TWDB). TWC, §35.004 (SB 2, §2.22) provides that the TWDB, with assistance and cooperation from the commission, shall designate GMAs covering all of the major and minor aquifers in the state. It provides further that the commission may designate a GMA after September 1, 2001, for a petition filed and accepted by the commission prior to that date. TWC, §35.005, Petition to Designate a GMA, and §35.006, Notice for Designation of a GMA, were repealed by SB 2 (§13.02). Because the commission no longer has jurisdiction for the designation of GMAs, the commission adopts the repeal of §§294.21 - 294.25, which contain commission procedures for considering a petition for the designation of a GMA and designation of a GMA through agency rulemaking.

The adopted Chapter 294 amendments will also implement SB 2 provisions that streamline the PGMA designation process. The streamlined PGMA designation process incorporates considerations for creating GCDs in the PGMA designation hearing and requires specific GCD recommendations in the commission's PGMA designation order. TWC, §35.007 (SB 2, §2.23) requires the executive director's PGMA report to include specific GCD creation recommendations. TWC, §35.008 (SB 2, §2.24) requires GCD creation to be considered in the PGMA designation evidentiary hearing, requires the commission to make specific GCD creation recommendations in its PGMA designation order, and encourages new GCD boundaries to be based on designated GMA or PGMA boundaries. TWC, §35.018 (SB 2, §2.28) authorizes the commission to make recommendations in its report to the legislature if GCD creation in a designated PGMA would not be appropriate for or capable of protection of groundwater resources. TWC, §35.012 and §35.013 (SB 2, §2.26 and §2.27) provide for commission and local actions that are required after a PGMA designation. These actions include the opportunity for landowners to establish a

GCD in the designated PGMA through either creation or annexation processes and defines educational responsibilities in the PGMA. TWC, §35.012 and §36.0151 (SB 2, §2.26 and §2.37) provide time frames and authority for commission creation of GCDs in a designated PGMA if local initiative is not taken to create such districts. The commission adopts new §294.39 and amendments to §§294.40 - 294.44 to implement these new statutory provisions and to clarify rule language and sequential ordering of PGMA designation processes.

SECTION BY SECTION DISCUSSION

The name of the chapter is amended from "Underground Water Management Areas" to "Groundwater Management Areas" to be consistent with current statutory and agency usage.

Subchapter C: Designation of Groundwater Management Areas

Section 294.21, Designation of Groundwater Management Area Through Rulemaking; §294.22, Petition for Adoption of Rules Designating a Groundwater Management Area; §294.23, Commission Consideration of Petition for Adoption of Rules Designating a Groundwater Management Area; §294.24, Notice of Commission Consideration of Final Adoption of Rules Designating a Groundwater Management Area; and §294.25, Alteration of Groundwater Management Area, are repealed because the statute on which they are based has been repealed. The designation of GMAs under TWC, §35.004 is now under the jurisdiction of the TWDB.

Subchapter D: Priority Groundwater Management Areas

Section 294.30, Definitions, is repealed and replaced by new §294.30, Purpose and Applicability. The purpose of the subchapter, as provided in new subsection (a), is to set out the boundaries of PGMAs designated and delineated under the TWC prior to September 1, 1997. New subsection (b) provides reference to Subchapter E for PGMA designation procedures after September 1, 1997. Prior to statutory changes made by SB 1, 75th Legislature, 1997, PGMAs were designated and delineated by commission rules. Changes made by SB 1, that were effective on September 1, 1997, called for PGMAs to be designated by commission order.

Section 294.34, Designation of Hill Country Priority Groundwater Management Area, is repealed because the commission's January 24, 2001 order designating the PGMA supercedes and replaces this designation and delineation by rule. The commission's January 24, 2001 order designated a portion of northern Bexar County overlying the Trinity Aquifer as a PGMA, added the newly designated area to the existing Hill Country PGMA, and delineated new boundaries for the Hill Country PGMA to include the added area.

Subchapter E: Designation of Priority Groundwater Management Areas

New §294.39, Purpose, provides the purpose of Chapter 294, Subchapter E, relating to designation of PGMAs. The purpose of Subchapter E is to provide the procedures for the designation of PGMAs, including the development of recommendations for the creation of GCDs.

Section 294.40, Definitions, is amended to implement SB 2 and to improve readability. The definition of "Affected person" is amended to include statutory language changes. Definitions for "Executive administrator" and "Priority groundwater management area (PGMA)" are amended for formatting and statutory conformity reasons. The new definition "Texas Water Development Board (TWDB)" is added to define the term for use in the subchapter.

Section 294.41, Executive Director's Report Concerning Priority Groundwater Management Area Designation, is amended to retitle the section, to implement SB 2, and to improve readability and sequential ordering. The new title of the section, which is more descriptive of the contents of the section, is "Priority Groundwater Management Area Identification, Study, and Executive Director's Report Concerning Designation." New subsections (a) and (b) are amended from the existing (a) and (b) to improve readability. New subsection (a) removes Texas Parks and Wildlife Department (TPWD), as the statute does not provide for participation of the TPWD at this stage of the PGMA study process. New subsection (c) provides for the PGMA study stakeholder notification before the executive director requests studies from the other agencies. The new subsection (c) is amended to improve readability and moved from the existing subsection (d) to follow a chronological progression through the PGMA process. New subsection (d) provides for the executive director's request for a study to the executive administrator of the TWDB. The subsection is amended from existing subsection (c) to improve readability and reordered to follow a chronological progression through the PGMA process. New subsection (e) provides for the executive director's request for a study to the executive director of the TPWD and is amended from existing subsection (e) to improve readability. New subsection (f) provides the opportunity for the Texas Department of Agriculture (TDA) to submit information relating to the PGMA study. New subsection (f) reflects the addition of TDA to the PGMA process as amended by House Bill 2660, 76th Legislature, 1999. New subsection (g) provides for the timing, filing, and contents of the executive director's PGMA report and recommendations and is amended from existing subsection (f) to improve readability and to implement SB 2 changes. As provided in new subsection (g), the report must include recommendations for boundaries and financing of groundwater management and district-operation functions for any GCD recommended for creation in the PGMA by the executive director. New subsection (h) provides for the distribution of the executive director's PGMA report for public inspection, and is amended from existing subsection (g)(1) to improve readability and ordering. New subsection (i) provides for publishing notice of the executive director's PGMA report in the *Texas Register* and mailing notice to identified stakeholders. The subsection is amended from existing subsection (g)(2) to improve readability.

Section 294.42, Commission Action Concerning PGMA Designation, is amended to implement SB 2 and to improve readability and sequential ordering. New subsection (a) provides that if the executive director concludes in the PGMA report that the area is not a PGMA, no further action is necessary in a PGMA study area. New subsection (a) is moved from existing §294.41(i) and is amended to improve readability. New subsection (b), concerning commission consideration of the executive director's PGMA report, is amended to improve readability. The subsection provides for the considerations, timing, notice, location, and procedures of the PGMA evidentiary hearing, and is amended from existing subsections (a) - (d) and (f) - (h) to improve readability and to implement new statutory provisions. New subsection (b) requires the commission to hold a hearing on the executive director's report and recommendation for PGMA designation. The hearing may be remanded to the State Office of Administrative Hearings (SOAH). The hearing would consider whether a PGMA should be designated, whether one or more districts should be

created, and the feasibility and practicability of each district recommendation. New subsection (c) provides for commission action regarding PGMA designation. The subsection provides for the commission's order, PGMA boundary considerations, and GCD creation recommendations. The subsection is amended from existing subsections (e) and (i) to improve readability and to implement statutory changes. As changed by SB 2, if the commission designates the area as a PGMA, the designation order must recommend that the PGMA be covered by a GCD by either creation of one or more new GCDs, by addition of the land in the PGMA to an existing GCD, or by a combination of these actions. If the commission finds that a GCD created under TWC, Chapter 36 would not be feasible, the commission may recommend to the legislature that a special district be created or an existing district's powers be amended. Existing subsection (j) repeated statutory language relating to the evidentiary hearing and is removed and not replaced.

Section 294.43, Landowner Actions in a PGMA, is amended to retitle the section, to implement SB 2, and to improve readability and sequential ordering. The commission retitled the section as "Actions Required After PGMA Designation" to be more descriptive of the section contents. New subsection (a) provides for the distribution of the commission's PGMA designation order. New subsection (b) provides for notification by the executive director to the Texas Cooperative Extension and to commissioners courts of counties in the PGMA for the initiation of educational outreach in the PGMA. New subsection (c) provides that the executive director review locally-initiated GCD creation efforts in the PGMA no sooner than 180 days after PGMA designation. New subsection (d) requires the executive director to identify and recommend GCD boundaries that are consistent with the commission's PGMA designation order if locally-initiated GCD creation actions have not been taken in the PGMA. New subsection (e) provides for commission-initiated creation of GCDs within two years if landowners do not take GCD creation action. The new language implements SB 2 changes relating to commission actions that are required following the designation of a PGMA. Existing subsection (a) is removed and is replaced by executive director action in new (c). Existing subsection (a) is replaced by new subsections (b) and (d) - (e).

Section 294.44, Adding a PGMA to an Existing District, is amended to retitle the section, to implement SB 2, to improve readability and sequential ordering, and to remove existing language relating to statutory processes that are outside of the commission's authority. The commission retitled the section as "Adding a PGMA to an Existing Groundwater Conservation District" to be more descriptive of the section contents. New subsection (a) provides for executive director notification of a commission PGMA designation order that recommends adding a PGMA to an existing GCD. It is amended from existing subsection (a) to improve readability. New subsection (b) provides for GCD status reporting of current activities under TWC, §36.013, relating to the addition of a PGMA recommended by a commission order. New subsection (b) replaces existing subsection (b) - (g) by reference to TWC, §36.013. Existing subsections (b) - (g) repeated statutory requirements for a board of directors of a district for which a commission order has recommended addition of a PGMA. This language is omitted because it described board actions that are outside the commission's authority. New subsection (c) amends and replaces existing subsection (h) to provide for costs of an election to add a PGMA to an existing GCD and is amended to improve readability. New subsection (d) provides for commission action in a PGMA if an existing GCD's efforts to add a PGMA recommended by a commission order are not successful or if addition of a PGMA recommended by a commission order is declined by an existing GCD or defeated in a confirmation election. It replaces and amends existing subsection (i) to improve readability and to implement statutory changes.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the adopted rules are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in that statute. Major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. These adopted rules implement legislation and do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety. The designation of an area as a PGMA does not have a regulatory impact on the area.

In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. No federal law applies. These adopted rules implement state legislation and do not exceed that legislation.

TAKINGS IMPACT ASSESSMENT

The commission has assessed the impact of the adopted rules in accordance with Texas Government Code, §2007.43. The purpose of these adopted rules is to implement amendments to TWC, Chapter 35. These amendments to TWC provide the process for the agency to designate a PGMA. A PGMA designation is simply a designation; the PGMA does not have any regulatory authority. Therefore, the PGMA designation does not impact or burden private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The executive director reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action or authorization identified in 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

PUBLIC COMMENT

A public hearing on this rulemaking was scheduled on June 4, 2002 in Austin, but a hearing was not conducted because no one asked to provide oral comments on the rulemaking. One commenter, the Texas Rural Water Association (TRWA), provided written comments on the proposed rules and suggested changes to proposed §294.42. TRWA did not indicate whether it was for or against the adoption of the proposal.

RESPONSE TO COMMENTS

Proposed §294.42 - Commission Action Concerning PGMA Designation (as to evidentiary hearing)

Proposed §294.42 describes the actions involved with designation of a PGMA, including holding an evidentiary hearing. TRWA noted that in §293.42 the commission proposes the evidentiary hearing be conducted by the SOAH as a contested case hearing under Texas Government Code, §2001.0058, which is a portion of Subchapter C of Chapter 2001. TRWA contends that the legislature did not intend for the commission to utilize the contested case hearing process, which is used in other agency permit hearings under Subchapter C, Texas Government Code, for conducting a PGMA designation-evidentiary hearing. TRWA argues that, if the legislature had contemplated a process by which affected persons would proceed with the formalities characteristic of the contested case hearings conducted by SOAH, the Legislature would not have precluded judicial review of the agency's final determination on PGMA designation in TWC, §35.008(i). TRWA recommended that the commission set forth particular procedures by which an evidentiary hearing is to be conducted, rather than defaulting to the contested case hearing procedures utilized by SOAH. Further, TRWA recommended that a stakeholder group be appointed to develop recommended procedures consistent with legislative intent.

The commission has made no change to the rule in response to this comment. The TWC, §35.008 requirement to hold an evidentiary hearing on a PGMA designation was first included in Chapter 35 in 1997. While TWC, §35.008 provides that the procedures set out in that section shall be used for PGMA designations, this section does not provide detailed procedures for conducting evidentiary hearings. However, at the time the legislature amended TWC, §35.008 in the 77th Legislature, 2001, the commission had already conducted two hearings on PGMA designations in which commission and SOAH contested case hearing rules were used. Importantly, in 2001, the legislature did amend TWC, §35.008 to implement some changes suggested by the commission and the TWDB in a January 2001 submittal entitled "Priority Groundwater Management Areas and Groundwater Conservation Districts, Report to the 77th Legislature" (see discussion and recommendations on pages 87 and 94). Presumably the legislature would have expressly stated that this was not the proper procedure or included detailed procedures in the changes to TWC, §35.008, if it believed that such commission action was not appropriate to conduct PGMA designation hearings. The commission would also note that in both the PGMA designation cases held prior to 2001, expedited hearing procedures were used by SOAH at the request of the parties. Although this is still a complicated and lengthy procedure, the commission and SOAH contested case hearing rules provided a workable forum for the PGMA hearings.

SUBCHAPTER C. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

30 TAC §§294.21 - 294.25

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205204
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Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER D. PRIORITY GROUNDWATER MANAGEMENT AREAS

30 TAC §294.30, §294.34

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205205
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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30 TAC §294.30

STATUTORY AUTHORITY

The new section is adopted TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and TWC, §§35.002, 35.004, 35.008, 35.009, 35.0012, 35.0013, and 35.018, as amended by SB 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205206

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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SUBCHAPTER E. DESIGNATION OF PRIORITY GROUNDWATER MANAGEMENT AREAS

30 TAC §§294.39 - 294.44

STATUTORY AUTHORITY

The new and amended sections are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state; and TWC, §§35.002, 35.004, 35.008, 35.009, 35.0012, 35.0013, and 35.018, as amended by SB 2.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205207
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: May 10, 2002
For further information, please call: (512) 239-4712

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CHAPTER 312. SLUDGE USE, DISPOSAL, AND TRANSPORTATION

The Texas Natural Resource Conservation Commission (commission or agency) adopts the repeal of §§312.4 and 312.10 - 312.12, and the amendment to §312.13. The commission concurrently adopts new §§312.4 and 312.10 - 312.12. New §§312.4 and 312.10 - 312.12 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3513). Repealed §§312.4 and 312.10 - 312.12, and amended §312.13 are *adopted without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rulemaking is to implement House Bill (HB) 2912, §9.05, 77th Legislature, which added to Texas Health and Safety Code (THSC), new §361.121 to require permits for the land application of Class B sewage sludge after September 1, 2003. The commission simultaneously repeals and adopts new §§312.4 and 312.10 - 312.12. The commission also adopts the amendment to §312.13. The new sections retain as much of the previous language as feasible. The rulemaking also includes provisions relevant to Class B sewage sludge and other materials regulated by the chapter.

HB 2912, §9.05 further requires that a permit holder must report any noncompliance of the permit conditions or applicable permit rules to the commission. The legislation also stipulates that a permit applicant must submit information regarding the hydrological characteristics of the surface water and groundwater within one-quarter mile of any land application unit. Unrelated to legislative implementation, the rulemaking also updates the rules, increases clarity, corrects typographic and grammatical errors, corrects outdated citations and names, and corrects inconsistencies and errors in the rules, as discussed in the SECTION BY SECTION DISCUSSION portion of the preamble.

The key change for implementing legislation is that, beginning September 1, 2003, all sites which land apply Class B sewage sludge will be required to have a valid permit instead of a registration. The provisions for land application of Class B sewage sludge under a registration will expire on August 31, 2003. Those sites that are currently registered exclusively for land application of Class A sewage sludge, water treatment sludge, and/or domestic septage are not affected by the rulemaking.

The introduction of a new fee structure for issuing Class B sewage sludge land application permits is also adopted in this rulemaking. By statute, the fees must be from $1,000 to $5,000 based on the amount of sludge to be land applied on an annual basis.

One significant provision not related to HB 2912 allows the executive director (ED) to deny a request for authorization (submitted via a notice of intent) regarding the proposed activities related to storage, land application, and marketing and distribution of Class A sewage sludge. Another significant provision deals with soil sampling for beneficial use sites. Under the previous rules, applicants were allowed to sample at the rate of one sample per 80 acres and to change the frequency by including a sampling plan in their application. The new rules require the frequency of one sample per 80 acres or less to apply in all cases and allow the use of alternate ways of defining the areas to be sampled when described in detail in a sampling plan submitted with the application. Other changes not arising from HB 2912 include: 1) Updating certain names and citations and correcting typographic errors; 2) Requiring that administrative penalties and annual fees be paid or waived by the ED before a permit application is processed; 3) Requiring that annual fees and any associated penalties for non- payment become the liability of any person to whom a permit is transferred; 4) Allowing 50% refunds of the application fee upon written request if a permit is not issued; 5) In cases where a permit application is filed for a site whose current registration will expire before September 1, 2003, allowing the registration to remain in effect either until that date or until the permit is issued, whichever occurs first; 6) No longer accepting registration applications for the land application of Class B sewage sludge after the effective date of the rules; 7) Requiring that only one application (permit or registration) be processed for a given site; 8) Requiring that information for public notices conform with 30 TAC §50.135 provisions; and 9) Changing the exclusion from public notice for sites using Class A sewage sludge so that only sites using Class A sewage sludge that has been approved for marketing and distribution are excluded.

SECTION BY SECTION DISCUSSION

Sections 312.4 and 312.10 - 312.12 are repealed and replaced with new §§312.4 and 312.10 - 312.12 for the purpose of legislative implementation. The new sections retain as much of the previous rule language as feasible.

In addition to the provisions mandated by HB 2912, §9.05, the rulemaking improves clarity and corrects inconsistencies, outdated citations and names, and grammatical/typographic errors throughout the sections. The rule language is made clearer and simpler where possible, both by rewording and reformatting of previous language. Throughout the language, the commission clarifies where appropriate that the generic term "sewage sludge" includes domestic septage (although since domestic septage is not Class A or Class B sewage sludge, those more specific terms do not include it) and substitutes the word "commission" for the acronym "TNRCC." In HB 2912, Article 18, the 77th Legislature changed the name of the agency to the Texas Commission on Environmental Quality, effective September 1, 2002, so a more generic term is used in the adopted language where practical.

Section 312.4 - Requirements for Sewage Sludge Permit, Registration, or Notification

New §312.4 changes the section title to "Requirements for Sewage Sludge Permit, Registration, or Notification." New §312.4(a) adds the temporary storage of waste incidental to secondary transportation to the list of types of storage that do not require a permit; such storage is required at Type V Liquid Waste Transfer Stations, which can be authorized under registrations if receiving less than 32,000 gallons per day of liquid wastes. To clarify that provisions in existing registrations allowing the use of Class B sewage sludge will no longer be effective after August 31, 2003, new §312.4(a)(1) provides that any provisions allowing the use of Class B sewage sludge in registrations will no longer be valid after that date and that such activity will require a permit. To be consistent with 30 TAC §50.135 concerning Effective Date of Executive Director Action, new subsection (a)(2) clarifies that the effective date of a permit is the date that the ED signs it. New subsection (a)(3) specifies that certain information relating to permits must be confirmed or updated under certain conditions or upon request. New subsection (a)(4) provides that if a permit is required under this chapter, all activities related to this chapter (except transportation) at that site must be incorporated into the permit.

New §312.4(b) changes and updates notifications of the use, distribution, or storage of Class A sewage sludge that meets the metal limits in §312.43(b)(3) and vector attraction reduction requirements at the point of generation. New subsection (b)(1) clarifies that the exemption for Class A sewage sludge from registration requirements apply also to permit requirements. New subsection (b)(2) simplifies language concerning the filing of a notice of intent (for marketing and distributing, land applying, or storing Class A sewage sludge; requires that the notices be sent by certified mail, return receipt requested; and provides clearer language on the content of a notice of intent for activities related to Class A sewage sludge in subsection (b)(2)(C). Also in subsection (b)(2)(C), the proposal language is changed slightly for clarity. New subsection (b)(3) provides a mechanism for the ED to deny authorization for an activity requested in a notice of intent within 30 days after the notice is received if there is a conflict with rule requirements or permit conditions in the notice. New subsection (b)(4) removes the requirement to use certain forms for annual reports, that the reports must show in detail the activities that occurred during the year, and to clarify that the report can be combined with certain other annual reports required by the chapter if the person filing it engaged in activities covered by the other reports.

New §312.4(c)(1) provides that sites can be permitted for land application instead of being registered for this activity. New subsection (c)(2) provides that the provisions for land application of Class B sewage sludge in registrations will expire on August 31, 2003, but that provisions for applying other materials will continue. New subsection (c)(3) provides that applications to register sites for the land application of Class B sewage sludge will not be accepted after the effective date of these rule changes, that permit applications must be submitted instead, and that only one application will be processed for any site. New subsection (c)(4) provides for the removal of the provisions in previous subsection (c)(2) and changes the effective date of registrations to the date signed by the ED, in order to be consistent with changes to §50.135.

New §312.4(d) deletes outdated language. New §312.4(e) deletes language indicating that §312.4(b) allows land application of sewage sludge without a prior written authorization and substitutes "commission" for "executive director" as a more general term (since some permits may require orders from the commission in order to be issued).

New §312.4(f) provides a new schedule for base fees for permits to land apply Class B sewage sludge. New subsection (f)(1) provides that the fees are for applying for the permit; that the fees in this subsection replace those in 30 TAC §305.53; that the final decision on an application cannot be made until the fee is paid; and that the fees be paid to the commission (showing the new name for the agency that takes effect on September 1, 2002) at the time applications for new permits, amendments, renewals, modifications, and transfers are submitted. The effective date of the name change of the agency is deleted from the rule language that was proposed because the name change will be in effect by the effective date of these amendments. New subsection (f)(2) provides that applications related to permits for the land application of Class B sewage sludge cannot be processed until all delinquent annual fees and administrative penalties for the applicant and site have been paid. This requirement can be waived by the ED for good cause if the applicant was not the permittee at the time that the fees or penalties became delinquent. Entities to whom a permit is transferred become liable for any outstanding fees and associated penalties. A word substitution is made for clarity in the rule language that was proposed for subsection (f)(2). New subsection (f)(3) provides that half of a permit fee can be refunded upon written request if a permit is not issued; although such refunds are not covered in HB 2912, §9.05, the language in the legislation specifies that the fees are for issuance of a permit. New subsection (f)(4) provides the fee schedule for permit applications; the schedule covers fees between $1,000 and $5,000 based on the amount of Class B sewage sludge to be land applied annually under the permit, as required by statute.

Section 312.10 - Permit and Registration Application Processing

New §312.10(b) references the parts of the rules where specific information required for permit and registration applications is found, rather than listing certain specific information that is required for both permit and registration applications. The language that was previously in §312.10(b)(1) - (6) and (c), all of which pertain to the items to be included in permit and registration applications, is moved to new §312.11 and §312.12, so that required information for applications for registrations or permits are together in those sections.

New §312.10(c) retains the language that was previously in §312.10(d) with minor corrections for other adopted changes. New subsection (d) references 30 TAC Chapter 39 rather than listing information to be included in notices of receipt of applications. New subsection (e) updates citations in language from previous subsection (f) and adds "land application" and "storage" to the list of types of permits covered by the subsection, since permits are also required for such activities under some circumstances. New subsection (f) expands applicability to all types of permit applications since the processing requirements apply to all types of permits under this chapter. New subsection (g) retains the processing criteria for registrations (previously §312.10(h)) and, when a permit application is filed, allows a registration that would otherwise expire to remain in effect until a final decision is made on the permit or until September 1, 2003, whichever occurs first. A comma is added for clarity to the rule language that was proposed for subsection (g). New subsection (h) includes the provisions from the previous subsection (i) with clarification that cancellations are not contingent upon the ED informing the other party affected. New subsections (i) - (k) expand the applicability to permits for beneficial use in addition to registrations and change terms specific to registrations to more generic language since some sites will also be permitted in the future. A word substitution is made for clarity in the rule language that was proposed for subsection (j). New subsection (k) differentiates the criteria for major amendments to permits and registrations. Additionally, the term "permit" is deleted twice in the language concerning major amendments to registrations in subsection (k) because it is incorrect since the requirements for major amendments to permits are covered separately in the subsection.

Section 312.11 - Permits

New §312.11(a) makes the section applicable to all types of permits under the chapter, rather than only disposal and incineration permits. Similarly, new subsection (b) expands the processing standards to apply to all types of permits under the chapter. New subsection (c) references other chapters in this title that specify elements of permit applications and lists additional requirements for permits under this chapter in associated paragraphs. New subsection (c)(1) provides the additional criteria for maps depicting the site and surrounding properties for disposal and incineration applications, which retains the requirement to show information on landowners within one-half mile of the site and adds requirements to send information on landowners' names and addresses in multiple formats. New subsection (c)(2) provides similar criteria for these maps for other types of permits under the chapter, which only require information on adjacent landowners but duplicate the requirements for multiple formats noted previously. New subsection (c)(3) requires a notarized affidavit verifying land ownership or landowner agreement to the proposed activity (previously §312.10(b)(4)). New subsection (c)(4) requires that all permit applications be submitted in quadruplicate form.

New §312.11(d) lists additional requirements for applications for permits to land apply Class B sewage sludge, which do not apply to other permits under the chapter. New subsection (d)(1) cites the requirements for registration applications for certain information that is also needed in applications under this subsection. New subsection (d)(2) provides the requirements for soil sampling for metals, and new subsection (d)(3) provides the requirements for soil sampling for nutrients, salinity, and pH. The new language differs substantively from the language that had applied to registrations in the following ways: 1) the minimum rate of sampling is set at one composite sample from each 80 acres or less of area being sampled; 2) alternate lower sampling frequencies are no longer allowed; and 3) an alternate method of defining areas to be sampled is allowed if a sampling plan is included in the application to show that the soils present have been adequately tested. New subsection (d)(4) adds a requirement that applicants furnish documentation regarding the hydrological characteristics of the surface and groundwater within one-quarter mile of the site, as required by the statute. New subsection (d)(5) requires four copies of applications to be submitted.

New §312.11(e) expands applicability of permit characteristics and standards to all types of permits covered by the chapter. New subsection (f) requires reporting of noncompliance with permit conditions and states that this provision must appear in all beneficial use permits, as required by statute; new subsection (f)(1) - (5) provides the minimum requirements for this reporting. New subsection (g) requires that each permit for the land application of Class B sewage sludge include the maximum amount of sludge that can be applied under the permit, as required by statute. New subsection (h) cites the requirements that apply to amendments and renewals of permits covered by this chapter and describes the obligation for permittees to provide written notice of changes under certain conditions.

Section 312.12 - Registration of Land Application Activities

New §312.12(a) provides that, after August 31, 2003, all registrations for the beneficial use of Class B sewage sludge will be void. Registrations for the beneficial use of Class A sewage sludge, water treatment plant sludge, and domestic septage remain in effect until other action occurs.

New §312.12(b) retains with changes the language from the old §312.12(a), adds a reference to §312.11 (since permits will apply to some beneficial use sites after the effective date of these rule revisions), and makes changes in the associated paragraphs. New subsection (b)(1) adds a requirement that forms approved by the agency be used when applying for a registration action, specifies that the appropriate number of copies be submitted, and provides specific information requirements in the associated subparagraphs. New subsection (b)(1)(A) retains the requirement that applications provide a description of the sewage sludge and its composition. New subsection (b)(1)(B) clarifies that the provision applies to all sewage sludge to be applied to the site, including domestic septage. New subsection (b)(1)(C) provides for language that is grammatically compatible with the listed information in the associated clauses. The clauses are retained intact, except that in new subsection (b)(1)(C)(v) the exemption from resubmitting soils data that was submitted since August 19, 1993, is deleted; this change requires more current and complete data in all applications to allow for more comprehensive public review and comment, as well as requiring that the most current information be provided as soil surveys are updated and reissued. New subsection (b)(1)(D) - (G) provides the criteria from the old §312.10(b)(1) - (6) and (c) (pertaining to the items required to be included in registration applications) so that information in this chapter for registration applications is together in one section. New subsection (b)(1)(H) requires that maps and lists related to adjacent landowners be included in multiple formats with applications for new registrations and major amendments, in order to facilitate public review of the application and the mailing of notices on the application by the commission's chief clerk. New subsection (b)(1)(I) and (J) provides criteria for soil sampling for registrations that are the same as for permits. New subsection (b)(1)(K) retains the requirement that four

copies of all application information be submitted. New subsection (b)(2) retains the requirements for providing written notice of certain changes for a site or registration.

New §312.12(c) retains the provisions for review and approval of registrations (previously §312.12(b)) with minor changes for clarity. New subsection (d) provides the requirement to send notice (rather than copies) of the decision on an application to all parties who submitted written information on the application (including public comments) when the decision is mailed to the applicant (previously §312.12(c)).

Section 312.13 - Actions and Notice

Section 312.13 corrects typographical errors and incorrect citations, reorganizes the section for clarity, and adds new notice requirements. The amendments to subsection (a) provide clarity and add "store" and "process" to the list of types of permits and registrations affected since the same actions pertain to those types of authorizations as well. The amendment to subsection (b) groups current provisions as subsection (b)(1) with corrections of outdated citations. The amendment to subsection (b)(2) requires that notice be provided to all landowners within one-half mile of disposal and incineration sites. The amendment to subsection (c)(1) applies the required public notice actions to all types of registrations; subsection (c)(1) limits the current exclusion for Class A sewage sludge to only Class A sewage sludge that has been approved for marketing and distribution because the commission believes that all types of registrations should be subject to public notice and input requirements (per new §312.4(b), no registration is required for sites using Class A sewage sludge that has been approved for marketing and distribution). The amendment to subsection (c)(3) corrects the name for public notices. The amendments to subsection (d) clarify that "domestic septage" is part of the term "sewage sludge," delete unnecessary verbiage, and update a citation that is renumbered. In subsection (e), the following changes are made: 1) update the term "motion for reconsideration" to "motion to overturn"; 2) update reference to the applicable rule for such motions; and 3) clarify that the commission's public interest counsel and any other person can file motions, rather than just persons who are affected by the authorization of a site.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from 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. This adoption does not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking requires a responsible person to obtain a permit to apply Class B sewage sludge on a land application unit as required by THSC, §361.121. This rulemaking affects the same class of regulated entities, except the entities must obtain a permit as authorization instead of a registration. The commission shall no longer process and issue any registrations to authorize persons to land apply Class B sewage sludge. In addition, the rules require an applicant to pay a permit fee based on the amount of sludge to be applied. The rules require a sampling plan in the permit application when soil sampling is based on a method other than sampling separately each United States Department of Agriculture Natural Resource Conservation Service soil type (soils with the same characterization or texture). The new minimum sampling frequency is one sample per 80 acres or less of each soil type in the application area. The rules allow alternate sampling methods to be used when described in detail in the sampling plan submitted with the application. The rulemaking also includes minor administrative changes and corrections.

Unrelated to the legislative changes, the proposed rules also allow the executive director to deny activities under a filed Notice of Intent for marketing and distributing, storing, or land applying Class A sewage sludge. Additionally, the rulemaking clarifies that the exemption for Class A sewage sludge from registration requirements also apply to permit requirements.

The rulemaking does not meet the definition of a major environmental rule as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The commission concludes that a regulatory analysis is not required in this instance because the rules do not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of these rules in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to ensure that the commission's regulations comply with new Class B sewage sludge permitting requirements. The rulemaking requires a responsible person to obtain a commission permit to apply Class B sewage sludge on a land application unit as required by THSC, §361.121. The commission shall no longer process and issue any registrations to authorize persons to land apply Class B sewage sludge. The rulemaking also allows the executive director to deny certain activities with Class A sewage sludge. The rules substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding state law. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by state law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management 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. Therefore, the amendments to Chapter 312 are not subject to the CMP.

PUBLIC COMMENT

A public hearing on this proposal was held in Austin on May 28, 2002. The public comment period ended at 5:00 p.m. on May 28, 2002. Written and/or oral comments were submitted by: Clean Water Action; Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C., on behalf of Synagro, Inc. (Synagro-1); Matt Bochat, Technical Services Director, Synagro, Inc. (Synagro-2); and one individual.

RESPONSE TO COMMENTS

General

An individual commented that the commission should convene a panel of expert stakeholders to review and to make recommendations on the rules and procedures within Chapter 312.

RESPONSE

The commission appreciates the comment. This rulemaking primarily addresses legislative changes as required by THSC, §361.121. The new statute imposes a September 1, 2003 deadline to obtain a permit for land application of Class B sewage sludge. In order to make the required changes expeditiously, this rulemaking is limited to legislative requirements and additional changes in the same sections. The commission intends to do a comprehensive review of this chapter in the near future. The second rulemaking will include stakeholders in a group formed in accordance with current rules.

An individual recommended that the application process be changed to include only a certification from the applicant regarding the quality of sludge instead of the analytical data on the sludge.

RESPONSE

The commission will continue to implement the existing requirements for test data with application to track the sources used and to verify both that applicants can calculate agronomic rates correctly and that the sludge is of sufficient quality for land application. The commission believes that the recommendation is a major change which could be considered in the future review of the rules. The commission has made no changes in response to this comment.

An individual commented that the rule language for ground and surface water distances and restrictions for shallow groundwater should be deleted because the data can be reviewed on a case-by- case basis. The individual suggested the review should be made based on the management plan for the farm and not as if the activity was for disposal.

RESPONSE

The commission disagrees with the comment. The commission believes that the current distance requirements and restrictions are appropriate to protect human health and the environment. The requirements related to distance from surface water and features that might provide transport to groundwater and related to restrictions based on the presence of shallow groundwater are in 30 TAC §312.44, which is not part of this rulemaking. Additionally, THSC, §361.121 specifically requires that hydrological characteristics of the surface and groundwater within one-quarter mile of the site be contained in permit applications. The commission has made no changes in response to this comment.

An individual commented that the rules should encourage the use of environmental management plans and that the commission should consult and use National Biosolids Partnership guidelines in writing and implementing these rules.

RESPONSE

The commission appreciates the comment. The commission intends to consider these types of issues in the future rulemaking for this chapter. Input on changes to the rules will be solicited from a balanced group of stakeholders, as required by 30 TAC Chapter 5. The commission has made no changes in response to this comment.

Synagro-1 commented that its primary concern is related to timing and cost. The lack of grandfathering for existing sites after August 31, 2003, will require efficient review by the commission and, when required, consideration by the State Office of Administrative Hearings (SOAH). Synagro-2 expressed concern that potential applicants may avoid land application of sludge because of cost, delays, and uncertainty. Additionally, it commented that the beneficial land application of sewage sludge should be encouraged and promoted by the commission. Finally, it stated that Synagro will work with the commission staff as quickly and efficiently as possible to avoid process delays.

RESPONSE

The commission appreciates the comment. The commission staff will review and make decisions on permit applications on a reasonable and timely basis to comply with THSC, Chapter 361, Texas Water Code (TWC), Chapter 26, and with Chapter 312. The commission will continue to promote the proper use of sewage sludge over disposal, as mandated by THSC, §361.022(c). The commission has made no changes in response to this comment.

An individual expressed concern that if permit applications are approved wherein the level of contaminants are lower than the limits in the rules and then the levels rise while staying within the permissible range, that the permit may be challenged because its approval was based on the lower levels in the application.

RESPONSE

The commission appreciates the comment. As was done for registrations for the same activities, permits for the land application of Class B sewage sludge will show the permissible ranges for the contaminants of concern that can be in the sludge that is used at the specific site. In certain cases, the commission may need to require that only sludge with contaminant levels below the limits in 30 TAC §312.43(b)(1) be used at a specific site, but in such cases the permit will still show the contaminant limits for the site. The commission has made no changes in response to this comment.

Synagro-2 and an individual commented that other states review and issue authorizations for the land application of sewage sludge in less time than the commission estimates will be required to issue permits under this rule.

RESPONSE

The commission appreciates the response. The commission does not believe that other states' processes are comparable to the permitting process required by THSC, §361.121. The processing and review of permit applications will be performed as expeditiously as possible in order to comply with statutory and regulatory requirements of the State of Texas. The commission has made no changes in response to this comment.

Section 312.4

An individual commented that the ED should not have the authority to deny activities related to Class A sewage sludge land

application because the material is safe for use and the potential for a denial may cause marketing problems. The individual further commented that the notice in the generator's discharge permit and notification to the commission involving Class A sewage sludge activities should include statements that all rules and regulations will be followed and that utilization of the material should protect the environment and have minimal impact on human activity. The individual also commented that the rules do not give specific guidelines for denying an activity.

RESPONSE

The commission disagrees with the comment. The proposed language will allow the ED to review and deny within the 30-day period before the activities would commence. As proposed, the ED is allowed to deny the activities only if there is a conflict with current rules or the permit requirements of the generators. This amendment is intended to give opportunity for the ED to verify if all requirements are being met. The commission believes that the general guidelines form sufficient basis for denial of authorization for Class A sewage sludge activities. The commission also believes that receiving notifications of planned activities for Class A sewage sludge is more protective of health and the environment and allows for more efficient enforcement of the rule than would be provided by only certification statements in the notification forms. The commission has made no changes in response to this comment.

An individual commented that a general prior notification should be allowed under §312.4(b)(2)(B) rather than listing all planned recipients of Class A sewage sludge, and stated that the existing rules require generators to document the users so there is no reason for such notification.

RESPONSE

The commission disagrees with this comment. The requirement to list all persons proposed to receive the sewage sludge directly from the generator is currently in the rules in §312.4(b)(2)(B) and is not being changed in this rulemaking. This information is important to the commission for tracking where sludge is used and verifying the information reported annually. The commission has made no changes in response to this comment.

Section 312.10

An individual commented that §312.10(k) is not clear on whether the addition or changing of sludge resources requires a major amendment, and he suggested that this action should only require notification in the annual reports and not an amendment to the permit.

RESPONSE

The commission disagrees in part with the comment. Section 312.10(k) states that the provisions for the major amendments for permits are provided in 30 TAC Chapter 305, Subchapter D. The provisions for major amendments to registrations also are listed in §312.10(k). The commission notes that this listing erroneously mentions permits, and this language is being changed. However, the changes or additions to sludge sources are currently not considered major amendments and will not be such in the amended rule. Sections 312.11(h) and 312.12(b)(2) state that changes in sludge sources only require advance notice to the commission with information to show its quality and proper use, rather than amendments. The commission believes that the advance notice is important for tracking and verification purposes, including verification that the permittee can recalculate agronomic rates properly. The commission has deleted two incorrect references to "permit" in part of §312.10(k) to clarify that the specific provisions apply to registrations. As stated in the proposed language, a major amendment to a permit is under Chapter 305.

Section 312.11

An individual commented that the rules for Class B sewage sludge permits should require submitting information on the status of water bodies nearby, including those listed on the 303d list, and suggested that the application should identify the location of any water bodies, including streams with bed and banks on the proposed site or adjacent properties and any significant surface features, including springs, sink holes, and caves. In addition, the individual recommended that the application include an evaluation of risk from a proposed site to any water body that might arise from normal operations and from significant storm events, together with steps the operator will take if a significant storm event is predicted to occur. Additionally, the individual recommended that the contingency plans include the requirements for the steps to be taken to avoid runoff and steps to be taken in case of runoff. Finally, the individual suggested that groundwater be treated in a similar fashion with appropriate application requirements.

RESPONSE

The commission disagrees with the comment in part. The information on the status of water bodies, including their 303d list status, applies to waste water discharge activities. Because these are non-discharge permits, the commission believes this information is not applicable to the beneficial use of sewage sludge at land application sites. However, since some waters are impaired for nutrients, the commission will consider this factor in reviewing permits in the watersheds of these water bodies. This information does not need to be included in the application because the commission knows which water bodies are impaired. If conditions at a specific site require additional protection, the commission may impose additional restrictions on a case-by-case basis.

The commission agrees that the applicant must identify the location of water bodies. Section 312.11(d)(4) requires that the hydrological characteristics of the surface and ground water within one-quarter mile of the site be identified in the application. The application requires a United States Geological Survey topographical map of the proposed application site and surrounding areas which shows all the relevant surface features and conduits to the groundwater, as well as appropriate buffer zones.

Chapter 312 includes safeguards to prevent potential risks to surface water and groundwater through various requirements for management practices and other restrictions. Additionally, whenever shallow groundwater that might be affected by land application is present, the permit application is reviewed by the Groundwater Protection Team, and any additional restrictions recommended are incorporated into the permit. Because the rules and permits will contain requirements that limit the amounts of sewage sludge that can be used at a site and its placement, and since significant rain events produce a very large dilution factor, the commission does not believe that plans are needed for the control of runoff from such events; the use of sewage sludge is no more hazardous that other agricultural operations. The commission has made no changes in response to this comment.

An individual recommended that the rules require that the permit applications include information on the vegetation at the site and on adjacent property, and suggested that the application identify any plant or animal species on the state and federal list of endangered or threatened species that might be present at a proposed site. Additionally, the individual recommended that the application include a description of the steps the applicant proposes to protect any important habitat.

RESPONSE

The commission disagrees with this comment in part. The application form requires the information on crops grown on the site, as authorized by 30 TAC §305.46. However, the site applicant is free to change the crops during the term of the permit, but such changes must be reported in the annual report for the site. Vegetation outside the application area will not be affected by land application as long as the management practices required in the rules and permits are followed. The beneficial use of the sewage sludge is limited to agricultural purposes and will have no more impact than other agricultural practices. The permit application is not required to identify endangered species, but §312.44(a) requires that the use of sewage sludge not cause harm to threatened or endangered species or their habitat. In addition, THSC, §361.067 and 30 TAC Chapter 39 require notification to Texas Parks and Wildlife Department to allow their review and comment on any permit application to avoid impact to a threatened or endangered species. Furthermore, all permits for land applying Class B sewage sludge that will be issued will contain the language prohibiting impacts to the species or their habitat found in §312.44(a). The commission has made no changes in response to this comment.

An individual commented that the commission should provide greater public participation by expanding the notification of nearby landowners from only adjacent properties to properties within one- quarter mile of the site. This change would insure that critical information is known to the commission and not hidden from the public. The individual also contended that the commission does not perform inspection of sites prior to making decisions on application, necessitating the public to serve as an alternative source of information.

RESPONSE

The commission disagrees with the comment in part. First, 30 TAC §§39.413(1), 305.45, and 312.11 require an applicant to provide notice to adjacent land owners, who are also identified in the map attached to the application. To be consistent with current registration requirements and water quality procedural rules, the commission will continue to comply with the applicable water quality notice requirements. The commission welcomes public input on both registrations and permits, and all relevant information is considered when deciding what action to take on a specific application. The new THSC, §361.121 and this rulemaking allow greater public participation by establishing that Class B land application cases are subject to public meetings and contested case hearings. Although not required by rule or law, the practice of the commission is to inspect all new sites that apply for sludge land application activities that require an authorization. The commission has made no changes in response to this comment.

Synagro-2 commented that the information requested in the application for a permit to land apply Class B sewage sludge is excessive, and that revisions to the application forms since they were first developed have made it difficult to provide all needed information and revising the information submitted is unreasonable.

RESPONSE

The commission disagrees with the comment. The information contained in the permit application forms is generally the same as what has been required for registrations for several years. The commission understands that changes to the application form have caused some confusion and apologizes for the inconvenience. However, since THSC, §361.121 does not allow continued operation of registered sites unless a permit is obtained by September 1, 2003, the commission believes that the interests of both the regulated community and the public were best served by developing and distributing the permit application form as quickly as possible, even though this decision did lead to changes to the form as the rules were developed. Although information may need to be updated in some applications that were submitted early, the commission believes that this inconvenience is offset by the higher probability that a permit can be issued by the statutory deadline, thereby avoiding temporary closure of the site. The commission further believes that revising information that is not adequate is necessary for the proper review and issuance of permits. The commission has made no changes in response to this comment.

Section 312.12

An individual commented that background soil sampling requirements in §312.12(b)(1)(I) could be greater than 80 acres, as long as sufficient sampling is performed for each soil type, and suggested that a permit require more rigorous testing prior to the land application of the sludge. Additionally, the individual suggested that each permit application have a soil sampling plan and a rationale for the plan.

RESPONSE

The commission disagrees with the comment. The commission believes that ten to 15 samples per 80 acres is the minimum sampling required to adequately characterize soil that will receive sewage sludge. Even in tracts with uniform soil, a variety of factors can cause differing levels of plant nutrients and contaminants in different parts of the application area. Reduced sampling frequencies increase the risk of missing such areas of elevated nutrients or contaminants. The registrations and permits currently require ongoing testing of both soil and sludge. The frequency of testing will continue to be annually for soil and based on §312.46(a) for sludge. The commission believes these frequencies are the minimum required to protect public health and environment in light of changes in nutrient levels in soils over time and the variability of composition of the sludge produced at wastewater treatment plants. The commission disagrees that a soil sampling plan is needed if sampling is based on soil types or characterization, but a sampling plan is required if testing is done on a different basis in order to demonstrate that the soils have been characterized properly. The commission has made no changes in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§312.4, 312.10 - 312.12

STATUTORY AUTHORITY

The repeals are adopted under TWC, §5.102, which provides the commission with the general powers to carry out its duties under the TWC; and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers

and duties under the provisions of the TWC and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205214
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 239-6087

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30 TAC §§312.4, 312.10 - 312.13

STATUTORY AUTHORITY

The amendment and new sections are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state and to establish and approve all general policies of the commission; and the Texas Solid Waste Disposal Act, THSC, §361.011, which provides the commission with the authority to manage municipal waste, THSC, §361.013, which provides the commission with the authority to adopt rules and establish fees for the transportation and disposal of solid waste, THSC, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge such as reuse, THSC, §361.024, which provides the commission authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste, THSC, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste, and THSC, §361.121, which provides the commission the authority to require a permit for the land application of Class B sewage sludge and charge a fee for the permit.

§312.4. Requirements for Sewage Sludge Permit, Registration, or Notification.

(a) Permits. Except where in conflict with other chapters in this title, a permit shall be required before any storage, processing, incineration, or disposal of sewage sludge, except for storage allowed under this section, §312.50 of this title (relating to the Storage and Staging of Sludge at Beneficial Use Sites), §312.61(c) of this title (relating to Applicability), §312.147 of this title (relating to Temporary Storage), and §312.148 of this title (relating to Secondary Transportation of Waste). Any permit authorizing disposal of sewage sludge shall be in accordance with any applicable standards of Subchapter C of this chapter (relating to Surface Disposal) or §312.101 of this title (relating to Incineration). No permit will be required under this chapter if issued pursuant to other requirements of the commission, as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(1) Effective September 1, 2003 a permit is required for the beneficial land application of Class B sewage sludge. All provisions for this activity in any registration are void after August 31, 2003.

(2) The effective date of a permit is the date that the executive director signs the permit.

(3) Site permit information on file with the commission shall be confirmed or updated, in writing, whenever the mailing address, telephone number of the owner or operator is changed, or whenever requested by the commission.

(4) If a permit is required under this chapter, all activities at the site under this chapter, except transportation, shall be incorporated in the permit.

(b) Notification of certain Class A sewage sludge land application activities.

(1) If sewage sludge meets the metal concentration limits in §312.43(b)(3) (Table 3) of this title (relating to Metal Limits), the Class A pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction), and one of the requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), it will not be subject to the requirements of §312.10 of this title (relating to Permit and Registration Applications Processing), §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registration of Land Application Activities), and §312.13 of this title (relating to Actions and Notices), except as provided in this subsection.

(2) At least 30 days prior to engaging in such activity for the first time, any generator in Texas or any person who first conveys sewage sludge from out of state into the State of Texas and who proposes to store, land apply, or market and distribute sewage sludge meeting the standards of this subsection shall submit a notification form approved by the executive director. A completed notification shall be submitted to the Agriculture Team of the Water Quality Division by certified mail, return receipt requested. The notification shall contain information detailing:

(A) sewage sludge composition, all points of generation, and wastewater treatment facility identification;

(B) name, address, and telephone number of all persons who are being proposed to receive the sewage sludge directly from the generator;

(C) a description in a marketing and distribution plan which describes any of the following activities:

(i) to sell or give away sewage sludge directly to the public, including a general description of the types of end uses proposed by persons who will be receiving the sewage sludge;

(ii) methods of distribution, marketing, handling, and transportation of the sewage sludge;

(iii) a reasonable estimate of the expected quantity of sewage sludge to be generated or handled by the person making the notification; and

(iv) a description of any proposed storage and the methods which will be employed to prevent surface water runoff of the sewage sludge or contamination of groundwater.

(3) Thirty days after the notification has occurred, the activities regulated by this subsection may commence unless the executive director determines that the activities do not meet the requirements of this subsection or an applicant's permit. After receiving a notification, the executive director may review a generator's activities or the activities of the person conveying the sewage sludge into Texas to determine whether any or all of the requirements of this chapter are necessary. In making this determination, the executive director will consider specific circumstances related to handling procedures, site conditions, or the application rate of the sewage sludge. The executive director may review a proposal for storage of sewage sludge, considering the amount of time and the amount of material described on the notification. Also,

in accordance with §312.41 of this title (relating to Applicability), any reasonably anticipated adverse effect that may occur due to a metal pollutant in the sewage sludge may also be considered.

(4) Annually, on September 1, each person subject to notification of certain Class A sewage sludge activities required by this subsection shall provide a report to the commission, which shows in detail all activities described in paragraph (2) of this subsection that occurred in the reporting period. The report shall include an update of new information since the prior report or notification was submitted and all newly proposed activities. The report shall also include a description of the annual amounts of sewage sludge provided to each initial receiver from the in-state generator and for persons who convey out of state sewage sludge into Texas, the amounts provided from this person directly to any initial receivers. This report can be combined with the annual report(s) required under §312.48 of this title (relating to Reporting), §312.68 of this title (relating to Reporting), or §312.123 of this title (relating to Annual Report).

(c) Registration of land application sites.

(1) If the requirements in Subchapter B of this chapter (relating to Land Application for Beneficial Use) are met and a sewage sludge does not meet the requirements of subsection (b) of this section, a site shall be registered for the land application of sewage sludge for beneficial use, in accordance with the requirements of §312.12 and §312.13 of this title unless a permit is issued under §312.11 of this title.

(2) Registrations for the use of Class B sewage sludge shall expire on or before August 31, 2003. If the registration is scheduled to expire after August 31, 2003, and authorizes the use of Class A sewage sludge, domestic septage or water treatment plant sludge, only the provisions for the use of Class B sewage sludge shall expire on August 31, 2003; the other provisions shall expire on the expiration date of the registration or when a permit is issued for the site.

(3) Upon the effective date of these rules:

(A) the executive director shall not accept registration applications for land application of Class B sewage sludge;

(B) only permit applications will be accepted; and

(C) for pending registration applications, the executive director shall process either the pending registration application or a permit application (if submitted) for the same site, but not both.

(4) The effective date for the registration of a site at which sewage sludge is applied to the land for beneficial use is the date that the executive director signs the registration, in accordance with §312.12(d) of this title. Site registration information on file with the commission shall be confirmed or updated, in writing, whenever:

(A) the mailing address and/or telephone number of the owner or operator is changed; or

(B) requested by the executive director.

(d) Term limits. Term Limits for registrations or permits shall not exceed five years.

(e) Authorization. No person may cause, suffer, allow, or permit any activity of land application for beneficial use of sewage sludge unless such activity has received the prior written authorization of the commission.

(f) Permit application fees for Class B sewage sludge.

(1) Any person who applies for a permit, permit renewal, permit modification, permit amendment, or permit transfer shall pay a permit application fee. The fees in this subsection supercede the fees in §305.53 of this title (relating to Application Fee). The commission shall not consider an application for final decision until such time as the permit application fee is paid. All permit application fees must be made payable to the Texas Commission on Environmental Quality and paid at the time the application for a permit is submitted.

(2) The executive director shall not process an application until all delinquent annual fees and delinquent administrative penalties owed the commission by the applicant or for the site as delineated in the permit application are paid in full. Any permittee to whom a permit is transferred shall be liable for payment of the annual fees assessed for the permitted entity/site on the same basis as the transferor of the permit, as well as any outstanding fees and associated penalties owed the commission. If the applicant is not the permittee at the time fees become delinquent or against whom administrative penalties are assessed, the executive director may for good cause waive the applicant's obligation under this section for payment of delinquent annual fees or delinquent administrative penalties.

(3) An applicant may file a written request for a refund in the amount of 50% of the permit application fee paid if the permit is not issued. No fees shall be refunded after a permit, permit renewal, permit modification, permit amendment, or permit transfer has been issued by the commission. Transfer of a permit shall not entitle the transferor permittee to a refund, in whole or part, of any fee already paid by that permittee.

(4) The permit application fees shall be between $1,000 and $5,000, based on the quantity of sewage sludge to be applied annually under the permit, as shown in the following schedule:

(A) $1,000 if the quantity is 2,000 dry tons or less;

(B) $2,000 if the quantity is greater than 2,000 dry tons but less than or equal to 5,000 dry tons;

(C) $3,000 if the quantity is greater than 5,000 dry tons but less than or equal to 10,000 dry tons;

(D) $4,000 if the quantity is greater than 10,000 dry tons but less than or equal to 20,000 dry tons; or

(E) $5,000 if the quantity is greater than 20,000 dry tons.

§312.10. Permit and Registration Applications Processing.

(a) Applications for permits, registrations, or other types of approvals required by this subchapter shall be reviewed by staff for administrative completeness within 14 calendar days of receipt of the application by the executive director.

(b) Permit and registration applications must include all required information shown in §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registration of Land Application Activities), or §312.142 of this title (relating to Transporter Registrations).

(c) Upon receipt of an application for a permit or registration, not to include transportation registrations, the executive director shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative completeness which is suitable for publishing or mailing, and forward that statement to the chief clerk. The chief clerk shall notify every person entitled to notification of a particular application as described in §312.13 of this title (relating to Actions and Notice).

(d) The notice of receipt of an application for permit or registration and declaration of administrative completeness shall contain the information in Chapter 39 of this title (relating to Public Notice).

(e) Nothing in this section shall be construed so as to waive the notice and processing requirements concerning the application and the draft permit in accordance with Chapter 39, Subchapters H and J

of this title (relating to Public Notice), Chapter 50, Subchapters E - G of this title (relating to Action on Applications and Other Authorizations), Chapter 55, Subchapters D - F of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), or Chapter 305, Subchapters C, D, and F of this title (relating to Consolidated Permits) for applications for sewage sludge land application, processing, disposal, storage, or incineration permits.

(f) Any person who is required to obtain a permit, or who requests an amendment, modification, or renewal of a permit for sewage sludge land application, processing, disposal, storage, or incineration is subject to the application processing procedures and requirements found in §§281.18 - 281.24 of this title (relating to Applications Returned; Technical Review; Extensions; Draft Permit, Technical Summary, Fact Sheet, and Compliance Summary; Referral to Commission; Application Amendment; and Effect of Rules).

(g) Any person who is required to obtain a registration, or who requests an amendment, modification, or renewal of a registration to land apply sewage sludge (including domestic septage) is subject to the application processing procedures and requirements found in §§281.18 - 281.20 of this title. If a permit application for land application of Class B sewage sludge is filed for a site holding a current registration before the expiration of the registration, the registration will remain in effect until either the permit is issued or denied, or until August 31, 2003, whichever occurs first.

(h) The registration for land application of sewage sludge shall be cancelled upon receipt of a written request for cancellation from either the site operator or landowner. The executive director will provide notice to the other party that cancellation has been requested and that cancellation will occur ten days from the issuance of notice. This notice is provided merely as a courtesy by the commission and is not mandatory for cancellation.

(i) In order to transfer a registration or permit for land application of sewage sludge, both the site operator and the landowner must sign the transfer application. An application for transfer that is not signed by both the site operator and the landowner will be considered a request for cancellation.

(j) If a registration or permit for a site is cancelled, a complete application for registration or permit must be submitted in order to reauthorize the site. If the application is approved, the site will be authorized under the same site registration or permit number.

(k) For permits, a major amendment is defined in Chapter 305, Subchapter D of this title. For purposes of this chapter concerning registrations and except as provided in subsection (l) of this section, a major amendment for a registration is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a registration or a substantive change in the information provided in an application for registration regarding sewage sludge. Changes to registrations which are not considered major include, but are not limited to, typographical errors, changes which result in more stringent monitoring requirements, changes in site ownership, changes in site operator, or similar administrative information.

(l) Upon the effective date of this chapter, the executive director will process as a minor amendment a request by an existing permittee or registrant to change any substantive term, provision, requirement, or a limiting parameter in a permit or registration which implemented prior regulations of the commission, when it is no longer a requirement of this chapter. Notice requirements of §312.13 of this title are not applicable to a minor amendment for a registration.

§312.11. Permits.

(a) The provisions of this section set the standards and requirements for permit applications to land apply, process, store, dispose of, or incinerate sewage sludge.

(b) Any person who is required to obtain or who requests a new permit or an amendment, modification, or renewal of a permit under this section is subject to the permit application procedures of §1.5(d) of this title (relating to Records of the Agency), §305.42(a) of this title (relating to Application Required), §305.43 of this title (relating to Who Applies), §305.44 of this title (relating to Signatories to Applications), §305.45 of this title (relating to Contents of Application for Permit), and §305.47 of this title (relating to Retention of Application Data). For a land application permit, the applicant must be:

(1) the owner of the application site if the sewage sludge was generated outside this state; or

(2) the site operator if the sewage sludge was generated in this state.

(c) An application for a permit must include all information in accordance with Chapter 281, Subchapter A of this title (relating to Application Processing) and Chapter 305, Subchapter C of this title (relating to Application for Permit), and must also include the following.

(1) for an incineration or disposal facility, the map required by §305.45(a)(6) of this title shall provide the following information:

(A) the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant;

(B) the name and mailing address of the owner of each tract of land within one-half mile of any portion of the tract of land where the permitted activities would occur, as such information can be determined from the current county tax rolls or other reliable sources;

(C) the source(s) of the information on the surrounding property owners; and

(D) the list of property owners must be provided both as a hard copy, either on the map or as an attached list, and in one of the following manners:

(i) in electronic format; or

(ii) on four sets of self-adhesive mailing labels for all property owners;

(2) for beneficial use land application, processing, or storage facility, the map required by §305.45(a)(6) of this title must provide the following information:

(A) the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant;

(B) the name and mailing address of the owner of each tract of land adjacent to the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources;

(C) the source(s) of the information on the surrounding property owners; and

(D) the list of property owners in both a hard copy, either on the map or as an attached list, and in one of the following manners:

(i) in electronic format; or

(ii) on four sets of self-adhesive mailing labels for all property owners;

(3) a notarized affidavit from the applicant(s) verifying land ownership of the permitted site or landowner agreement to the proposed activity; and

(4) any information provided under this subsection must be submitted in quadruplicate form.

(d) An applicant for a permit to land apply Class B sewage sludge must also provide the following information:

(1) the information listed in §312.12(b)(1)(A) - (C) of this title (relating to Land Application Activities);

(2) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), based on the following:

(A) the samples must be taken from the zero to six inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) the soil samples must accurately show soil conditions in the application area(s) and must be taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples must be comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample must be taken from each United States Department of Agriculture (USDA) Natural Resource Conservation Service soil type (soils with the same characterization or texture) unless an alternate method is used;

(E) an alternate method for defining areas to be sampled may be used, such as sampling by agricultural management units or other defined areas; and

(F) when using an alternate method, a sampling plan must also be included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA Natural Resource Conservation Service soil type in each area sampled;

(3) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), based on the following:

(A) separate samples must be taken from the zero to six inch and from the six to 24 inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) the soil samples must accurately show soil conditions in the application area(s) and must be taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples must be comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample must be taken from each USDA Natural Resource Conservation Service soil type (soils with the same characterization or texture) unless an alternate method is used;

(E) alternate methods for defining areas to be sampled may be used, such as sampling by agricultural management units or other defined areas; and

(F) when using an alternate method, a sampling plan must also be included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA Natural Resource Conservation Service soil type in each area sampled;

(4) information necessary to identify the hydrological characteristics of the surface water and groundwater within one-quarter mile of the site to be permitted; and

(5) any information under this subsection shall be submitted in quadruplicate form.

(e) Any person who is issued a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the permit characteristics and standards set forth in §305.122 of this title (relating to Characteristics of Permits), §305.123 of this title (relating to Reservation in Granting Permit), §305.124 of this title (relating to Acceptance of Permit, Effect), §305.125 of this title (relating to Standard Permit Conditions), §305.126(d) of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits), §305.127 of this title (relating to Conditions to be Determined for Individual Permits), §305.128 of this title (relating to Signatories to Reports), and §305.129 of this title (relating to Variance Procedures).

(f) If any provision of a permit is violated during its term, the permit holder is required to report to the executive director the noncompliance in accordance with Texas Health and Safety Code, §361.121(d)(5) and §305.125(9) of this title. Each permit for the land application of sewage sludge must contain a provision requiring such reporting. Report of such information shall be provided orally or by facsimile transmission (fax) to the appropriate Regional Office within 24 hours of the permit holder becoming aware of the noncompliance. A written submission of such information shall also be provided by the permit holder to the Regional Office and to the Enforcement Division at the commission's Central Office (MC 149) within five working days of becoming aware of the noncompliance. The written submission must contain the following information:

(1) a description of the noncompliance and its cause;

(2) the potential danger to human health, safety, or the environment;

(3) the period of noncompliance, including exact dates and times;

(4) if the noncompliance has not been corrected, the anticipated time it is expected to continue; and

(5) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

(g) Each sewage sludge land application permit must include a reference to the maximum quantity of sewage sludge that may be land applied under the permit.

(h) Any permittee who requests a new permit or an amendment, modification, or renewal of a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the standards and requirements for applications and actions concerning amendments, modifications, renewals, transfers, corrections, revocations, denials, and suspensions of permits, as set forth in §305.62 of this title (relating to Amendment), §305.63 of this title (relating to Renewal), §305.64 of this title (related to Transfer of Permits), §305.65 of this title (relating to Corrections of Permits), §305.66 of this title (relating to Permit Denial, Suspension, and Revocation), §305.67 of this title (relating to Revocation and Suspension upon Request or Consent), and §305.68 of this title (relating to Action and Notice on Petition for Revocation or Suspension). The permittee shall have the continuing obligation to provide immediate written notice to the executive director of any changes to a permit or to information on soil or subsurface conditions

at the site, and to provide any additional information concerning changes in land ownership, site control, operator, waste composition, source of sewage sludge, or waste management methods. Information submitted under this subsection shall be in quadruplicate form.

§312.12. Registration of Land Application Activities.

(a) After August 31, 2003, all registrations for the beneficial use of Class B sewage sludge will be void. Registrations for the beneficial use of Class A sewage sludge, water treatment plant sludge, and/or domestic septage will remain valid until they expire, are renewed, are cancelled, or are revoked.

(b) Except as provided in §312.4(b) of this title (relating to Requirements for Sewage Sludge Permit, Registration, or Notification) and §312.11 of this title (relating to Permits), any person who intends to land apply sewage sludge for beneficial use shall:

(1) submit to the executive director an original, completed application form approved by the executive director, along with the appropriate number of copies of the registration application. Each applicant shall submit to the executive director such information as may reasonably be required to enable the executive director to determine whether such land application for beneficial use activities are compliant with the terms of this chapter. Such information may include, but is not limited to the following:

(A) a description and composition of the sewage sludge;

(B) a description of all processes generating the sewage sludge (including domestic septage) to be applied at the site;

(C) information about the site and the planned management of the sewage sludge, including the name, address, and telephone number of any landowner or operator at the site and the following information:

(i) whether such material is managed on-site and/or off-site from its point of generation;

(ii) a description of each on-site land application beneficial use unit or tract, including the name, address, and telephone number of all landowners, or the same information from a landowner acting as a spokesperson(s) for all the landowners, so long as the spokesperson submits to the executive director a sworn statement allowing the spokesperson to act for other persons;

(iii) a listing of the types of sewage sludge managed in each unit or tract;

(iv) a detailed description of the beneficial use occurring at each unit or tract of land where application of sewage sludge is proposed, including proposed waste management and crop production methods; and

(v) information regarding soil characteristics and subsurface conditions where the land application site will be located;

(D) the verified legal status of the applicant(s), as applicable;

(E) the notarized signature of each applicant, checked against commission requirements in accordance with §305.44 of this title (relating to Signatories to Applications);

(F) a notarized affidavit from the applicant(s) verifying land ownership or landowner agreement to the proposed activity;

(G) technical reports and supporting data required by the application;

(H) for applications for major amendments or new registrations, information concerning surrounding landowners, including the following:

(i) a map depicting the approximate boundaries of the tract of land owned or under the control of the applicant and each residential or business address and owner of all the tracts of land bordering the perimeter of any portion of the site;

(ii) a list on or attached to the map of the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls and other reliable sources;

(iii) the source of the information; and

(iv) the list of property owners in both a hard copy and in one of the following manners:

(I) in electronic format; or

(II) on four sets of self-adhesive mailing labels for all property owners;

(I) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), based on the following:

(i) the samples must be taken from the zero to six inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) the soil samples must accurately show soil conditions in the application area(s) and must be taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples must be comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample must be taken from each USDA Natural Resource Conservation Service soil type (soils with the same characterization or texture) unless an alternate method is used;

(v) an alternate method for defining areas to be sampled may be used, such as sampling by agricultural management units or other defined areas; and

(vi) when using an alternate method, a sampling plan must also be included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA Natural Resource Conservation Service soil type in each area sampled;

(J) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), based on the following:

(i) separate samples must be taken from the zero to six inch and from the six to 24 inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) the soil samples must accurately show soil conditions in the application area(s) and must be taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples shall be comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample must be taken from each USDA Natural Resource Conservation Service soil type (soils with the same characterization or texture) unless an alternate method is used;

(v) an alternate method for defining areas to be sampled may be used, such as sampling by agricultural management units or other defined areas; and

(vi) when using an alternate method, a sampling plan must also be included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA Natural Resource Conservation Service soil type in each area sampled;

(K) any information provided under this paragraph must be submitted to the executive director in quadruplicate form.

(2) have the continuing obligation to immediately provide written notice to the executive director of any changes, requests for an amendment, modification, or renewal of a registration, or any additional information concerning changes in land ownership, changes in site control, or operator, changes in waste composition, changes in the source of sewage sludge, or waste management methods, and information regarding soils and subsurface conditions where the operation is to be located. Any information provided under this paragraph shall be submitted to the executive director in duplicate form.

(c) The executive director shall determine, after review of any application for registration to land apply sewage sludge (including domestic septage) for beneficial use, whether to approve or deny an application in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application, the executive director will consider all relevant requirements of this chapter and consider all information pertaining to those requirements received by the executive director regarding the application. The written determination on any application, including any authorization granted, shall be mailed to the applicant upon the decision of the executive director.

(d) At the same time the executive director's decision is mailed to the applicant, notice of this decision shall also be mailed to all parties who submitted written information on the application, as described in §312.13(c)(2) and (3) of this title (relating to Actions and Notice).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 9, 2002.

TRD-200205213
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 29, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH

34 TAC §§41.33 - 41.39, 41.41 - 41.43

The Teacher Retirement System of Texas (TRS) adopts new §§41.33-41.39 and §§41.41, 41.42 and 41.43 concerning the Texas School Employees Uniform Group Health Coverage Program ("Program"). New §§41.33-41.35 set forth definitions applicable to the Program, describe eligibility requirements, establish coverage plans and set forth requirements of the coverage plans and tiers of coverage. New §§41.36-41.39 set forth enrollment timelines, effective dates and termination dates of coverage, and requirements for individuals who change employment from one participating entity to another. New §§41.41-41.43 set forth deadlines and other requirements for participating entities to submit premium payments, and the deadlines and other requirements that must be met for eligible entities to receive funding authorized under Insurance Code articles 3.50-8 and 3.50-9

New §§41.33-41.39 and new §41.42 are adopted without changes to the proposed text as published in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5506). The emergency adoption of §§41.33-41.35 originally published in the March 15, 2002 issue of the *Texas Register*, (27 TexReg 1951) and emergency amendments to §41.33 published in the June 21, 2002 issue of the *Texas Register*, (27 TexReg 5325) are being withdrawn effective 20 days from the date of this filing.

New §41.41 and §41.43 are adopted with several non-substantive revisions to the text as proposed in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5510). Specifically, the non-substantive revisions to §41.41 eliminate language indicating that participating entities will be billed for COBRA participants, and add language to clarify that participating entities will be billed for individuals receiving coverage while they are on leave without pay. The non-substantive revision to §41.43 changes the term "and" in the next to the last sentence to "in consultation with" in order to track the statutory language.

No comments were received on the proposals.

The new sections are adopted under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board. The new sections are also adopted under House Bill 3343, which was passed by the 77th Legislature, 2001, including Insurance Code articles 3.50-7, 3.50-8 and 3.50-9. Insurance Code 3.50-7 authorizes TRS to adopt rules to administer the Program. Insurance Code article 3.50-7, §3(c) further authorizes TRS, as trustee, to "adopt rules relating to the program as considered necessary by the trustee." Insurance Code article 3.50-8, §4, also authorizes TRS to adopt rules to implement the article.

§41.41. Premium Payments.

(a) Each participating entity shall remit to TRS the amount on each bill directed to the participating entity by TRS or the administering firm. The participating entity shall remit payment on or before the sixth day after the last day of each month in which TRS or the administering firm issued a bill. Payment shall be delivered in the same manner (e.g., currently, TEXNET) in which the participating entity delivers retirement contributions. Any waiver granted to a participating entity under Government Code §825.408(a) does not apply to amounts billed under this section or to amounts otherwise owed to TRS for the TRS-ActiveCare program.

(b) A participating entity will be billed for all full-time and part-time employees enrolled in the TRS-ActiveCare program who were employed by the participating entity on the first day of the billing month as reported by the participating entity. In addition, a participating entity will be billed retroactively for all full-time and part-time employees who enroll after the first day of a month and choose coverage for that month. A participating entity will also be billed for any individual covered in accordance with §41.40 of this title (relating to Coverage Continuation While on Leave Without Pay.) Participating entities are responsible for collecting all applicable premiums and other costs that are required to be paid by its full-time employees, part-time employees, and any individuals covered in accordance with §41.40 of this title. A participating entity shall remit the full amount billed each month.

(c) Participating entities shall not modify the amount of any bill or remit any amount different from the amount billed. A participating entity shall report proposed adjustments, including those seeking credit for terminated employees, to the administering firm no later than the 90th day after the billing date. TRS may reject any inappropriate proposed adjustments, including those reported later than 90 days after the billing date. Approved adjustments will be reflected on a subsequent bill.

(d) TRS may take corrective action against a participating entity that fails to remit payment in accordance with the timelines and other requirements of this section, including but not limited to placement of a warrant hold with the Comptroller of Public Accounts.

§41.43. Payment of State Assistance for Meeting Minimum Effort.

School districts and participating charter schools eligible for state assistance under Insurance Code article 3.50-9 §4 ("eligible entities") shall report monthly, in the same manner described under §41.42 of this title (relating to Payment of $1,000 Supplemental Compensation), the number of employed participating members who are covered by a group health plan. TRS and TEA will periodically calculate the monthly amount an eligible entity may be entitled to receive as described in Insurance Code article 3.50-9 §4 ("projected amount"). If TEA receives an eligible entity's report on or before the deadline established by §41.42 of this title (relating to Payment of $1,000 Supplemental Compensation) and if none of the information submitted by the eligible entity is disputed or requires verification, TRS will begin remitting the projected amount to the eligible entity on a monthly basis no earlier than October 2002. TRS and TEA may periodically revise the projected amount and TRS may make a corresponding increase or decrease in funds that would otherwise be remitted to an eligible entity. After the end of each fiscal year, TRS in consultation with TEA will make a final determination of the amounts eligible entities were entitled to receive for that fiscal year under Insurance Code article 3.50-9 §4 and will make any corresponding increase or decrease in funds that would otherwise be remitted to an eligible entity. If necessary, TRS may institute other action to recover amounts an eligible entity was not entitled to receive.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205052

Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective date: August 26, 2002
Proposal publication date: June 21, 2002
For further information, please call: (512) 542-6115

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE PROBABLE COMMISSION

CHAPTER 343. STANDARDS FOR JUVENILE PRE-ADJUDICATION SECURE DETENTION FACILITIES

37 TAC §§343.1, 343.2, 343.4 - 343.19

The Texas Juvenile Probation Commission adopts the repeal of chapter 343 rules relating to standards for juvenile pre-adjudication secure detention facilities without changes as published in the April 5, 2002 issue of the *Texas Register* (27 TexReg 2738) and will not be republished.

TJPC repeals this chapter in an effort not to overlap with adopted new standards which provide structural and substantive changes from the current standards that were effective September 30, 2002.

No public comment was received regarding the repeals.

This repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to modify or delete obsolete rules which provide minimum standards for the juvenile probation commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205078
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: April 5, 2002
For further information, please call: (512) 424-6710

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CHAPTER 343. STANDARDS FOR JUVENILE PRE-ADJUDICATION SECURE DETENTION FACILITIES

The Texas Juvenile Probation Commission adopts new chapter 343 rules §343.2, 343.3, 343.4, 343.5, 343.6, 343.7, 343.8, 343.9, 343.10, 343.11, 343.13, 343.14, 343.15, 343.16, 343.17, 343.18, 343.30, 343.31, 343.32, 343.33, 343.34, 343.40, 343.41, 343.42, 343.43, 343.44, 343.50, 343.51, 343.52,

343.53 relating to standards for juvenile pre-adjudication secure detention facilities. This chapter is adopted with non-substantive changes to the proposed text as published in the June 14, 2002 issue of the*Texas Register* (27 TexReg 5078) and will not be republished. Non-substantive changes were made in sections 343.1(11)(C); 343.12(i); 343.25(d); and 343.35 of this chapter.

TJPC adopts this rule in an effort to provide structural and substantive changes from the current standards. These adopted rules provide standards for all juvenile pre-adjudication secure detention facilities across the state of Texas to ensure the standardized practice of keeping children and staff safe within each facility.

Public Comment. Public comment was received from Smith County regarding Section 343.1(7). The way the standard is written prevents the facility administrator, assistant facility administrator and supervisor of juvenile detention officers from being considered detention officers. These positions often are needed to assist with detention officer duties.

Agency Response. TJPC does not recommend adopting this change. Under the proposed definition facility administrators, assistant facility administrators and supervisors of juvenile detention officers do fall within the definition of a detention officer and may perform the duties of certified detention officers under the standards.

Public Comment. Public comment was received from Tarrant County regarding 343.1 (11)(D). Social Workers and medical practitioners are included in the definition of professionals, but are not included under mental health professionals. Individuals licensed by the Texas State Board of Examiners of Psychologists is included twice.

Agency Response. TJPC recommends deleting the second reference to the Texas State Board of Examiners of Psychologists and including medical practitioners licensed or certified by the Texas Board of Medical Examiners within the definition of mental health professional. However, TJPC does not recommend including licensed social workers in the definition. Licensure in social work may allow an individual to qualify for licensure in some mental health professions (e.g. licensed professional counselor, marriage and family therapist), but social work is not exclusively in and of itself a "mental health profession".

Public Comment. Public comment was received by Randall County regarding Section 343.1 (11)(D) and (11)(E). The definition of mental health professional should also include a qualified mental professional (QHMP-CS) as defined in 25 Texas Administrative Code 412.312. Many governmental agencies (including mental health divisions) employ and utilize personnel based on this qualification, and the department could verify whether an individual meets the qualifications. The Youth Center of the High Plains currently has two employees who are master level counselors, who currently provide services to the department, but would not qualify as a mental health professional under the standard. The local MHMR authority does not provide services after hours, on weekends, or on holidays. The Youth Center of the High Plains should not be penalized for electing to provide emergency services internally.

Agency Response. TJPC does not recommend adopting this change. In the proposed agency revisions, TJPC is amending the definition of mental health professional to include mental health professionals employed by TDMHMR, or is employed by an entity that contracts as a service provider with TDMHMR. This amendment will, therefore, implicitly incorporate the qualifications found in 412.312, since those qualifications are imposed on TDMHMR service providers already. TJPC does not recommend having TDMHMR's "qualified mental health professional" definition apply to an entity that is not employed with TDMHMR, or a contracted service provider with TDMHMR because it, would be difficult to monitor whether the individual met the definition of a qualified mental health professional. Under the agency's proposed definition, the mental health professional will have a verifiable licensure with an appropriate licensing agency, or employment with MHMR, or one of its service providers.

Public Comment. Public comments was received by Smith County regarding Section 343.2(e)(2)(B)(ii). Requiring the placement of an alleged perpetrator on administrative leave adversely affects staff coverage (ratios), staff morale, and the costs of staff coverage particularly for mid-size and small detention centers. It is not always possible to complete an internal investigation in one or two days. The standard would pressure a facility to rush through an internal investigation, or would result in facilities not reporting allegations. Residents in the detention facility would be able to control staffing patterns by making allegations. The facility should have discretion regarding whether the alleged perpetrator is placed on administrative leave.

Agency Response. TJPC does not recommend adopting this change. The standard does not require the placement of the alleged perpetrator on administrative leave. The facility has the option of placement on either administrative leave, or placement in a position having no contact with any juveniles. The standard is designed to protect all the juveniles residing within the facility, not just those residents involved in an allegation. Reassignment of the alleged perpetrator may cause a staffing problem, but the problem is no different in magnitude than the staffing issues caused by sudden staff illness, or other unforeseeable events. Additionally, the reassignment lasts only until the completion of an internal investigation. With the exception of providing a copy to the Commission, TJPC does not place any parameters on the nature and length of the internal investigation. While reassignment of the alleged perpetrator inevitably may have a short-term impact on facility operations, the agency believes administrative leave or reassignment to a position having no contact with any youth substantially diminishes a facility's liability when dealing with abuse allegations. Most importantly, it is the best way of protecting the safety of the facility's residents. Any difficulties a facility encounters when dealing with false allegations as an attempt by residents to control staffing patterns can be dealt with effectively by filing charges of a false report (a class B misdemeanor) against the child.

Public Comment. Public comment was received by Smith County regarding Section 343.3(b)(2). Federal law requires hiring the best qualified applicant as opposed to having to hire an individual based on his/her gender for the facility to come into compliance with a state standard. The agency should issue a BFOQ, so that counties do not face federal litigation because they followed this standard.

Agency Response. TJPC recommends taking no action on this public comment. The designation of gender as a Bona Fide Occupational Qualification (BFOQ) constitutes an exception to Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination based on sex and other protected categories. In

particular, TJPC contends that the proposed standard is reasonably necessary in a custodial setting such juvenile detention facility in order to accommodate the privacy interests of both male and female adolescent detainees and to reduce the incidence of sexual misconduct by staff. Specifically, routine practices such as monitoring showers or conducting body searches are of utmost concern. The proposed requirement is supported in case law which has held that the BFOQ exception can be utilized to designate or restrict the direct contact of correctional officers on the basis of gender in order to ensure the safety, rehabilitation, privacy, and integrity of the detainees. Most importantly, there is a compelling interest to specify the hiring of female officers in order to carry out duties that entail the direct contact, surveillance or supervision of female detainees. We contend that gender-based staff hiring should be reasonably based upon staff ratios and detainee population. In addition, the BFOQ exception is a reasonable and necessary solution to this problem and to the fulfillment of the rehabilitative mission of the juvenile correctional facility. However, because the field has expressed concern with the language of this standard, TJPC has requested technical assistance from the Department of Justice (Labor Division) and Equal Employment Opportunity Commission. The agency recommends taking no action on this public comment until it receives its response.

Public Comment. Public comment was received by Smith County regarding Section 343.3(b)(2). The standards allow for non-certified officers with proper training to count toward the facility-wide ratio under 343.3(c)(2), but not to perform any duties of a certified juvenile detention officer. The standards should allow a non-certified juvenile probation officer to count toward the supervision ratio and to perform any duty that a certified juvenile probation officer may perform.

Agency Response. TJPC does not recommend adopting this change. The intent behind Chapter 343 is to expedite the training and certification of juvenile detention officers. Allowing an uncertified officer to perform the same duties as a certified juvenile detention officer, poses a liability risk to the counties, and undermines the professionalism of the certified officers.

Public Comment. Public comment was received by Randall County regarding Section 343.3(c)(2)(C). The Tom Green County Juvenile Probation Department representing the 51st, 119th, 340th, and 391st Judicial Districts also submitted public comment on this issue. Officers who have received 40 hours of pertinent orientation training including restraint training, CPR/First Aid, abuse and neglect suicide precautions, facility procedures, etc. should be authorized to supervise residents. It is highly likely that departments will be forced into non-compliance while attempting to compensate for staff turnover. Placing uncertified officers in a position of supervision is better than the unsafe practice of working with a staff shortage.

Agency Response. TJPC does not recommend adopting this change. The intent behind Chapter 343 is to expedite the training and certification of juvenile detention officers. Allowing an uncertified officer to perform the same duties as a certified juvenile detention officer, poses a liability risk to the counties, and undermines the professionalism of the certified officers. TJPC recognized the challenge in maintaining the supervision ratio by increasing the ratio.

Public Comment. Public comment was received by Smith County regarding Section 343.3(d)(1)(C)(i). The standards allow for non-certified officers with proper training to count toward the facility-wide ratio under 343.3(c)(2), but not to perform any duties of a certified juvenile detention officer. The standards should allow a non-certified juvenile probation officer to count toward the supervision ratio and to perform any duty that a certified juvenile probation officer may perform. If a detention officer has received training relating to the required job duties, the officer can perform checks without jeopardizing the safety of the residents.

Agency Response. TJPC does not recommend adopting this change. The intent behind Chapter 343 is to expedite the training and certification of juvenile detention officers. Allowing an uncertified officer to perform the same duties as a certified juvenile detention officer, poses a liability risk to the counties, and undermines the professionalism of the certified officers.

Public Comment. Public comment was received by Smith County regarding Section 343.8(d). The standards allow for non-certified officers with proper training to count toward the facility-wide ratio under 343.3(c)(2), but not to perform any duties of a certified juvenile detention officer. The standards should allow a non-certified juvenile probation officer to count toward the supervision ratio and to perform any duty that a certified juvenile probation officer may perform. If a detention officer has received training relating to the use of mechanical restraints, an uncertified detention officer can restrain youth without jeopardizing the safety of the residents.

Agency Response. TJPC does not recommend adopting this change. The intent behind Chapter 343 is to expedite the training and certification of juvenile detention officers. Allowing an uncertified officer to perform the same duties as a certified juvenile detention officer, poses a liability risk to the counties, and undermines the professionalism of the certified officers.

Public Comment. Public comment was received from the 63rd/83rd Judicial Districts' Regional Juvenile Probation Department regarding Section 343.8(d)(7). The approved mechanical restraint devices do not keep juveniles from trying to hurt themselves because they are still able to move their heads freely. As a result, detention officers must physically hold the juveniles in place for hours at a time. When properly used the restraint chair is safe and extremely effective in keeping youth from harming themselves or those around them.

Agency Response. TJPC does not recommend adopting this change. Neither the Texas Youth Commission, nor the Texas Department of Criminal Justice utilizes restraint chairs. Deaths due to positional asphyxiation have been attributed both to the use of four point restraints and the use of the restraint chair. Deaths due to blood clots have also been attributed to the restraint chair. Additionally, the agency has concerns injuries due to restraints will increase with the use of the restraint chairs.

Public Comment. Public comment was received by Nueces County regarding Section 343.8(d)(7). It is inconceivable that the Commission would approve a standard authorizing the use of chemical agents under procedures directed by the Juvenile Board an not allow the use of the restraint chair as an approved restraint device with the same juvenile board approval requirements. The standards as published allow for a four-point restraint leaving the door open to use approved restraint devices to either "hogtie" or restrain a child laying down on stomach or back by hands and feet. All of these techniques pose a serious risk to the child by either aspiration of vomit or positional asphyxia.

Agency Response. TJPC does not recommend adopting this change. Neither the Texas Youth Commission, nor the Texas Department of Criminal Justice utilizes restraint chairs. Deaths due to positional asphyxiation have been attributed both to the use of four point restraints and the use of the restraint chair. Deaths due to blood clots have also been attributed to the restraint chair. Additionally, the agency has concerns injuries due to restraints will increase with the use of the restraint chairs.

Public Comment. Public comment was received from the Nueces County Juvenile Board and County Commissioners Court regarding Section 343.12(h) requesting additional consideration and study before passing a standard governing the supervision of suicidal youth.

Agency Response. TJPC recommends taking no action on this public comment. In addition to hosting a field workgroup on March 21st, the agency has devoted a significant number of hours and staff to study the standard of care for supervision of suicidal youth in juvenile facilities. In addition to the Texas Youth Commission and the Texas Department of Mental Health and Mental Retardation, the agency reviewed the recommendations of the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care. With the exception of the American Corrections Association, the agency's current standard falls below the standard of care established by these authorities. The proposed draft already represents a compromise between the budgetary constraints of the local facilities and the widely accepted standard of care.

Public Comment. Public comment was received from the Nueces County Juvenile Probation Department regarding Section 343.12(h). TJPC derives its standard from the Texas Youth Commission's. TYC is a state agency and is state funded. The application of their administrative policies to juvenile detention facilities is an unfounded mandate. Many detention facilities are funded completely with County tax dollars. The Standard will impose a significant cost to the counties (estimated at $150-250,000) in Nueces. TJPC should require compliance with the ACA Standard for Juvenile Detention Facilities 3-JDF4C-35 Revised 1994 (Mandatory). Please consider additional study and recommendations from the field.

Agency Response. TJPC does not recommend adopting this change. In addition to hosting a field workgroup on March 21st, the agency has devoted a significant number of hours and staff to study the standard of care for supervision of suicidal youth in juvenile facilities. In addition to the Texas Youth Commission and the Texas Department of Mental Health and Mental Retardation, the agency reviewed the recommendations of the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care. With the exception of the American Corrections Association, the agency's current standard falls below the standard of care established by these authorities. The proposed draft already represents a compromise between the budgetary constraints of the local facilities and the generally accepted standard of care.

Public Comment. Public comment was received from the 63rd/83rd Judicial Districts' Regional Juvenile Probation Department regarding Section 343.12(h)(1)(C). The Department has very limited access to a certified psychologist or psychiatrist who specializes in suicidal behaviors. The Department would have to contract with a professional outside of their counties. This places additional financial and time consuming burdens on the facility, which already has to supplement its existence through other programs and contracts just to remain in operation.

Agency Response. TJPC does not recommend adopting this change. Since suicide is a mental health issue, a mental health professional should assist in the development of a facility's suicide prevention plan. The annual review of the plan ensures the supervision plans complies with any changes or developments in the arena of mental health.

Public Comment. Public comment was received by Randall County regarding Section 343.12(h)(2)(A). Title 25 Texas Administrative Code Rule 405.127, which addresses the use of restraints and seclusion states that residents placed on a moderate risk level of supervision should be monitored every 15 minutes at staggered intervals unless otherwise directed by a mental health professional. Mental health professionals put greater emphasis on the staggering of checks as opposed to the time frame as it does not allow for potentially suicidal youth to pattern the framed checks place a high risk of "negligence per se" on institutions , thus exposing the agency to a high degree of liability.

Agency Response. TJPC does not recommend adopting this change. The proposed standard already requires staggered checks to prevent a suicidal youth from being able to time a room check. The 10-minute room checks are consistent with TYC's policy and procedure for supervising moderate risk residents. The level of mental health training and supervision experience, and the number of or access to mental health professionals is greater in TDMHMR's facilities than in juvenile justice facilities.

Public Comment. Public comment was received from Smith County regarding Section 343.3(h)(2)(A). The documentation of the 10 minute room checks is too manpower intensive. The standard would require staff to document at least six times an hour the behavior of these youth even when they are out of their rooms. This would require at least two staff per shift during program hours just for documentation purposes when the staff are need to meet the supervision ratio for the rest of the residents.

Agency Response. TJPC does not recommend adopting this change. The requirement for the room checks only applies during non-program hours or when a moderate risk resident is isolated from the general population. Depending upon the facility's classification plan, a moderate risk resident may not need isolation from the general population. Additionally, documentation of the checks protects the county from liability because it not only helps ensure staff actually conduct the check, but written documentation serves as "proof" the checks were conducted. Without documentation, neither the counties nor the Commission have the ability to verify compliance.

Public Comment. Public comment was received by Smith County regarding Section 343.12(h)(2)(B). The proposed standard is too strict, manpower intensive and could effectively shut down a detention center. It presents both a safety issue for staff and the residents. The standard could increase allegations of abuse or neglect. It could escalate anxiety of both the residents and staff. High risk residents can be handled by taking the residents, clothing, bedding, and means of injuring himself. This would allow the 5 minute checks to continue. The ACA standards do not have such a restrictive policy. TJPC is stepping beyond its boundary by imposing such stringent measures without considering local options and resources.

The draft does not track mental health practices and takes all discretion away from the local departments.

Agency Response. TJPC does not recommend adopting this change. The proposed language comports with the standards of care used or recommended by the Texas Youth Commission, the Texas Department of Mental Health and Mental Retardation, the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care.

Public Comment. Public comment was received from the 63rd/83rd Judicial Districts' Juvenile Probation Department regarding Section 343.12(h)(2)(B). The standard requiring one to one supervision places a financial burden on the departments. The probation department would have to pay overtime to have an officer continuously monitor a high risk juvenile without having any other duties. Isolating the juvenile, removing every possible item the child may use to commit suicide with continuous five minute visual checks until the resident is evaluated by a mental health professional is sufficient.

Agency Response. TJPC does not recommend adopting this change. The proposed language comports with the standards of care used or recommended by the Texas Youth Commission, the Texas Department of Mental Health and Mental Retardation, the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care.

Public Comment. Public comment was received from Randall County regarding Section 343.12(h). TJPC has relied on the Texas Youth Commission's policy, which requires residents placed on their highest level of supervision be assigned to a staff member for their sole supervision. It was reported to the work group that for larger facilities this would involve only 3 or 4 residents per year. It is not uncommon for our facility to have 3 or 4 residents on our highest level of supervision on any given day. It is not feasible for our department to employ three or four additional staff. Our agency has great concern with regard to watering down our practices to fit this proposed standard. The real emphasis should be on assessment and training of staff to recognize the warning signs of suicidal behavior. Unfortunately, the common denominator among the majority of youth detention suicides is they involve young people who have not been identified as a suicide risk.

Agency Response. TJPC does not recommend adopting this change. The proposed language comports with the standards of care used or recommended by the Texas Youth Commission, the Texas Department of Mental Health and Mental Retardation, the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care.

Public Comment. Public comment was received from Tarrant County regarding Section 343.12(h)(2)(B). There is a two-fold availability issue with regard to this standard. One is the availability of certified staff to supervise high risk residents under the one-to one ratio. The second is the availability of mental health professionals to assess suicide risk. The one-to-one supervision will be cost prohibitive in situations when more than one youth is classified as high risk. It will cost the county $756.00 per high risk resident for one weekend. With the MAYSI-2 to help identify suicidal youth at the time of admission, the number of youth potentially classified as high risk is escalated. Thirty-eight juveniles entered detention scoring with "warnings" on the MAYSI-2 suicide indicator. Local detention budgets cannot be ignored. It is of concern that facility definitions of high suicidal risk may be so restrictive that they exclude many youth who could benefit from a level of in-room supervision greater than every ten minutes. Tarrant County recommends state funding and collaboration between TJPC and MHMR to establish MHMR services in juvenile detention centers prior to inclusion in 343 and 344.

Agency Response. TJPC does not recommend adopting this change. The proposed language comports with the standards of care used or recommended by the Texas Youth Commission, the Texas Department of Mental Health and Mental Retardation, the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care.

Public Comment. Public comment was received from Tarrant County regarding Section 343.12(h)(3)(A). Calls to a 24 hour MHMR crisis line will satisfy this requirement. This appears to be a reporting standard only that may not result in providing the specific care needed for a detained youth. The credentials of the person staffing the local MHMR crisis line at any given time will be unknown, but will be covered by the umbrella definition of mental health professional as one who works for MHMR, or an agency that contracts with MHMR. It will be very unlikely that the person staffing the local MHMR crisis line will have any knowledge of a juvenile detention setting.

Agency Response. TJPC recommends taking no action on this public comment.

Public Comment. Public comment was received from Tarrant County regarding Section 343.12(h)(3)(C). The Department is recommending that facility administrators determine the risk level for suicide of detained youth and determine when it is appropriate to lower the risk level from high risk. In the absence of the facility administrator, a mental health professional would determine when it is appropriate to lower a suicide risk level. The department also recommends that training be provided to facility administrators to learn haw to evaluate and change the risk classification from high to low risk. This would allow the flexibility needed to implement the 1:1 supervision.

Agency Response. TJPC does not recommend adopting this change. The proposed language comports with the standards of care used or recommended by the Texas Youth Commission, the Texas Department of Mental Health and Mental Retardation, the American Corrections Association, the National Institute of Corrections, and the National Commission on Correctional Health Care.

Public Comment. Public comment was received by Smith County regarding Section 343.17. The standard relating to volunteers and interns creates an adverse impact on youth because the screening requirements are too strict and could eliminate some volunteer programs, or discourage individuals (especially those with criminal history) from participating in the volunteer programs. Additionally the standard does not provide definitions of who are considered volunteers and interns. The standard could be modified to allow children to be supervised while in the presence of a volunteer, or to allow each department to enact its own safeguards using existing resources. The standard takes away local control and operates to the detriment of children. Each department should set up its own standards for volunteers.

Agency Response. TJPC does not recommend adopting this change. With the exception of the required criminal history checks, the standard gives local discretion to define and to adopt a screening process that would meet the needs of the facility and volunteer program. The criminal history checks are required to protect the safety of the juveniles residing in the facility. Measures to protect resident safety in turn decrease a county's exposure to liability. This standard is identical to the volunteers and interns standard found in Chapter 341. TJPC does not recommend incorporating a definition into the standard, as the common usage of these two terms is sufficient.

Public Comment. Public comment was received from Wichita County regarding Section 343.31(b)(1). Wichita County is very concerned that the proposed standard requires the completion and return of the FBI fingerprint check before certification can be granted. The requirement is impractical because of the lengthy amount of time (four to six weeks) it takes for the FBI fingerprint check to be returned. Because the officer is not yet certified, his or her duties are limited. This creates a hardship, especially since TJPC is proposing that detention officers perform new duties such as one-on-one observation of suicidal juveniles. Unless TJPC can expedite the return of FBI fingerprint checks, this requirement should be reconsidered and amended.

Agency Response. TJPC does not recommend adopting this change. For the majority of certifications, TJPC does not anticipate that the FBI check will hinder the certification process. Proposed standard 343.25(c)(1)(C) requires the successful completion of a FBI fingerprint based criminal history check when an individual is hired. The proposed standard allows a candidate to be hired contingent upon a successful criminal history screening. This "hiring" criminal history check may also be used as the "certification" criminal history check under 343.31(b)(2) so long as the certification application is sent before the FBI criminal history check is 60 days old. Since most departments will use the initial weeks of an officer's employment to provide the officer with certification training, TJPC anticipates the "hiring" criminal history check will also be viable as the "certification" criminal history check.

Public Comment. Public comment was received from Tarrant County regarding Section 343.42. The Department suggested adding Chapter 343 standard-based training for the curriculum.

Agency Response. TJPC does not recommend adopting this change.

SUBCHAPTER A. DEFINITIONS

37 TAC §343.1

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§343.1. Definitions.

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

(1) Attempted Suicide-Any action a resident takes that could result in taking his or her own life voluntarily and intentionally while detained or placed in a secure detention facility.

(2) Chief Administrative Officer-regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department or a multi-county juvenile judicial district.

(3) Commission-the Texas Juvenile Probation Commission.

(4) Contraband-any item not issued to employees for the performance of their duties and which employees have not obtained supervisory approval to possess. Contraband also includes any item given to a resident by an employee as an item, which a resident is not authorized to possess or use. Specific items of contraband include, but are not limited to:

(A) firearms;

(B) knives;

(C) ammunition;

(D) drugs;

(E) intoxicants;

(F) pornography; or

(G) any unauthorized written or verbal communication brought into or taken from an institution for a resident, former resident, associate of or family members of a resident.

(5) Control Room-A secure area which contains the emergency, monitoring, and communications systems and is staffed 24 hours each day that residents are in the facility.

(6) Detention-The temporary secure custody of a juvenile, or other individual pending juvenile court disposition or transfer to another jurisdiction or agency.

(7) Detention Officer-A person whose primary responsibility is the supervision of the daily activities of residents in a secure detention facility and who is certified with the Texas Juvenile Probation Commission as a certified juvenile detention officer. With the exception of the facility administrator, assistant facility administrator or supervisor of juvenile detention officers administrative, food services, janitorial, and other auxiliary staff are not considered to be detention officers.

(8) Facility Administrator-individual designated by the policy board of a private secure detention facility, or by the Chief Administrative Officer or juvenile board, as the program director or superintendent of a secure detention facility.

(9) Multiple Occupancy Housing Unit-a unit designed and constructed for multiple occupancy sleeping which is self-contained and includes appropriate sleeping, sanitation and hygiene equipment or fixtures within the unit.

(10) Non-Program Hours-time period when all scheduled resident activity for the entire resident population has ceased for the day

(11) Professionals-

(A) Teachers certified as educators by the State Board for Education Certification including teachers certified by the State Board for Education Certification with provisional or emergency certifications;

(B) educational aides or paraprofessionals certified by the State Board for Education Certification;

(C) medical practitioners licensed or certified by:

(i) the Texas Board of Nurse Examiners;

(ii) The Texas Board of Medical Examiners;

(iii) the State Board of Physician Assistants; or

(iv) The Texas Department of Health;

(D) mental health professionals licensed or certified by:

(i) the Texas State Board of Examiners of Psychologists;

(ii) the Texas State Board of Examiners of Professional Counselors;

(iii) the Texas State Board of Examiners of Marriage and Family Therapists;

(iv) the Texas Department of Health;

(v) the Texas Commission on Alcohol and Drug Abuse;

(vi) the Texas State Board of Medical Examiners; or

(vii) the Texas Board of Social Worker Examiners provided the licensure is either as an advanced practitioner or advanced clinical practitioner.

(E) mental health professionals employed by the Texas Department of Mental Health and Mental Retardation or an entity that contracts as a service provider with the Texas Department of Mental Health and Mental Retardation.

(F) social workers licensed by the Texas Board of Social Worker Examiners;

(G) juvenile probation officers certified by the Texas Juvenile Probation Commission; and

(H) commissioned law enforcement personnel.

(12) Program Hours-time period of no less than 10 hours when the resident population has scheduled activities and any shift changes that occur during the time period when the resident population has scheduled activities.

(13) Rated Capacity-maximum number of residents who may be housed within a secure detention facility in accordance with TJPC Standards.

(14) Resident-a juvenile or other individual that has been admitted into or court-ordered to reside at a secure detention facility.

(15) Secure Detention Facility ("Detention Facility")-Any public or private residential facility that includes construction and fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility and is used for the temporary placement of any juvenile or other individual who is accused of having committed an offense and is awaiting court action, an administrative hearing, or other transfer action. A secure detention facility does not include a short-term detention facility as defined by Texas Family Code Section 51.12(j).

(16) Single Occupancy Housing Units-units designed and constructed with separate secure, individual resident sleeping quarters.

(17) Video Training-pre-recorded training materials or conferences. Video training does not include video teleconferences.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205072

Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER B. FACILITY STANDARDS

37 TAC §§343.2 - 343.18

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§343.12. Medical and Mental Health Services.

(a) Anyone presented for admission to detention and in need of emergency medical care due to injury, illness or intoxication or in need of mental health intervention shall not be admitted into detention. The referring person shall be directed to a health care facility to have the individual evaluated and treated. Subsequent admission to detention is contingent upon written medical clearance provided by a medical or mental health professional.

(b) Anyone admitted to detention shall be assessed to determine need for detoxification from alcohol or other substances. Intoxicated individuals who have been medically cleared for admission should be segregated from other detainees and closely monitored by staff.

(c) Written policies shall describe the manner in which health care services shall be provided. Each resident shall be informed of the procedures. Policies shall include the following.

(1) Health Service Authority. The facility administrator shall designate a health authority with responsibility for health care decisions within the facility. The health service authority may be a physician, licensed nurse, paramedic, or emergency medical technician. Final medical judgment shall rest with a physician if the health service authority is not a physician.

(2) Health Service Coordinator. The facility administrator shall designate a staff member to coordinate health care delivery in the facility. The health service coordinator shall receive special training in health care and be familiar with local health care providers and facilities. The facility administrator should meet regularly with the health service authority and health service coordinator to review and assess the quality of health care delivery.

(3) Referral. If a staff member believes that a resident or staff member to be in need of immediate medical attention or if a resident or staff member requests treatment, that person shall be referred to the health service authority or health service coordinator.

(4) Medical Release. Facility staff shall obtain a signed consent to treatment from each unemanicpated minor resident's parents or guardian, or if they are not available, from a grandparent or other adult relative. If no relatives are available to give consent, and there are reasonable grounds to believe the resident is in need of immediate medical care, the health service authority or health service coordinator may authorize the treatment.

(d) Medical Room. If medical services are delivered in the facility, adequate space, equipment, secure storage, and supplies shall be provided.

(e) Emergency Procedures. Written policies shall provide:

(1) a plan for the emergency evacuation of residents from the facility; and

(2) arrangements for the use of one or more hospitals, emergency clinics, or other appropriate medical facilities, or on-call services when no emergency room is nearby.

(f) Health Screening. Within one hour of admission, a health screening shall be conducted on each resident. Information obtained shall include, but is not limited to:

(1) mental health problems;

(2) suicide risk;

(3) current state of health including allergies or other chronic conditions, and any illnesses such as tuberculosis, sexually transmitted and other infectious diseases. Questions should be structured to identify behaviors that indicate a high risk of contracting the AIDS virus, and informed consent requested to test such juveniles for HIV;

(4) current use of medication including type, dosage and prescribing physician;

(5) dental problems;

(6) vision problems;

(7) drug and alcohol use;

(8) physical disabilities; and

(9) evidence of physical trauma.

(g) Any finding of the health screening that indicates a significant potential health risk to the staff and residents shall be immediately reported to the facility administrator and medical staff. The affected resident shall be segregated from the general population until proper medical clearance is obtained.

(h) Suicidal Youth.

(1) Prevention Plan.

(A) Each facility shall have a written suicide prevention plan that addresses the following components:

(i) definitions of high risk and moderate risk for suicidal behavior;

(ii) screening methodology to assess and assign a resident's risk of suicide upon admission or upon any indication a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iii) communication among facility staff, mental health professionals, the resident's juvenile probation officer, the resident and the resident's parent or guardian including communication regarding observations or indications a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iv) level of supervision for residents assigned to moderate or high risk for suicidal behavior;

(v) policy and procedure for intervening in suicide attempts;

(vi) reporting of resident suicides and attempted suicides in accordance with any applicable state law, administrative standard, or local policy or ordinance;

(vii) training on the contents and implementation of the suicide prevention plan;

(viii) housing of residents assigned to moderate or high risk of suicidal behavior including the removal from the resident's presence of any dangerous objects; and

(ix) mortality reviews designed to review the facility's compliance and possible needed revisions to the suicide prevention plan following a resident's suicide.

(B) All certified juvenile detention officers shall be trained in the implementation of the suicide prevention plan.

(C) Review.

(i) The suicide prevention plan shall be reviewed on an annual basis in consultation with a mental health professional.

(ii) The suicide prevention plan shall be included in the juvenile board's review of the facility's policies and procedures in accordance with §343.2(a)(1) of this title.

(2) Level of Supervision.

(A) Moderate Risk for Suicidal Behavior. During non-program hours, or any time a resident classified as a moderate risk for suicidal behavior is isolated from the general population under §343.7(k), §343.9(c)(2)(A) or (B), §343.12(b), or §343.13(c) of this title:

(i) The resident shall be visually checked by a certified juvenile detention officer at staggered intervals not to exceed every 10 minutes.

(ii) The certified juvenile detention officer shall document each visual observation made with the time of the observation and a general description of the resident's behavior.

(B) High-Risk for Suicidal Behavior.

(i) Supervision. During non-program hours, or any time a resident classified as high risk for suicidal behavior is isolated from the general population under §343,7(k), §343.9(c)(2)(A) or (B), §343.12(b), or §343.13(c) of this title:

(I) The resident shall be under the continuous, uninterrupted visual supervision of a certified juvenile detention officer.

(II) The certified juvenile detention officer shall have no other duties including the supervision of another resident or residents classified as high risk for suicidal behavior.

(III) The certified juvenile detention officer shall document physical observations of a high risk resident at staggered intervals no less than every 30 minutes.

(ii) Required Documentation. The following documentation shall be maintained for high-risk residents and shall be posted where it is immediately accessible to the certified juvenile detention officer providing supervision to the high-risk resident:

(I) the date and time the resident was classified as high risk;

(II) who classified the resident as high risk;

(III) a description of the resident's behavior that caused the resident's classification as high risk;

(IV) who has been assigned to supervise the resident;

(V) the location for the resident's supervision;

(VI) the date and time the resident was reclassified as no longer being high risk; and

(VII) the name of the mental health professional who reclassified the resident as no longer being high risk.

(C) A certified juvenile detention officer assigned to work in a facility's control room may not provide supervision under paragraph (2)(A) or (2)(B) of this subsection.

(D) Video and audio monitoring devices shall not substitute for supervision by a certified juvenile detention officer under paragraph 2(A) or 2(B) of this subsection.

(3) Mental Health Referral.

(A) the facility shall refer a resident classified as exhibiting a high-risk for suicidal behavior to a mental health professional as defined by §343.1(11)(D) or(E) of this title or mental health agency within 24 hours from the time the juvenile is classified as a high risk for suicidal behavior.

(B) The facility shall maintain written documentation that the referral under (A) was made. The documentation shall include:

(i) who notified the mental health professional or mental health agency;

(ii) the date and time of the notification;

(iii) the method of notification; and

(iv) a brief description of the response provided by the mental health professional or mental health agency.

(C) Only a certified or licensed mental health professional as defined by §343.1(11)(D), or (E) of this title may remove a resident from being classified as a high-risk for suicidal behavior under subsection (2)(B) of this section.

(i) Applicability. Section 343.12(h) does not become effective until September 1, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205073
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER C. HIRING JUVENILE DETENTION OFFICERS

37 TAC §343.25

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§343.25. Hiring Juvenile Detention Officers.

(a) Qualifications for Employment.

(1) Juvenile Detention Officers and Supervisors of Juvenile Detention Officers. An applicant for the position of a juvenile detention officer, or supervisor of juvenile detention officers shall be at least 21 years of age.

(2) Administrative Officer. An applicant for the position of facility administrative officer shall:

(A) meet the qualifications for employment under the Texas Human Resources Code §141.061(a) and 37 Texas Administrative Code §341.38 .

(B) In accordance with 37 Texas Administrative Code §341.39, the juvenile board, or chief administrative officer shall apply to the Commission for an exemption of the one year of experience or graduate study prior to the employment of an individual as the administrative officer.

(b) Disqualification from Employment.

(1) A person who within the last ten years has been convicted of or placed on deferred adjudication for a felony offense under the laws of this State, another State, or the United States, is currently on either felony probation or parole, or who is registered as a sex offender under Chapter 62, Texas Code of Criminal Procedure is not eligible for employment as a juvenile detention officer, supervisor of juvenile detention officers, or administrative officer. A request for waiver under §343.19 of this title may not be requested for this section unless the person received a pardon based upon proof of innocence.

(2) An individual whose certification has been revoked by the Commission shall never qualify for employment as a juvenile detention officer, supervisor of detention officers or administrative officer. An individual whose certification is currently under a suspension order issued under §343.51(g)(4)(B) of this title shall not qualify for employment as a juvenile detention officer, supervisor of juvenile detention officers, or administrative officer so long as the suspension order remains in effect. An individual whose certification is currently under a suspension order issued under §343.53(a) of this title shall not qualify for employment as a juvenile detention officer, supervisor of juvenile detention officers, or administrative officer until the Commission receives an order issued under Texas Family Code Section 232.013 staying or vacating the license suspension.

(c) Criminal Records Check. Prior to employing a person as a juvenile detention officer, supervisor of juvenile detention officers, or facility administrator, the facility administrator, chief administrative officer or juvenile board or their designee shall initiate a criminal history check in accordance with the following guidelines. Continued employment shall be contingent upon the completion and return of acceptable results for criminal history checks in accordance with §343.25(b)(1) of this title.

(1) The following criminal history checks shall be conducted:

(A) a Texas criminal history background search (TCIC);

(B) a local law enforcement sex offender registration records check in the city or county where the application was made; and

(C) a Federal Bureau of Investigation fingerprint based criminal history background search (NCIC).

(2) In addition to the requirements of (1), if the applicant currently resides in one of the following states, or resided in one of the following states within the 10 years prior to the date the employment application was made, a state criminal history background search and state sex offender registration check shall also be conducted where available:

(A) Hawaii;

(B) Kansas;

(C) Kentucky;

(D) Louisiana;

(E) Maine;

(F) Massachusetts;

(G) New Hampshire;

(H) Rhode Island;

(I) Tennessee;

(J) Vermont; and

(K) the District of Columbia.

(3) An Internet based criminal background search shall not be used to conduct the background searches required under subsection (c)(1)(A) or subsection (c)(1)(C) of this section.

(4) A copy of the returned criminal history checks shall be retained in the facility's records.

(d) Applicability. This subchapter applies to all individuals hired on or after the effective date of this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205074
Lisa Capers
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Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER D. JUVENILE DETENTION OFFICER CERTIFICATION

37 TAC §§343.30 - 343.35

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§343.35. Applicability.

Except for §343.32(a)(4) of this title this subchapter applies to all certification and re-certifications received on or after the effective date of this subchapter. Any felony conviction or deferred prosecution occurring before the effective date of this subchapter will not disqualify a juvenile detention officer who held an active certification on the subchapter's effective date from receiving a recertification under this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205075
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER E. TRAINING

37 TAC §§343.40 - 343.44

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205076
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER F. CODE OF ETHICS AND ENFORCEMENT PROCEEDINGS

37 TAC §§343.50 - 343.53

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205077
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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CHAPTER 344. STANDARDS FOR JUVENILE POST-ADJUDICATION SECURE CORRECTIONAL FACILITIES

37 TAC §§344.1 - 344.18

The Texas Juvenile Probation Commission adopts the repeal of Chapter 344, §§344.1 - 344.18, relating to standards for juvenile post-adjudication secure correctional facilities without changes to the proposal as published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2757) and will not be republished.

TJPC repeals this chapter in an effort not to overlap with adopted new standards which provide structural and substantive changes from the current standards that will be effective September 30, 2002.

No public comment was received regarding the repeal.

The repeal is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to modify or delete obsolete rules which provide minimum standards for the juvenile probation commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205085
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: April 5, 2002
For further information, please call: (512) 424-6710

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CHAPTER 344. STANDARDS FOR JUVENILE POST-ADJUDICATION SECURE CORRECTIONAL FACILITIES

The Texas Juvenile Probation Commission adopts new Chapter 344, §§344.1 - 344.17, 344.25, 344.30 - 344.35, 344.40 - 344.44, and 344.50 - 344.53 relating to standards for juvenile post-adjudication secure correctional facilities. Sections 344.1, 344.11, 344.25, and 344.35 are adopted with changes to the proposed text as published in the June 14, 2002, issue of the *Texas Register* (27 TexReg 5097). Sections 344.2 - 344.10, 344.12 - 344.17, 344.30 - 344.34, 344.40 - 344.44, and 344.50 - 344.53 are adopted without changes and will not be republished. Nonsubstantive changes were made in §§344.1(9)(D)(vi), 344.11(d), 344.25(d), and 344.35.

TJPC adopts this chapter in an effort to provide structural and substantive changes from the current standards.

No public comment was received regarding the proposal.

SUBCHAPTER A. DEFINITIONS

37 TAC §344.1

The new section is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

§344.1. Definitions.

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

(1) Attempted Suicide--Any action a juvenile takes that could result in taking his or her own life voluntarily and intentionally while detained or placed in a secure juvenile facility.

(2) Boot Camp--A post-adjudication secure correctional facility meeting the above definition that features military-style discipline and structure as an integral part of its treatment and rehabilitation program.

(3) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department or a multi-county juvenile judicial district.

(4) Commission--The Texas Juvenile Probation Commission.

(5) Contraband--Any item not issued to employees for the performance of their duties and which employees have not obtained supervisory approval to possess. Contraband also includes any item given to a resident by an employee as an item which a resident is not authorized to possess or use. Specific items of contraband include, but are not limited to:

(A) firearms;

(B) knives;

(C) ammunition;

(D) drugs;

(E) intoxicants;

(F) pornography; and

(G) any unauthorized written or verbal communication brought into or taken from an institution for a juvenile, former juvenile, associate or family member of a juvenile.

(6) Facility Administrator--Individual designated by the policy board of a private secure detention facility, or by the Chief Administrative Officer or juvenile board, as the program director or superintendent of a secure post-adjudication secure correctional facility.

(7) Juvenile Corrections Officer--A person whose primary responsibility is the supervision of the daily activities of juveniles in the facility and who is certified by the Commission as certified corrections officer. Clerical, food service, janitorial and other auxiliary staff are not considered to be Juvenile Corrections Officers.

(8) Non-Program Hours--Time period when all scheduled resident activity for the entire resident population has ceased for the day.

(9) Professionals--

(A) Teachers certified as educators by the State Board for Education Certification including teachers certified by the State Board for education Certification with provisional or emergency certifications;

(B) educational aides or paraprofessionals certified by the State Board for Education Certification;

(C) medical practitioners licensed or certified by:

(i) the Texas Board of Nurse Examiners;

(ii) The Texas Board of Medical Examiners;

(iii) the State Board of Physician Assistants; or

(iv) the Texas Department of Health;

(D) mental health professionals licensed or certified by:

(i) the Texas State Board of Medical Examiners;

(ii) the Texas State Board of Examiners of Psychologists;

(iii) the Texas State Board of Examiners of Marriage and Family Therapists;

(iv) the Texas Department of Health;

(v) the Texas Commission on Alcohol and Drug Abuse; or

(vi) the Texas State Board of Social Worker Examiners provided the licensure is either as an advanced practitioner or advanced clinical practitioner;

(E) mental health professionals employed by the Texas Department of Mental Health and Retardation, or an entity that contracts as a service provider with the Texas Department of Mental Health and Mental Retardation;

(F) social workers licensed by the Texas Board of Social Worker Examiners;

(G) juvenile probation officers certified by the Texas Juvenile Probation Commission and;

(H) commissioned law enforcement professional.

(10) Post-Adjudication Secure Correctional Facility--A public secure facility administered by a juvenile board or a privately operated facility certified by the juvenile board includes construction fixtures designed to physically restrict the movements and activities of the residents, and is intended for the treatment and rehabilitation of youth who have been adjudicated for a delinquent offense. Any non-secure residential program operating under the authority of a juvenile board shall not be subject to these standards.

(11) Program Hours--Time period of no less than 10 hours when the resident populations has scheduled activities and any shift changes that occur during the time period when the resident population has scheduled activities.

(12) Rated Capacity--Maximum number of juveniles who may be housed within a facility in accordance with TJPC Standards.

(13) Video Training--Pre-recorded training materials or conferences. Video training does not include video teleconferences.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205079

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Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER B. FACILITY STANDARDS

37 TAC §§344.2 - 344.17

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

§344.11. Medical and Health Care Services.

(a) Written policies shall describe the manner in which health care services shall be provided to residents. Each juvenile shall be informed orally and in writing of the procedures. The policies shall include the following.

(1) If the facility administrator of the correctional facility believes any resident or employee to be in need of immediate medical attention, he shall require that person to submit to a medical examination.

(2) The referring agency shall provide a complete medical and dental evaluation of each resident. The evaluation shall be kept in the resident's permanent file. The results of the evaluation shall be communicated to staff responsible for daily supervision of the residents. At admission, a staff member shall complete a Texas Juvenile Probation Commission approved medical checklist to determine whether the juvenile has prescribed medications and whether he or she appears to be ill, injured, or intoxicated. Policies shall ensure the information is conveyed to all appropriate staff.

(3) The referring agency shall provide a letter of consent to medical treatment from the juvenile's parent, guardian, or conservator. The consent form shall be kept in the resident's permanent file, and a copy shall be accessible to daily supervision staff.

(4) The facility administrator shall ensure that arrangements are made with local health care providers to treat the residents of the facility.

(5) If a resident requests medical treatment or if a staff member believes that he or she is in need of treatment, the staff member shall consult with an approved medical professional.

(b) If medical services are delivered in the facility, adequate space, equipment, supplies, and materials shall be provided.

(c) Suicidal Youth.

(1) Prevention Plan.

(A) Each facility shall have a written suicide prevention plan that addresses the following components:

(i) definitions of high risk and moderate risk suicidal behavior;

(ii) screening methodology to assess and assign a resident's risk of suicide upon admission or upon any indication a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iii) communication among facility staff, mental health professionals, the resident's juvenile probation officer, the resident and the resident's parent or guardian including communication regarding observations or indications a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iv) level of supervision for residents assigned to moderate or high risk for suicidal behavior;

(v) policy and procedure for intervening in suicide attempts;

(vi) reporting of resident suicides and attempted suicides in accordance with any applicable state law, administrative standard, or local policy or ordinance;

(vii) training on the contents and implementation of the suicide prevention plan;

(viii) housing of residents assigned to moderate or high risk of suicidal behavior including the removal from the resident's presence of any dangerous objects; and

(ix) mortality reviews designed to review the facility's compliance and possible needed revisions to the suicide prevention plan following a resident's suicide.

(B) All certified juvenile detention officers shall be trained in the implementation of the suicide prevention plan.

(C) Review.

(i) The suicide prevention plan shall be reviewed on an annual basis in consultation with a mental health professional.

(ii) The suicide prevention plan shall be included in the juvenile board's review of the facility's policies and procedures in accordance with §343.2(a)(1) of this title.

(2) Level of Supervision.

(A) Moderate Risk for Suicidal Behavior. During non-program hours, or any time a resident classified as a moderate risk for suicidal behavior is isolated from the general population under §§343.7(k), 343.9(c)(2)(A) or (B), 343.12(b), or 343.13(c) of this title:

(i) The resident shall be visually checked by a certified juvenile detention officer at staggered intervals not to exceed every 10 minutes.

(ii) The certified juvenile corrections officer shall document each visual observation made with the time of the observation and a general description of the resident's behavior.

(B) High-Risk for Suicidal Behavior.

(i) Supervision. During non-program hours, or any time a resident classified as high risk for suicidal behavior is isolated from the general population under §§343.7(k), 343.9(c)(2)(A) or (B), 343.12(b), or 343.13(c) of this title:

(I) The resident shall be under the continuous, uninterrupted visual supervision of a certified juvenile corrections officer.

(II) The certified juvenile corrections officer shall have no other duties including the supervision of another resident or residents classified as high risk for suicidal behavior.

(III) The certified juvenile corrections officer shall document physical observations of a high risk resident at staggered intervals no less than every 30 minutes.

(ii) Required Documentation. The following documentation shall be maintained for high-risk residents and shall be posted where it is immediately accessible to the certified juvenile corrections officer providing supervision to the high-risk resident:

(I) the date and time the resident was classified as high risk;

(II) who classified the resident as high risk;

(III) a description of the resident's behavior that caused the resident's classification as high risk;

(IV) who has been assigned to supervise the resident;

(V) the location for the resident's supervision;

(VI) the date and time the resident was reclassified as no longer being high risk; and

(VII) the name of the mental health professional who reclassified the resident as no longer being high risk.

(C) A certified juvenile corrections officer assigned to work in a facility's control room may not provide supervision under subparagraph (A) or (B) of this paragraph.

(D) Video and audio monitoring devices shall not substitute for supervision by a certified juvenile corrections officer under subparagraph (A) or (B) of this paragraph.

(3) Mental Health Referral.

(A) the facility shall refer a resident classified as exhibiting a high-risk for suicidal behavior to a mental health professional as defined by §344.1(9)(D) or (E) of this title or mental health agency within 24 hours from the time the juvenile is classified as a high risk for suicidal behavior.

(B) The facility shall maintain written documentation that the referral under subparagraph (A) of this paragraph was made. The documentation shall include:

(i) who notified the mental health professional or mental health agency;

(ii) the date and time of the notification;

(iii) the method of notification; and

(iv) a brief description of the response provided by the mental health professional or mental health agency.

(C) Only mental health professional as defined by §344.1(9)(D) or (E) of this title may remove a resident from being classified as high-risk for suicidal behavior under paragraph (2)(B) of this subsection.

(d) Applicability. Subsection (c) of this section does not become effective until September 1, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205080

Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER C. HIRING JUVENILE CORRECTIONS OFFICERS

37 TAC §344.25

The new section is adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new section.

§344.25. Hiring Juvenile Corrections Officers.

(a) Qualifications for Employment.

(1) Juvenile Corrections Officers. An applicant for the position of a juvenile corrections officer, or supervisor of juvenile corrections officers shall be at least 21 years of age.

(2) Facility Administrator. An applicant for the position of facility administrator shall:

(A) meet the qualifications for employment under the Texas Human Resources Code §141.061(a) and §341.38 of this title.

(B) In accordance with §341.39 of this title, the juvenile board shall apply to the Commission for an exemption of the one year of experience or graduate study prior to the employment of an individual as the administrative officer.

(b) Disqualification from Employment.

(1) A person who within the last ten years has been convicted of or placed on deferred adjudication for a felony offense under the laws of this State, another State, or the United States, is currently on either felony probation or parole, or who is registered as a sex offender under Chapter 62, Texas Code of Criminal Procedure is not eligible for employment as a juvenile corrections officer, supervisor of juvenile corrections officers, or facility administrator. A request for waiver under §344.20 of this title may not be requested for this section unless the person received a pardon based upon proof of innocence.

(2) An individual whose certification has been revoked by the Commission shall never qualify for employment as a juvenile corrections officer, supervisor of corrections officers or facility administrator. An individual whose certification is currently under a suspension order issued under §344.51(g)(4)(B) of this title shall not qualify for employment as a juvenile corrections officer, supervisor of juvenile corrections officers, or facility administrator so long as the suspension order remains in effect. An individual whose certification is currently under a suspension order issued under §344.53(a) of this title shall not qualify for employment as a juvenile corrections officer, supervisor of juvenile corrections officers, or facility administrator until the Commission receives an order issued under Texas Family Code §232.013 staying or vacating the license suspension.

(c) Criminal Records Check. Prior to employing a person as a juvenile corrections officer, supervisor of juvenile corrections officers, or facility administrator, the facility administrator, the chief administrative officer or juvenile board or their designee shall initiate a criminal history check in accordance with the following guidelines. Continued employment shall be contingent upon the completion and return of acceptable results for criminal history checks in accordance with §344.24(b)(1) of this title:

(1) The following criminal history checks shall be conducted:

(A) a Texas criminal history background search (TCIC);

(B) a local law enforcement sex offender registration records check in the city or county where the application was made; and

(C) a Federal Bureau of Investigation fingerprint based criminal history background search (NCIC).

(2) In addition to the requirements of paragraph (1) of this subsection, if the applicant currently resides in one of the following states, or resided in one of the following states within the 10 years prior to the date the employment application was made, a state criminal history background search and state sex offender registration check shall also be conducted where available:

(A) Hawaii;

(B) Kansas;

(C) Kentucky;

(D) Louisiana;

(E) Maine;

(F) Massachusetts;

(G) New Hampshire;

(H) Rhode Island;

(I) Tennessee;

(J) Vermont; and

(K) the District of Columbia.

(3) An Internet based criminal background search shall not be used to conduct the background searches required under paragraph (1)(A) or (C) of this subsection.

(4) A copy of the returned criminal history checks shall be retained in the facility's records.

(d) Applicability. This subchapter applies to all individuals hired on or after the effective date of this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205081
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER D. JUVENILE CORRECTIONS OFFICER CERTIFICATION

37 TAC §§344.30 - 344.35

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

§344.35. Applicability.

Except for §344.32(a)(4) of this title this subchapter applies to all certification and re-certifications received on or after the effective date of this subchapter. Any felony conviction or deferred prosecution occurring before the effective date of this subchapter will not disqualify a juvenile corrections officer who held an active certification on the subchapter's effective date from receiving a recertification under this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205082
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER E. TRAINING

37 TAC §§344.40 - 344.44

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205083
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER F. CODE OF ETHICS AND ENFORCEMENT PROCEEDINGS

37 TAC §§344.50 - 344.53

The new sections are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by the new sections.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205084
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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CHAPTER 351. STANDARDS FOR HOLD-OVER DETENTION FACILITIES

The Texas Juvenile Probation Commission adopts new Chapter 351, §§351.1-351.16, and 351.20-351.23, relating to hold-over facilities. Sections 351.1, 351.11, and 351.20 are adopted with changes to the text as published in the June 14, 2002, issue of the *Texas Register* (27 TexReg 5116). Non-substantive changes were made in §§351.1(6)(A); 351.11(d); and 351.20(d). Sections 351.2-351.10, 351.12-351.16, and 351.21-351.23 are being adopted without changes and will not be republished.

TJPC adopts this rule in an effort to provide structural and substantive changes from the current standards.

No public comment was received.

SUBCHAPTER A. DEFINITIONS

37 TAC §351.1

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§351.1. Definitions.

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

(1) Attempted Suicide--Any action a resident takes that could result in taking his or her own life voluntarily and intentionally while detained or placed in a short-term detention facility.

(2) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department or a multi-county juvenile judicial district.

(3) Commission--The Texas Juvenile Probation Commission.

(4) Facility Administrator--Individual designated by the Chief Administrative Officer or juvenile board, as the program director or superintendent of a short-term detention facility.

(5) Medical Professional--Practitioner licensed or certified by:

(A) the Texas Board of Nurse Examiners;

(B) the Texas Board of Medical Examiners;

(C) the State Board of Physician Assistants; or

(D) the Texas Department of Health.

(6) Mental Health Professional--

(A) practitioner licensed or certified by:

(i) the Texas State Board of Examiners of Professional Counselors;

(ii) the Texas State Board of Examines of Marriage and Family Therapists;

(iii) the Texas Department of Health;

(iv) the Texas Commission on Alcohol and Drug Abuse;

(v) the Texas State Board of Examiners of Psychologists; and

(vi) the Texas Board of Social Worker Examiners provided the licensure is either as an advanced practitioner or advanced clinical practitioner;

(vii) the Texas State Board of Medical Examiners; or

(B) mental health professionals employed by the Texas Department of Mental Health and Mental Retardation or an entity that contracts as a service provider with the Texas Department of Mental Health.

(7) Rated Capacity--Maximum number of juveniles who may be housed within a facility in accordance with the facility's design and any applicable codes.

(8) Resident--A juvenile or other individual that has been admitted into a short-term detention facility.

(9) Short-Term Detention--The temporary secure custody of a juvenile or other individual pending the first hearing to be conducted under Texas Family Code §54.01.

(10) Short Term Detention Facility ("Facility")--A facility used to provide temporary secure custody of a juvenile or other individual pending the first detention hearing to be conducted under Texas Family Code §54.01.

(11) Short-Term Detention Officer--A person whose primary responsibility is the supervision of the daily activities of the short-term detention facility's residents.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205086
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER B. HOLD-OVER DETENTION FACILITY STANDARDS

37 TAC §§351.2 - 351.16

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§351.11. Medical and Mental Health Services.

(a) Any individual presented for admission for detention in a short-term detention facility and in need of emergency medical care due to injury, illness or intoxication or in need of mental health intervention shall not be admitted into the short-term detention facility. The referring person shall be directed to a health care facility to have the individual evaluated and treated. Subsequent admission to the short-term detention facility is contingent upon written medical clearance provided by a medical or mental health professional.

(b) All individuals admitted into a short-term detention facility shall be assessed to determine need for detoxification from alcohol or other substances. Intoxicated individuals who have been medically cleared for admission should be segregated from other residents and closely monitored by staff.

(c) Suicidal Youth.

(1) Prevention Plan.

(A) Each facility shall have a written suicide prevention plan developed in consultation with a mental health professional that addresses the following components:

(i) definitions of high risk and moderate risk suicidal behavior;

(ii) screening methodology to assess a resident's risk of suicide upon admission or upon any indication a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iii) communication among facility staff, mental health professionals, the resident, and the resident's parent or guardian including communication regarding observations or indications a resident previously screened may now be at moderate or high risk for suicidal behavior;

(iv) level of supervision for residents assigned to moderate or high risk for suicidal behavior;

(v) policy and procedure for intervening in suicide attempts;

(vi) reporting of resident suicides and attempted suicides in accordance with any applicable state law, administrative standard, or local policy or ordinance;

(vii) training on the contents and implementation of the suicide prevention plan;

(viii) housing of residents assigned to moderate or high risk of suicidal behavior; and

(ix) mortality reviews designed to review the facility's compliance and possible needed revisions to the suicide prevention plan following a resident's suicide.

(B) All short-term juvenile detention officers shall be trained annually in the implementation of the suicide prevention plan.

(C) Review.

(i) The suicide prevention plan shall be reviewed on an annual basis in consultation with a mental health professional.

(ii) The suicide prevention plan shall be included in the juvenile board's review of the facility's policies and procedures in accordance with §351.2(a) of this title.

(2) Level of Supervision.

(A) Moderate Risk for Suicidal Behavior. During non-program hours, or any time a resident classified as a moderate risk for suicidal behavior is isolated from the general population:

(i) The resident shall be visually checked by a short-term juvenile detention officer at staggered intervals not to exceed every 10 minutes.

(ii) The short-term juvenile detention officer shall document each visual observation made with the time of the observation and a general description of the resident's behavior.

(B) High Risk for Suicidal Behavior.

(i) Supervision. During non-program hours, or any time a resident classified as high risk for suicidal behavior is isolated from the general population:

(I) The resident shall be under the continuous, uninterrupted visual supervision of a short-term juvenile detention officer.

(II) The short-term juvenile detention officer shall have no other duties including the supervision of another resident or residents classified as high risk for suicidal behavior.

(III) The short-term juvenile detention officer shall document physical observations of a high risk resident at staggered intervals no less than every 30 minutes.

(ii) Required Documentation. The following documentation shall be maintained for high-risk residents and shall be posted where it is immediately accessible to the short-term juvenile detention officer providing supervision to the high risk resident:

(I) the date and time the resident was classified as high risk;

(II) who classified the resident as high risk;

(III) a description of the resident's behavior that caused the resident's classification as high risk;

(IV) who has been assigned to supervise the resident;

(V) the location for the resident's supervision;

(VI) the date and time the resident was reclassified as no longer being high risk; and

(VII) the name of the mental health professional who reclassified the resident as no longer being high risk.

(C) A short-term juvenile detention officer assigned to work in a facility's control room may not provide supervision under subparagraphs (A) or (B) of this paragraph.

(D) Video and audio monitoring devices shall not substitute for supervision by a short-term juvenile detention officer under subparagraphs (A) or (B) of this paragraph.

(3) Mental Health Referral.

(A) the facility shall refer a resident classified as exhibiting a high risk for suicidal behavior to a or mental health professional mental health agency within 24 hours from the time the juvenile is classified as a high risk for suicidal behavior.

(B) The facility shall maintain written documentation that the referral under subparagraph (A) of this paragraph was made. The documentation shall include:

(i) who notified the mental health professional or mental health agency;

(ii) the date and time of the notification;

(iii) the method of notification; and

(iv) a brief description of the response provided by the mental health professional or mental health agency.

(C) Only a mental health professional may remove a resident from being classified as a high risk for suicidal behavior under paragraph (2)(B) of this subsection.

(d) Applicability. Section 341.11(c) does not become effective until September 1, 2003.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205087
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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SUBCHAPTER C. HIRING, CERTIFICATION AND RECERTIFICATION OF JUVENILE DETENTION OFFICERS

37 TAC §§351.20 - 351.23

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§351.20. Hiring Short-Term Juvenile Detention Officers.

(a) Qualifications for Employment.

(1) Short-Term Juvenile Detention Officers and Supervisors of Short-Term Juvenile Detention Officers.

(A) An applicant for the position of a short-term juvenile detention officer, or supervisor of short-term juvenile detention officers shall be at least 21 years of age; and

(B) have either a high school diploma or a general equivalency diploma from a high school or issuing authority within the United States of America. An applicant with a high school diploma issued in a foreign country or who completed high school under home schooling may be hired contingent upon a successful validation of

the applicant's high school diploma or high school education under subparagraph (C) of this paragraph.

(C) Validation of High School Diploma or High School Education:

(i) Method of Validation. An applicant with a foreign high school diploma, or who received a high school education through home schooling shall validate his/her high school diploma within 3 months from the applicant's date of hire using one of the following methods:

(I) obtaining unconditional acceptance into a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(II) receiving a general equivalency diploma;

(III) obtaining the unconditional acceptance of the high school diploma as the equivalent to a high school diploma received within the United States of America by an educational evaluation service approved by the Texas Juvenile Probation Commission.

(ii) A short-term detention officer subject to subparagraph (C) of this paragraph who fails to validate his/her high school education within the three month time frame shall not be the sole supervisor of residents under §351.3(a)(2) of this title, nor count toward meeting the supervision ratio under §351.3(b) of this title.

(2) Facility Administrator. An applicant for the position of facility administrator shall:

(A) have a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board; and

(B) have either:

(i) one year of graduate study in criminology, corrections, counseling, law, social work, psychology, sociology; or

(ii) have one year of experience in full-time case work, counseling, community group work in criminal justice or a related field.

(C) If necessary, and in accordance with Title 37 Texas Administrative Code §341.39, the juvenile board, or chief administrative officer shall apply to the Commission for an exemption of the one year of experience or graduate study prior to the employment of an individual as the facility administrator.

(b) Disqualification from Employment.

(1) A person who within the last ten years has been convicted of or placed on deferred adjudication for a felony offense under the laws of this State, another State, or the United States, is currently on either felony probation or parole, or who is registered as a sex offender under Chapter 62, Texas Code of Criminal Procedure is not eligible for employment as a short-term juvenile detention officer, supervisor of short-term juvenile detention officers, or facility administrator. A request for waiver under §351.16 of this title may not be requested for this section unless the person received a pardon based upon proof of innocence.

(2) An individual whose certification has been revoked by the Commission shall never qualify for employment as a short-term juvenile detention officer, supervisor of short-term detention officers or facility administrator. An individual whose certification is currently under a suspension order issued or enforced by the Commission shall not qualify for employment as a short-term juvenile detention officer, supervisor of short-term juvenile detention officers, or facility administrator so long as the suspension order remains in effect.

(c) Criminal Records Check. Prior to employing a person as a short-term juvenile detention officer, supervisor of short-term juvenile detention officers, or facility administrator, the chief administrative officer or juvenile board shall initiate a criminal history check in accordance with the following guidelines. Continued employment shall be contingent upon the completion and return of acceptable results for criminal history checks in accordance with subsection (b)(1) of this title.

(1) The following criminal history checks shall be conducted:

(A) a Texas criminal history background search (TCIC);

(B) a local law enforcement sex offender registration records check in the city or county where the application was made; and

(C) a Federal Bureau of Investigation fingerprint based criminal history background search (NCIC).

(2) In addition to the requirements of paragraph (1) of this subsection, if the applicant currently resides in one of the following states, or resided in one of the following states within the 10 years prior to the date the employment application was made, a state criminal history background search and state sex offender registration check shall also be conducted where available:

(A) Hawaii

(B) Kansas;

(C) Kentucky;

(D) Louisiana;

(E) Maine;

(F) Massachusetts;

(G) New Hampshire;

(H) Rhode Island;

(I) Tennessee;

(J) Vermont; and

(K) the District of Columbia.

(3) An Internet based criminal background search shall not be used to conduct the background searches required under paragraph (1)(A) or (C) of this subsection.

(4) A copy of the returned criminal history checks shall be retained in the facility's records.

(d) Applicability. This section applies to all individuals hired on or after the effective date of this subchapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205088
Lisa Capers
Deputy Executive Director and General Counsel
Texas Juvenile Probation Commission
Effective date: September 30, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 424-6710

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 30. MEDICAID HOSPICE PROGRAM

SUBCHAPTER I. MEDICAL REVIEW AND RE-EVALUATION

The Texas Department of Human Services (DHS) adopts the repeal of §30.92 and new §30.92, concerning Texas Index for Level of Effort (TILE) assessments. New §30.92 is adopted with changes to the proposed text as published in the June 7, 2002, issue of the *Texas Register* (27 TexReg 4928). The repeal of §30.92 is adopted without changes to the proposal and will not be republished.

Justification for the repeal and new section is to update guidelines for Medicaid hospice providers so that they comply with utilization review requirements adopted by the Texas Health and Human Services Commission (HHSC) in 1 TAC §§371.212 - 371.214. New §30.92 for hospice providers is consistent with nursing facility utilization review requirements, thus offering the same set of guidelines for both hospice and nursing facility providers.

DHS received no comments regarding adoption of the repeal or the new section.

However, DHS made corrections to the citations in the new section to reflect the proper reference.

40 TAC §30.92

The repeal is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Texas Government Code, §531.021, which provides HHSC with the authority to administer federal medical assistance funds.

The repeal implements the Human Resources Code, §§22.001 - 22.036 and §§32.001 - 32.052, and the Texas Government Code, §531.021.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205158
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2002
Proposal publication date: June 7, 2002
For further information, please call: (512) 438-3734

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40 TAC §30.92

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

The new section implements the Human Resources Code, §§22.001 - 22.036 and §§32.001 - 32.052, and the Texas Government Code, §531.021.

§30.92. Texas Index for Level of Effort (TILE) Assessments.

The Texas Department of Human Services adopts by reference 1 TAC §371.212 (relating to Case Mix Classification System), §371.213 (relating to Utilization Review and Control Activities Performed by Texas Health and Human Services Commission (Commission)), and §371.214 (relating to Texas Index for Level of Effort (TILE) Assessments). Each hospice provider must comply with the Texas Health and Human Services Commission's utilization review requirements found at 1 TAC §§371.212 - 371.214.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 7, 2002.

TRD-200205159
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 1, 2002
Proposal publication date: June 7, 2002
For further information, please call: (512) 438-3734

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PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 159. ADMINISTRATIVE RULES AND PROCEDURES

SUBCHAPTER A. GENERAL RULES

40 TAC §159.6

The Texas Commission for the Blind adopts amendments to §159.6, pertaining to Rates for Medical Services, without changes to the text published in the May 24, 2002, issue of the *Texas Register* (27 TexReg 4551). The text will not be republished.

The section contains the agency's methodology for setting rates and also contains the rates the agency uses in reimbursing entities for medical services provided to consumers. The adopted amendments are the result of the agency's annual rate review. To increase the efficiency of purchases and maximize the cost savings to the state, the process of purchasing from national suppliers for optical low-vision devices has been expanded. The adoptions also contain several additional rates 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. Several increased rates insure the availability of services for agency consumers.

No comments were received regarding 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 rules and standards governing the determination of rates the Commission will pay for medical services.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205063
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 26, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 377-0611

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CHAPTER 163. VOCATIONAL REHABILITATION PROGRAM

The Texas Commission for the Blind adopts amendments to §163.4, Definitions, and §163.61, Consumer Participation in the Cost of Services. The Commission also adopts the repeal of §163.40, Self-employment Services and new §163.40, Establishing a Small Business as an Employment Outcome. The amendments to §163.4 and §163.61, and the repeal of §163.40 are adopted without changes to the proposed text as published in the May 24, 2002, issue of the *Texas Register* (27 TexReg 4551) and will not be republished. New §163.40 is adopted with changes to the proposed text and will be republished.

The changes to these rules in Chapter 163, Vocational Rehabilitation Program, are adopted to provide clearer procedures for providing vocational rehabilitation services to a consumer who is pursuing an employment outcome of self-employment by establishing a small business.

The amendment to §163.4 is adopted to bring the definition of self-employment into conformance with federal regulations. Clarifications have also been added to the definition to aid in understanding what is not considered to be self-employment.

The amendment to 163.61 is adopted to clarify that financial participation is not required in the provision of assistive technology devices and other necessary equipment to improve the functional capabilities of an individual with a disability and contains a cross reference to new §163.40 to aid in locating information about participation in the cost of establishing a small business that will provide an employment outcome of self-employment.

The repeal of §163.40, Self-Employment Services, in Subchapter C, is adopted in order to adopt a new §163.40, Establishing a Small Business as an Employment Outcome.

New §163.40 is adopted as the agency's rules for assessing the consumer's aptitude for self-employment and the viability of a proposed small business. The section also sets forth the required participation of the consumer in the establishment of a small business, the required documentation that must be submitted before the Commission will consider supporting the consumer's goal, and other limitations that may apply.

The Commission received no comments regarding the proposed amendments to §163.4 and §163.61, and the repeal of §163.40. Comments were received from the Texas Workforce Commission on proposed new §163.40.

A summary of the comments received regarding new §163.40 as proposed and the Texas Commission for the Blind's responses follow.

Comment: TWC encourages consideration of adding another subsection, (c)(5), with the following language: (c)(5) An itemized list of all certificates and permits required by law in order to operate the business.

Response: Subsection (c) as proposed pertains to the suggested content of a consumer's written proposal after the consumer and Commission agree that establishing a small business as an employment outcome should be further considered. Although nothing in the language of the rule as proposed precludes the Commission from requesting additional information from the consumer when assessing a written proposal, and the text of the proposed rule does not limit the written proposal to only the four proposed items, the Commission has no objection to the addition of the paragraph TWC recommends and has made the change.

Comment: TWC encourages a modification of subsection (d) to include the Texas Department of Economic Development as an additional available source from which the consumer has sought funding for the start up of the small business. TWC also proposes adding to the list of examples of programs for certain populations those programs that assist low-income individuals.

Response: Subsection (d) pertains to the requirement that the Commission requires verification that the consumer has also sought funding for the start up of the small business from other available sources. As proposed, the text illustrates this requirement by giving examples of other sources that may be available for the purpose of establishing small business enterprises. Although the text is not limiting as proposed, the Commission has no objection to including the Texas Department of Economic Development among the examples and has included the department in the adopted rule. The suggestion that the phrase "low-income individuals" be included is also acceptable and has been included.

Comment: TWC encourages a modification of subsection (f) to include the Texas Workforce Commission as an additional available source from which the consumer may obtain information regarding business tax and transaction information as well as other related services for the small business. TWC suggests the addition of the following language: "The consumer may be encouraged to consult with the Texas Workforce Commission, as it offers business tax information, as well as valuable information on labor law and labor market statistics. The Texas Workforce Commission and the appropriate local workforce development board also offer recruiting, retention, training and retraining, and outplacement services."

Response: The Commission has no objection to including the Texas Workforce Commission (TWC) among the illustrative examples of resources available to consumers when preparing a business plan and has included TWC's name in the adopted rule. The remaining text suggested by TWC, which merely lists the services available through TWC, has not been included in the rule. The suggested information is more appropriately explained to consumers during consultations with agency counselors about available resources.

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §163.4

The amendment is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which allows the agency to establish and maintain, by rule, guidelines for the delivery of services by the Commission consistent with state and federal law.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205059
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 26, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 377-0611

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SUBCHAPTER C. VOCATIONAL REHABILITATION SERVICES

40 TAC §163.40

The repeal is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which allows the agency to establish and maintain, by rule, guidelines for the delivery of services by the Commission consistent with state and federal law.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205061
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 26, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 377-0611

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40 TAC §163.40

The new section is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which allows the agency to establish and maintain, by rule, guidelines for the delivery of services by the Commission consistent with state and federal law.

The adoption affects no other statutes.

§163.40. Establishing a Small Business as an Employment Outcome.

(a) The Commission recognizes that self-employment through the establishment of a small business may be a viable employment outcome for certain consumers. The purpose of the rules in this section is to implement federal regulations (34 CFR Part 361, §361.48) that authorize the provision of technical assistance and other consultation services to conduct market analyses, develop business plans, and otherwise provide resources to eligible individuals who are establishing a small business operation as an employment outcome.

(b) When a consumer expresses an interest in establishing a small business as an employment outcome, the Commission shall make an assessment of the consumer's potential and aptitude for self-employment before any efforts are made to attain that goal. In doing so, the Commission shall utilize those resources available for the purposes of assessing the potential and aptitude of the consumer for successful self-employment. Such measures may include, but are not necessarily limited to, the use of standardized tests and surveys intended to measure vocational aptitudes as well as a consideration of the consumer's personal characteristics such as prior education, work experience, achievements, physical and psychological health, and independence.

(c) After a preliminary assessment as described in subsection (b) of this section, if the consumer and Commission agree that establishing a small business as an employment outcome should be further considered, the consumer shall submit to the Commission a written proposal. The proposal shall provide in reasonable detail such information as will inform the Commission of the financial and other support which will be requested of the Commission for the purposes of establishing a small business. The information required in the proposal shall include, but is not necessarily limited, to the following:

(1) The type of business proposed;

(2) The location from which the business will be operated;

(3) An itemized list of all equipment, appliances, supplies, initial start-up capital, and other materials requested from the Commission, including the source of each item and its cost; and

(4) An itemized list of all equipment, appliances, supplies, start-up capital and other materials to be provided by the consumer or other sources, including the source of each item and its cost.

(5) An itemized list of all certificates and permits required by law in order to operate the business.

(d) With respect to any proposed small business, the Commission shall require, in addition to any other relevant matters, verification that the consumer has sought funding for the start up of the small business from other available sources, including but not limited to the Small Business Administration, the Texas Department of Economic Development, community development funds that may be available for the purpose of establishing small business enterprises in the locality in which the consumer resides, funds from other sources such as programs for certain populations (e.g., programs that assist women, minorities or low-income individuals to start or expand a business), the Social Security Administration, or any other similar governmental or private funding source.

(e) In order to make the consumer a stakeholder with a vested interest in the success of the small business and to encourage the necessary diligence, perseverance, and commitment to enhance the possibility of success, the consumer shall be required to contribute to the start-up costs of the business in such amounts as may be required by the Commission. In determining the amounts required to be provided by the consumer, the Commission shall consider funds available to the consumer from other sources as well as funds available to the Commission under its then current budget limitations. The contribution required of the consumer may be satisfied in whole or in part by in-kind

contributions (personal assets provided by the consumer, which may include, but are not necessarily limited, to such items as tools, furniture, supplies, business space) and funds acquired or to be acquired from other sources as described in subsection (d) of this section.

(f) In addition to the written proposal required by subsection (c) of this section and the financial details required by subsection (d) of this section, the consumer shall prepare and submit to the Commission a business plan. The business plan shall describe the plans of the consumer to market the business operations, the demographics of the area intended to be served as such relate to the particular business being considered, the potential for growth and expansion, and the potential of employing other persons in the business, as well as any other information relevant to the operation of the small business. A copy of a suggested format for writing a business plan shall be provided to the consumer by the Commission. The Commission shall provide technical assistance in preparing a business plan appropriate to the individual and the amount of funds requested to establish the small business. The consumer may be required to consult with entities providing services to individuals seeking to establish and operate small businesses, such as the Texas Workforce Commission, Small Business Administration, Small Business Development Centers, Senior Corps of Retired Executives (SCORE), or other similar organizations that offer guidance in the preparation of business plans or self-employment. Any requirement shall be discussed in advance with the consumer and included on the consumer's individualized plan for employment.

(g) Identifying a business location and signing any necessary lease agreements are the sole responsibilities of the consumer.

(h) Costs of renovations or remodeling shall be limited to those costs essential to start the business.

(i) The ongoing costs after the commencement of the business are the full responsibility of the consumer, and the Commission shall have no responsibility for further financial or other assistance to the consumer subsequent to the commencement of the business.

(j) The Commission's self-employment services do not include the purchase of any of the following items; however, the cost of these items, if necessary to the business, may be included in the business plan in arriving at the total cost of establishing the business and may be considered as a part of the consumer's contribution:

(1) utility or other deposits;

(2) insurance;

(3) sales tax security deposit;

(4) bonding fees;

(5) the purchase or rental of real estate;

(6) operating capital (cash), except any initial amount agreed to be furnished by the Commission as initial cash start-up costs;

(7) vehicles, boats, aircraft, or trailers requiring title of ownership; and

(8) firearms.

(k) The consumer is responsible for obtaining and completing application for all certificates and permits required by law in order to operate the business. Assistance with these applications is available from the Commission.

(l) After reviewing the proposal and business plan pursuant to the requirements of this section, the Commission shall notify the consumer in a format accessible to the consumer if the plan has been approved as an employment outcome and whether the Commission shall provide funding and, if so, the extent of such funding as well as any other assistance to be provided to the consumer in establishing the small business. Appeals of decisions not to approve a plan or to fund a plan may be filed in accordance with procedures contained in §161.1, et seq., of this title, pertaining to appeals and hearing procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205062
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 26, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 377-0611

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SUBCHAPTER E. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §163.61

The amendment is adopted under the authority of Human Resources Code, Title 5, Chapter 91, §91.022, which allows the agency to establish and maintain, by rule, guidelines for the delivery of services by the Commission consistent with state and federal law.

The adoption affects no other statutes.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 6, 2002.

TRD-200205060
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Effective date: August 26, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 377-0611

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PART 9. TEXAS DEPARTMENT ON AGING

CHAPTER 253. STATE AGING PLAN

The Texas Department on Aging adopts the repeal and replacement of §253.3, concerning State Aging Plan, without changes to the proposed text as published in the May 31, 2002, issue of the *Texas Register* (27 TexReg 4680).

The Texas Board on Aging requested a committee be formed to review the current formula and to determine any impact following the reauthorization of the Older Americans Act and the new census data. The committee recommended some changes to the current formula and added a rural factor. The rule was presented to the Texas Board on Aging during their May meeting and was approved for publication in the *Texas Register* .

No comments were received regarding adoption of the repeal and new section.

40 TAC §253.3

The repeal is 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205221
Gary Jessee
Director of the Office of AAA Support and Operations
Texas Department on Aging
Effective date: September 1, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 424-6857

♦ ♦ ♦

40 TAC §253.3

The new rule is 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2002.

TRD-200205222
Gary Jessee
Director of the Office of AAA Support and Operations
Texas Department of Aging
Effective date: September 1, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 424-6857

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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.

Final Action on Rules

Effective October 22, 2002

EXEMPT NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF NEW AND/OR ADJUSTED 2001 AND 2002 MODEL PRIVATE PASSENGER AUTOMOBILE PHYSICAL DAMAGE RATING SYMBOLS FOR THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 2001 and 2002 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0702-27-I) was published in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6381).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data complied on damageability, repairability and other relevant loss factors for the 2001 and 2002 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-0702-27-I, which are incorporated by reference into Commissioner's Order No. 02-0848.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.10, 5.96, 5.98 and 5.101.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with Insurance Code Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

This agency hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200205291
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 14, 2002

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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 Department of Health

Title 25, Part 1

The Texas Department of Health (department) will review and consider for readoption, revision, or repeal Title 25, Texas Administrative Code, Part 1, Chapter 1. Texas Board of Health, Subchapter C. Texas Regulations for Control of Radiation, §289.130, and Subchapter D. General, §289.201.

This review is in accordance with the requirements of the Texas Government Code, §2001.039 regarding agency review of existing rules.

An assessment will be made by the department as to whether the reasons for adopting or readopting these 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 department.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-200205267
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 13, 2002

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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 20, Rulemaking. This review of Chapter 20 is proposed in accordance with the requirements of Texas Government Code, §2001.039, added by Acts 1999, 76th Legislature, Chapter 1499, §1.11(a), 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 20 establishes general requirements for commission rulemaking. Chapter 20 includes requirements that rulemaking hearings shall be conducted in a manner most suitable to obtain all relevant information and testimony as conveniently, inexpensively, and expeditiously as possible without prejudicing the rights of any person; the commission shall follow the Administrative Procedure Act (APA) rulemaking requirements; requirements for indexing, cross-indexing, and availability of certain documents; the executive director shall maintain a mailing list of persons requesting advance notice of proposed commission rules; and any person may appear in person or by authorized representative at a rulemaking hearing. Chapter 20 also includes sections regarding guidelines for written documents submitted to the executive director; oral presentations; actions required after a hearing; petitions; emergency rules; and working groups.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 20 continue to exist. The rules are needed to implement Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules and authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. The rules provide for general rulemaking requirements as well as guidelines for written documents submitted to the executive director; oral presentations; actions required after a hearing; petitions; emergency rules; and working groups for commission rulemakings.

The review has revealed the need for clarification of requirements for submission of documents in §20.9 and revisions to the agency name in §20.15, which will be addressed in a future rulemaking (Rule Log Number 2002-060-020-AD). Any additional identified updates, consistency issues, or other needed changes will also be addressed in that separate rulemaking.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on whether the reasons for the rules in Chapter 20 continue to exist. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-014-020-AD. Comments must be received in writing by 5:00 p.m., September 23, 2002. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239- 3972.

TRD-200205210
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: August 9, 2002

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Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (Commission) files this notice of intention to review 16 TAC §3.94, relating to Disposal of Oil and Gas NORM Waste. This review is being conducted in accordance with Texas Government Code §2001.039 (as added by Acts 1999, 76th Legislature, chapter 1499, §1.11(a)).

The Commission is concurrently proposing the withdrawal of proposed amendments to §3.94 published in the February 8, 2002, issue of the *Texas Register* (27 TexReg 844) and also the repeal of §3.94 in order to propose new rules in 16 TAC chapter 4, new subchapter F, to be entitled Oil and Gas NORM. As required by Texas Government Code §2001.039 (as added by Acts 1999, 76th Legislature, chapter 1499, §1.11(a)), the Commission will accept comments regarding whether the reasons for readopting §3.94, as proposed for repeal, continue to exist.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. For further information, call Dr. Steven Seni at (512) 475-4439. The status of rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

Issued in Austin, Texas, on August 6, 2002.

TRD-200205167
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: August 8, 2002

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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 47, concerning Employee Notice Of Injury Or Death And Claim For Benefits. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The agency's reason for adopting the rules contained in this chapter continues to exist and it proposes to readopt chapter 47.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on September 23, 2002, and submitted to Nell Cheslock, Legal Services Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Chapter 47 -- Employee Notice Of Injury Or Death And Claim For Benefits

§47.5. Information Constituting Claim

§47.10. Signature of Claimant.

§47.15. Employer Advances Compensation.

§47.20. Beneficiaries Filing Claim.

TRD-200205296
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: August 14, 2002

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Adopted Rule Review

Texas Department of Health

Title 25, Part 1

The Texas Department of Health (department) has reviewed Title 25. Health Services, Part 1, Texas Department of Health, Chapter 205. Product Safety, Subchapter D. Inhalant Abuse, §205.51.

The notice of intent to review was published in the March 2, 2001, issue of the *Texas Register* (26 TexReg 1875). No comments were received in regards to the publication of the notice.

This review is in accordance with the requirements of the Texas Government Code, §2001.039, the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which requires state agencies to review and consider for readoption of their rules every four years. The department has determined that reasons for readopting the section continues to exist; however the rule was repealed and new rules were adopted. The rule was reviewed and determined by the Board of Health (board) to continue to be needed, reflective of current legal and policy considerations, and reflective of current procedures of the board.

As a result of the rule review, the department adopted the repeal of §205.51, and adopted new rules §§205.51 - 205.56. The adopted rules were published in the August 16, 2002, issue of the *Texas Register*, and the rules became effective August 19, 2002. The rule review completion date for §205.51 is August 19, 2002.

TRD-200205272
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: August 13, 2002

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §157.38(c)

CONTENT AREAS	ECA	EMT-B	EMT-I	EMT-P
PREPARATORY	3	6	9	12
AIRWAY MANAGEMENT/VENTILATION	3	6	9	12
PATIENT ASSESSMENT	2	4	6	8
TRAUMA	3	6	9	12
MEDICAL	9	18	27	36
SPECIAL CONSIDERATIONS	3	6	9	12
CLINICALLY RELATED OPERATIONS	1	2	3	4
MINIMUM UNITS IN CONTENT AREAS	24	48	72	96
ADDITIONAL UNITS IN ANY APPROVED CATEGORY	12	24	36	48
TOTAL REQUIRED FOR RECERTIFICATION ELIGIBILITY	36	72	108	144

Figure: 30 TAC §291.85(e)(2)

Appendix A

NOTICE OF REQUIREMENT TO COMPLY WITH THE SUBDIVISION SERVICE EXTENSION POLICY OF {name of water supply corporation/special utility district}

Pursuant to Texas Water Code, §13.2502, _____ Water Supply Corporation/Special Utility District hereby gives notice that any person who subdivides land by dividing any lot, tract, or parcel of land, within the service area of _____ Water Supply Corporation/Special Utility District, Certificate of Convenience and Necessity No. _____, in _____ County, into two or more lots or sites for the purpose of sale or development, whether immediate or future, including re-subdivision of land for which a plat has been filed and recorded or requests more than two water or sewer service connections on a single contiguous tract of land must comply with {title of subdivision service extension policy stated in the tariff/policy} (the "Subdivision Policy") contained in _____ Water Supply Corporation's tariff/Special Utility District's policy.

_____ Water Supply Corporation/Special Utility District is not required to extend retail water or sewer utility service to a service applicant in a subdivision where the developer of the subdivision has failed to comply with the Subdivision Policy.

Applicable elements of the Subdivision Policy include:

Evaluation by _____ Water Supply Corporation/Special Utility District of the impact a proposed subdivision service extension will make on _____ Water Supply Corporation's/ Special Utility District's water supply/sewer service system and payment of the costs for this evaluation;

Payment of reasonable costs or fees by the developer for providing water supply/sewer service capacity;

Payment of fees for reserving water supply/sewer service capacity;

Forfeiture of reserved water supply/sewer service capacity for failure to pay applicable fees;

Payment of costs of any improvements to _____ Water Supply Corporation's/Special Utility District's system that are necessary to provide the water/sewer service;

Construction according to design approved by _____ Water Supply Corporation/Special Utility District and dedication by the developer of water/sewer facilities within the subdivision following inspection.

_____ Water Supply Corporation's/Special Utility District's tariff and a map showing _____ Water Supply Corporation's/Special Utility District's service area may be reviewed at _____ Water Supply Corporation's/ Special Utility District's offices, at {address of the water supply corporation/special utility district}; the tariff/policy and service area map also are filed of record at the Texas Commission on Environmental Quality and may be reviewed by contacting the TCEQ, c/o Utility Rates and Services Section, Water Supply Division, P.O. Box 13087, Austin, Texas 78711.

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.

Texas Department of Agriculture

Notice of Consultant Contract Award

Pursuant to the provisions of the Texas Government Code, §2254.030, the Texas Department of Agriculture (TDA) hereby provides notice of a consultant contract award published in the June 14, 2002 issue of the *Texas Register* (27 TexReg 5261).

1. The selected consultant will provide technical assistance and training for TDA staff and staff of the weather modification and control grant programs and assist weather modification program grantees in implementing and maintaining operational cloud seeding activities funded by the TDA weather modification grant program.

2. The name and address of the selected consultant is: Weather Modification Consultants L.L.C., P.O. Box 764, Pleasanton, Texas 78064.

3. The total amount of the contract is $184,063. The beginning date of the contract is July 30, 2002. The ending date of the contract is August 31, 2003.

4. The dates on which performance and budget reports that the consultant is required to present to the agency are due are: October 31, 2002; January 31, 2003; April 30, 2003; July 31, 2003; September 30, 2003; and October 31, 2003.

TRD-200205266
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: August 13, 2002

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Notice of Public Hearings

In accordance with the Texas Agriculture Code, §74.113, the Texas Department of Agriculture (the department) will hold three public hearings to take public comment on a proposed boll weevil eradication program assessment for the Northern Blacklands Boll Weevil Eradication Zone. The hearings will be held as follows:

on August 28, 2002, beginning at 2:00 p.m., at the Texas Farm Bureau Conference Room, 5828 Industrial Blvd., Greenville, Texas;

on August 29, 2002, beginning at 9:00 a.m., at the Helena Chemical Company Conference Room at FM 984 North, Bardwell, Texas; and

on August 29, 2002, beginning at 2:00 p.m., at the Hill Country Agricultural Extension Service Conference Room, 126 South Covington, Hillsboro Texas.

For more information, please contact , John McFerrin, Producer Relations Specialist, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas, 78711 (512)463-7593.

TRD-200205265
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: August 13, 2002

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Office of the Attorney General

Texas Solid Waste Disposal Act and Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Solid Waste Disposal Act and the Texas Water Code. Before the State may settle a judicial enforcement action under the 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, et al. v. Dixie Chemical Company, Inc., Cause No. 2001-23537, 61st District Court of Harris County, Texas

Nature of Defendant's Operations: Defendant owns and operates a chemical plant in Harris County. Harris County and the State claim Defendant violated the Texas Solid Waste Disposal Act and the Texas Water Code by illegally discharging industrial waste from its plant into or adjacent to waters of the state.

Proposed Agreed Judgment: The Agreed Judgment requires Defendant to submit an application for an individual storm water discharge permit to the TNRCC, pay Eighty Two Thousand Five Hundred Dollars in civil penalties (Twenty Thousand Dollars may be deferred if Defendant secures and complies with an individual storm water permit), pay Twenty Thousand Dollars in attorney's fees, and Defendant shall perform an environmental project set forth in an agreement between Defendant and Harris County.

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 judgment should be directed to Lisa Sanders Richardson, 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 contact A.G. Younger, Agency Liaison, at 512-463-2110.

TRD-200205282
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: August 14, 2002

♦ ♦ ♦

Automobile Theft Prevention Authority

Request for Applications under the Automobile Theft Prevention Authority Fund

Notice of Invitation for Applications:

The Automobile Theft Prevention Authority is soliciting applications for supplemental grants to be awarded for projects to reduce the incidence of economic automobile theft. This grant cycle will begin on November 1, 2002, and end August 31, 2003.

Notice: Awards under this notice are contingent upon approval by the legislature of ATPA's full legislative appropriation request. Availability of funds will be announced after September 1, 2002.

Law Enforcement/Detection/Apprehension Projects, to establish motor vehicle theft enforcement teams and other detection/apprehension programs. Priority funding may be provided to state, county, precinct commissioner, general or home rule cities for enforcement programs in particular areas of the state where the problem is assessed as significant. Enforcement efforts covering multiple jurisdictional boundaries may receive priority for funding.

Prosecution/Adjudication/Conviction Projects, to provide for prosecutorial and judicial programs designed to assist with the prosecution of persons charged with motor vehicle theft offenses.

Prevention, Anti-Theft Devices and Automobile Registration Projects, to test experimental equipment which is considered to be designed for auto theft deterrence and registration of vehicles in the Texas Help End Auto Theft (H.E.A.T.) Program.

Reduction of the Sale of Stolen Vehicles or Parts Projects, to provide vehicle identification number labeling, including component part labeling and etching methods designed to deter the sale of stolen vehicles or parts.

Public Awareness and Crime Prevention/Education/Information Projects, to provide education and specialized training to law enforcement officers in auto theft prevention procedures, provide information linkages between state law enforcement agencies on auto theft crimes, and develop a public information and education program on theft prevention measures.

Eligible Applicants:

Current ATPA funded agencies are eligible to apply for supplemental grants for automobile theft prevention assistance projects.

Contact Person:

Detailed specifications, including selection process for applicants are available from ATPA.

Contact Susan Sampson, Director

Texas Automobile Theft Prevention Authority

4000 Jackson Avenue

Austin, Texas 78779

Telephone: (512) 374-5101

Closing Date for Receipt of Applications:

The **original** and **three (3)** copies of the proposal must be received by the Texas Automobile Theft Prevention Authority by 5 p.m., September 7, 2002, or postmarked by September 7, 2002. If mailed, applications must be marked "Personal and Confidential" and addressed to the contact person listed above. If delivered, please leave application with the contact person (or designee) at the address listed.

Selection Process:

Applications will be selected according to §§57.2, 57.4, 57.7, and 57.14, as published in Title 43 Chapter 57, Texas Administrative Code. Grant award decisions by ATPA are final and not subject to judicial review. Grants will be awarded on or before October 17, 2002, issued in Austin, Texas on August 7, 2002.

TRD-200205160
Susan Sampson
Director
Automobile Theft Prevention Authority
Filed: August 7, 2002

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Texas Cancer Council

Request for Applications

NOTICE OF INVITATION: The Texas Cancer Council hereby solicits the Texas Children's Cancer Center, Baylor College of Medicine to submit an application for fiscal year 2003 funds to create an accurate and accessible healthcare information program for the growing population of long-term survivors of childhood cancer and their healthcare providers in Texas.

CONTACT PERSON: For further information contact Don Ray, Program Manager, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711, (512) 463-3190.

CLOSING DATE: The Texas Children's Cancer Center, Baylor College of Medicine's application must be received in the Texas Cancer Council's office by 5:00 p.m. on September 23, 2002.

BACKGROUND INFORMATION: The Texas Cancer Council is the state agency dedicated to reducing the human and economic impact of cancer on Texans through the promotion and support of collaborative, innovative, and effective programs and policies for cancer prevention and control. The Council's initiatives are guided by the philosophy that a cooperative and unified effort by public, private, and volunteer sector

agencies and individuals increases the ability of limited resources to serve more people and minimizes duplication of effort.

The Texas Children's Cancer Center provides support to children with cancer. Many of the long-term survivors of childhood cancer are at risk for a number of health problems unfamiliar to many physicians. Providing essential information in a concise fashion to the health care providers seeing childhood cancer survivors for the first time, particularly in situations that may have some medical urgency, poses a major problem. The goal of this project is to develop and implement a secure, online resource containing appropriate patient information and monitoring and management recommendations for use by physicians who provide health care to long-term survivors of childhood cancer.

The Texas Cancer Council will provide funding for a collaborative project to provide appropriate on-line patient information about long-term survivors of childhood cancer for use by health care providers and survivors. Additionally, this program will provide guidance in the medical care of patients with specific problems resulting from childhood cancers. Information will be kept secure and will be accessible only with the permission of the survivor.

APPLICATION REQUIREMENTS: The application must conform to the Texas Cancer Council's application requirements, which are available from the Council office. The applicant will:

1) Assess available materials and their applicability to children;

2) Develop clinical practice guidelines, including management standards, that will improve the supportive care management of long-term survivors of childhood cancer;

3) Design an interactive instructional module to complement the newly developed clinical practice guidelines;

4) Implement ongoing evaluation of patient/healthcare provider needs;

5) Develop and disseminate patient information and education materials (English and Spanish) for healthcare providers and long-term survivors of childhood cancer;

6) Establish a Web site that will provide access to these materials; and

7) Evaluate the effectiveness of long-term survivors of childhood cancer patient information, education materials, and Web site use.

FUNDING INFORMATION: The maximum amount of funding that may be requested for fiscal year 2003 is $37,500. Final funding is contingent upon the Texas Cancer Council's review and approval of the application at its meeting on November 20, 2002. Maximum funding of $50,000 in fiscal year 2004 may be provided, pending the availability of funds, the project's progress and the submission of a meritorious funding continuation proposal for fiscal year 2004.

TRD-200205245
Mickey L. Jacobs, M.S.H.P.
Executive Director
Texas Cancer Council
Filed: August 12, 2002

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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 August 2, 2002, through August 8, 2002. The public comment period for these projects will close at 5:00 p.m. on September 13, 2002.

FEDERAL AGENCY ACTIONS:

Applicant: Pleasure Island Commission; Location: The project is located in wetlands adjacent to Sabine Lake within the block of Wave Barrier Road, the existing RV Park to the southwest, the existing concrete bulkhead along Sabine Lake, and the existing marina to the northeast, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Port Arthur South, Texas. Approximate UTM Coordinates: Zone 15; Easting: 410441; Northing: 3303626. Project Description: The applicant proposes to construct a hike and bike trail and a 300-foot bulkhead. The trail will start on Wave Barrier Road, which is an existing upland levee, and make a southeast turn at the east end of the marina. The proposed trail will run 517 feet through uplands and on an existing levee. A boardwalk will be constructed on pilings for approximately 229 feet over adjacent wetlands. Additionally, the applicant will construct a 300-foot bulkhead along the shoreline of the RV lagoon. This area exhibits signs of erosion and may require minimal fill to straighten the shoreline. The boardwalk will then run along the shoreline for 522 feet adjacent to the existing concrete bulkhead. The boardwalk will turn north onto another existing levee and run an additional 800 feet along the shoreline. This portion of the boardwalk will result in fill material being placed in jurisdictional wetlands. The project will then extend onto developed upland property as it terminates at the marina area. The total fill area for the walkway through herbaceous wetlands will be approximately 2,956 square feet (0.068 acres). CCC Project No.: 02-0240-F1; Type of Application: U.S.A.C.E. permit application #22648 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Army Corps of Engineers; Project Description: The U.S. Army Corps of Engineers has been directed by the U.S. Congress to carry out a Storm Damage Reduction and Environmental Restoration project. The project consists of construction of a channel between the Laguna Madre and the Gulf of Mexico across North Padre Island referred to as Packery Channel (Project). An existing channel approximately 2.6 miles long that extends from the Gulf Intracoastal Waterway (GIWW) in the Laguna Madre to North Padre Island will be extended an additional 0.9 mile to connect the channel to the Gulf of Mexico. Packery Channel generally follows the course of a historic pass between the Gulf and the Laguna Madre. In addition to opening Packery Channel to the Gulf, the Project will add two impermeable rock jetties at the Gulf end of the Channel and deepen and widen the existing channel and Inner Basin. The Project also involves the establishment of four dredged material placement areas, including the use of some new work material for beach nourishment to counter the effects of erosion. Dredging Packery Channel will provide sand for nourishment of the eroding beach at Packery Channel that will reduce potential future storm damage to North Padre Island. The Project will also create a water exchange pass between the Laguna Madre and the Gulf of Mexico. The total length of the proposed channel from the Gulf end of the jetties to the GIWW is approximately 18,500 feet.

Over the 50-year life of the project, approximately 11,000,000 cubic yards of estimated maintenance dredging will be placed in an upland site through five year dredging cycles. The Project and the benefits and impacts to be expected are described in the Draft Environmental Impact Statement available at the U.S. Army Corps of Engineers web site at http://www.swg.usace.army.mil/pe/Packery/. CCC Project No.: 02-0169-F6; Type of Application: Consistency Determination for the North Padre Island Storm Damage Reduction and Environmental Restoration Project (PL 106-53), also known as Packery Channel. The applicant is also requesting to incorporate by reference the Draft Environmental Impact Statement (EIS) for this project. The Consistency Determination may also be found in the Draft EIS in Section 6.0.

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 on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, 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-200205289
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: August 14, 2002

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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 08/19/02-08/25/02 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 08/19/02-08/25/02 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-200205255
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: August 13, 2002

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Texas Council for Developmental Disabilities

Intent to Award Funds - Transportation Public Awareness Activities

The Texas Council for Developmental Disabilities announces its intent to award funds to the Texas Citizen Fund to continue 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 continue developing public awareness materials and activities that promote concerning affordable, outreach activities to the Spanish language media and accessible transportation.

Terms and Funds: Funding for this project will begin September 1, 2002 and end August 31, 2003. 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) 437-5435.

TRD-200205276
Roger A. Webb
Executive Director
Texas Council for Developmental Disabilities
Filed: August 14, 2002

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Texas Education Agency

Request for Proposals Concerning Special Education Hearing Officers for due Process Hearings brought pursuant to the Individuals with Disabilities Education Act

Eligible Proposers. The Texas Education Agency (TEA) is requesting proposals under Request for Proposals (RFP) #701-02-036 from individuals to serve as impartial hearing officers for special education due-process hearings brought pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, et seq. Historically underutilized businesses (HUBs) are encouraged to submit proposals.

Description. As hearing officer, the selected proposer will preside over administrative hearings concerning the identification, evaluation, or educational placement of students with disabilities or the provision of free and appropriate education to students with disabilities. The hearing officers have authority to administer oaths, call and examine witnesses, make rulings on discovery and dispositive motions, determine admissibility of evidence and amendments to pleadings, maintain decorum, schedule and recess proceedings, and issue final decisions appealable to state or federal district courts.

Dates of Project. All services and activities related to this RFP will be conducted within specified dates. Proposers should plan for a starting date of no earlier than October 15, 2002, and an ending date of no later than August 31, 2003.

Project Amount. One contractor will be selected to receive a maximum of $155,000 during the contract period. Subsequent project funding will be based on satisfactory progress of first-year objectives and activities and on general budget approval by the State Board of Education, the commissioner of education, and the state legislature. This project is funded 100% from IDEA B funds.

Selection Criteria. Proposals will be selected based on the ability of each proposer to carry out all requirements contained in this RFP. The

TEA will base its selection on, among other things, the demonstrated competence and qualifications of the proposer and upon the reasonableness of the proposed fee. The selected proposer must be an attorney who: (1) is licensed in Texas; (2) is in good standing with the State Bar of Texas; (3) has at least five years of practice; (4) has at least two years of experience in special education law, disability law, administrative law, or civil rights law; (5) possesses good research skills; and (6) demonstrates clarity of written expression. Special consideration will be given to proposers that have experience handling special education or disability cases in federal court. The TEA reserves the right to select from the highest-ranking proposals those that address all requirements in the RFP and that are most advantageous to the project.

The TEA is not obligated to execute a resulting contract, provide funds, or endorse any proposal submitted in response to this RFP. This RFP does not commit TEA to pay any costs incurred before a contract is executed. The issuance of this RFP does not obligate TEA to award a contract or pay any costs incurred in preparing a response.

Requesting the Proposal. A complete copy of RFP #701-02-036 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701, by calling (512) 463-9304; by faxing (512) 463-9811; or by e- mailing dcc@tea.state.tx.us. Please refer to the RFP number and title in your request. Provide your name, complete mailing address, and telephone number, including area code.

Further Information. For clarifying information about this RFP, contact Sandy Lowe or Carlos Gonzales, Division of Legal Services, TEA, (512) 463-9720.

Deadline for Receipt of Proposals. Proposals must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Tuesday, October 1, 2002, to be considered.

TRD-200205283
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: August 14, 2002

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Miller at (512) 463-5800 or (800) 325-8506.

Deadline: 8 Days Before An Election Report due March 6, 2000

Graciela Aleman, 3429 Bahamas, Mesquite, Texas 75150

Deadline: Semiannual J/COH report due July 17, 2000

Graciela Aleman, 3429 Bahamas, Mesquite, Texas 75150

Deadline: Semiannual J/COH Report due January 16, 2001

Graciela Aleman, 3429 Bahamas, Mesquite, Texas 75150

Roger Q. Settler, 6263 McNeil Dr. #1731, Austin, Texas 78729-7590

Deadline: Semiannual J/COH Report due July 16, 2001

Roger Q. Settler, 6263 McNeil Dr. #1731, Austin, Texas 78729-7590

Deadline: Semiannual J/COH Report due January 15, 2002

David F. Bristol, P.O. Box 1871, Frisco, Texas 75034

Robert E. De La Garza, P.O. Box 1161, Edinburg, Texas 78540

Diana L. Flores, 1134 Mountain Lake, Dallas, Texas 75224

John G. Jones, 5134 Cavendish Dr., Corpus Christi, Texas 78413

David M. Medina, 952 Echo Lane #350, Houston, Texas 77024

Aubrey R. Thoede, 1408 South Eldridge Parkway, PMB 138, Houston, Texas 77077

Deadline: Semiannual GPAC Report due January 15, 2002

Marian K. Stanko, Republican Party Of Bexar County (CEC), 900 NE Loop 410 #D-105, San Antonio, Texas 78209

Johnny Atkinson, Committee For Better Education, 307 E. FM 1988, Goodrich, Texas 77335

B. Fred Ashmead, Fair Judge Committee, 1348 Gardenia, Houston, Texas 77018

Deadline: 30 Days Before An Election Report due February 11, 2002

Janie Martinez Gonzalez, 162 Bradley, San Antonio, Texas 78211

Robert Ashton Herrera, 9607 Wildwood Ridge, San Antonio, Texas 78250

Gary A Hinchman, 13700 Veterans Memorial Dr. #238, Houston, Texas 77014

Clara E. "Betsy" Johnson, 103 South Irving #606A, San Angelo, Texas 76903

Stephen Kyle Johnston, 678 Fawn Drive, Houston, Texas 77015

Robert H. Mendoza, P.O. Box 5566, Brownsville, Texas 78523-5566

James N. Sylvester, 11705 Hidden Quail, Austin, Texas 78758

Thomas J. Wattley Jr., 2911 Turtle Creek Blvd. Suite 300, Dallas, Texas 75219

David B. Wilson, 505 Melbourne, Houston, Texas 77022

Ron Wilson, P.O. Box 2910, Austin, Texas 78768

Paul Womack, P.O. Box 774, Georgetown, Texas 78627

Deadline: 8 Days Before an Election Report due March 4, 2002

J.M. "Chuy" Alvarez, 501 N. Britton Ave., Rio Grande City, Texas 78582

Donald R. Burnett, 1014 Alma Dr., Lumberton, Texas 77657

Domingo Garcia, P.O. Box 2910, Austin, Texas 78768-2910

Robert Ashton Herrera, 9607 Wildwood Ridge, San Antonio, Texas 78250

Gary A. Hinchman, 505 North Belt East, Suite 240, Houston, Texas 77060

Dorothy M. Olmos, 102 Funston St., Houston, Texas 77012

James N. Sylvester, 11705 Hidden Quail, Austin, Texas 78758

Ron Wilson, P.O. Box 2910, Austin, Texas 78768

Paul Womack, P.O. Box 774, Georgetown, Texas 78627

Deadline: 8 Days Before an Election Report due April 1, 2002

Thomas F. Butler, P.O. Box 1682, LaPorte, Texas 77572

Ignacio Salinas Jr., 505 S. Victoria St., San Diego, Texas 78384

Paul Womack, P.O. Box 774, Georgetown, Texas 78627

Deadline: Monthly MPAC Report due March 5, 2002

Julio S. Laguarta, Houston Realty Breakfast Club, 441 Westmoreland St., Houston, Texas 77006-4520

Jeffrey J. Benavidez, San Antonio Ironworkers PAC, 4318 Clark Ave., San Antonio, Texas 78223

Mark Wood, Houston Gay & Lesbian Political Caucus PAC, 1701 Hermann Dr. #3402, Houston, Texas 77004

Don L. King, Sensitive Care PAC, 500 N. Akard St. #3960, Dallas, Texas 75201-6604

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

Deadline: Monthly MPAC Report due April 5, 2002

Jeffrey J. Benavidez, San Antonio Ironworkers PAC, 4318 Clark Ave., San Antonio, Texas 78223

Mark Wood, Houston Gay & Lesbian Political Caucus PAC, 1701 Hermann Dr. #3402, Houston, Texas 77004

Don L. King, Sensitive Care PAC, 500 N. Akard St. #3960, Dallas, Texas 75201-6604

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 75773-9799

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

Deadline: Monthly MPAC Report due May 6, 2002

Jeffrey J. Benavidez, San Antonio Ironworkers PAC, 4318 Clark Ave., San Antonio, Texas 78223

Mark Wood, Houston Gay & Lesbian Political Caucus PAC, 1701 Hermann Dr. #3402, Houston, Texas 77004

Don L. King, Sensitive Care PAC, 500 N. Akard St., #3960, Dallas, Texas 75201-6604

Kathleen P. Batchelor, Bedford Leadership Forum, 23251 County Road 460, Mineola, Texas 75773-9799

Leonard T. Dunnahoe, Uncommon Sense, 214 St. Mary's Place, Rockwall, Texas 75087

TRD-200205190
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: August 9, 2002

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Texas Department of Health

Notice of Public Hearings Schedule for Development and Review of Block Grant Funds

Under the authority of the Preventive Health Amendments of 1992 (see 42 United States Code §§300w et. seq.), the Texas Department of Health (department) is making application to the U.S. Public Health Service for funds to continue the Preventive Health and Health Services Block Grant (PHHSBG) during federal fiscal year (FFY) 2003. Provisions in the Act require the chief executive officer of each state to annually furnish a description (a state plan) of the intended use of block grant funds in advance of each FFY. A proposal of this description is to be made public within each state in such a manner as to facilitate comments.

In fiscal year (FY) 2003, nine activities are proposed to be funded under the block grant. These include sexual assault prevention and crisis services, border health and colonias, birth defects registry, behavioral risk factor surveillance system, dental health/fluoridation, trauma registry, pesticide exposure surveillance, local health departments, and public health regions.

The PHHSBG award for FFY 2002 was $5,473,788. Of this amount, $510,620 was required to be used for sexual assault prevention and crisis services. At this point in time, the department is expecting to receive this same amount for FY 2003.

The department has prepared the following schedule for the development and review of the FFY 2003 State Plan for the PHHSBG. In September of 2002, the department will hold public hearings in four public health regions (PHRs):

September 9, 2002

Public Health Region 7, 1100 West 49th Street, Room K-100, Austin, Texas, 4:00 - 6:00 p.m.

September 10, 2002

Public Health Region 6/5S, 5425 Polk, Suite J, Room 4C/D, Houston, Texas, 10:00 a.m.

September 10, 2002

Public Health Region 9/10, 401 East Franklin, 2nd Floor Conference Room, El Paso, Texas, 9:30 a.m.

September 12, 2002

Public Health Region 4/5N, 1517 West Front Street, Room 257, Tyler, Texas, 4:00 - 6:00 p.m.

Following these hearings, the department will summarize and consider the impact of the public comments received. The department will then notify the public of the availability of a published summary of these hearings. In September of 2002, the department will prepare the final FFY 2003 State Plan for the PHHSBG and forward it to the Governor and federal government.

Please note that the department will continuously conduct activities to inform recipients of the availability of services/benefits, the rules and eligibility requirements, and complaint procedures. Written comments regarding the PHHSBG may be submitted through September 13, 2002, to Martha McGlothlin, Block Grant Coordinator, Office of Deputy Commissioner for Programs, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, E-mail address Martha.McGlothlin@tdh.state.tx.us. For further information, call (512) 458-7200.

TRD-200205241
Susan Steeg
General Counsel
Texas Department of Health
Filed: August 12, 2002

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Texas Health and Human Services Commission

Public Hearing Notice

On Reimbursement Rates for Non-state Operated Intermediate Care Facilities for persons with Mental Retardation (ICF/MR) and Institutions for Mental Diseases (IMDs).

The Health and Human Services Commission will conduct a public hearing to receive public comment on the extension of current reimbursement rates for Non-state operated Intermediate Care Facilities for

persons with Mental Retardation (ICF/MR) and Institutions for Mental Diseases (IMDs). The rates will be effective September 1, 2002. The hearing will be held in compliance with Title 1, Texas Administrative Code, Chapter 355, Subchapter F, §355.702(h), which requires a public hearing on proposed reimbursement rates for medical assistance programs. Payment rates are proposed to be effective September 1, 2002, as follows:

For Non-state Operated ICF/MRs

House size	Level of Need	Rate
Small	Intermittent	$138.55
Small	Limited	$154.49
Small	Extensive	$176.51
Small	Pervasive	$216.49
Small	Pervasive +	$381.10
Medium	Intermittent	$116.31
Medium	Limited	$128.02
Medium	Extensive	$149.26
Medium	Pervasive	$180.86
Medium	Pervasive +	$357.33
Large	Intermittent	$ 90.36
Large	Limited	$102.20
Large	Extensive	$114.46
Large	Pervasive	$159.43
Large	Pervasive +	$352.71

$406.34 per day for IMD

Methodology and justification: The proposed rates were determined in accordance with the rate setting methodology codified as 1 Texas Administrative Code Chapter 355, Subchapter F (relating to Reimbursement Methodology for all medical assistance programs (ICF/MRs), §355.456 and (IMDs), §355.761).

The public hearing will be held on Friday, September 6, 2002, at 9:00 a.m. in the Big Bend Conference Room, Floor 1, Riata Building 3, 12555 Riata Vista Circle, Austin, Texas 78756.

Written comments may be submitted to HHSC Rate Analysis, Mail Code Y-995, 1100 West 49th street, Austin, Texas 78756, or faxed to (512) 685-3104. Hand deliveries will be accepted at Riata Building 3, 12555 Riata Vista Circle, Austin, Texas 78756. Comments must be received by 5:00 p.m. on Friday, September 6, 2002.

Persons requiring an interpreter for deaf or hearing impaired or other accommodation should contact Tony Arreola by calling (512) 685-3124 or the TDY phone number of Texas Relay, which is 1-800-735-2988, at least 72 hours prior to the hearing.

TRD-200205279

Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 14, 2002

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Public Hearing Notice

On Reimbursement Rates for Large and Small State Operated Intermediate Care Facilities for persons with Mental Retardation (ICF/MR).

The Health and Human Services Commission will conduct a public hearing to receive public comment on the new reimbursement rate for Large State Operated Intermediate Care Facilities and an extension for Small State Operated Intermediate Care Facilities for persons with Mental Retardation. The rates will be effective September 1, 2002. The hearing will be held in compliance with Title 1, Texas Administrative Code, Chapter 355, Subchapter F, §355.702(h), which requires a public hearing on proposed reimbursement rate for medical assistance programs. The payment rates are proposed to be effective September 1, 2002, as follows:

$265.77 per day for Large State Operated

$205.99 per day for Small State Operated

Methodology and justification: The proposed rates were determined in accordance with the rate setting methodology codified as 1 Texas Administrative Code Chapter 355, Subchapter F (relating to Reimbursement Methodology for all medical assistance programs, §355.456).

The public hearing will be held on Friday, September 6, 2002, at 10:30 a.m. in the Big Bend Conference room, Floor 1, Riata Building 3, 12555 Riata Vista Circle, Austin, Texas 78756.

Written comments may be submitted to HHSC Rate Analysis, Mail Code Y-995, 1100 West 49th street, Austin, Texas 78756, or faxed to (512) 685-3104. Hand deliveries will be accepted at Riata Building 3, 12555 Riata Vista Circle, Austin, Texas 78756. Comments must be received by 5:00 p.m. on Friday, September 6, 2002.

Persons requiring an interpreter for deaf or hearing impaired or other accommodation should contact Tony Arreola by calling (512) 685-3124 or the TDY phone number of Texas Relay, which is 1-800-735-2988, at least 72 hours prior to the hearing.

TRD-200205280
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 14, 2002

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Public Notice Statement Amendment Number 626

The Texas Health and Human Services Commission announces its intent to submit to the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Transmittal Number 02-07, Amendment Number 626 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. Amendment Number 626 implements the addition of two new provider types, Registered Nurse First Assistant and Licensed Surgical Assistant, to be reimbursed under the Texas Medical Assistance Program.

The proposed amendment is to be effective January 1, 2003, and is expected to increase the amount of federal matching funds to the state. The proposed amendment will result in increases to federal expenditures of $1,047,172 for state fiscal year 2004 and $1,076,845 for state fiscal year 2005.

Copies of the proposed reimbursement methodology may be obtained from Gregory Brennan, Texas Health and Human Services Commission, MC Y-975, 1100 West 49th Street, Austin, Texas 78756, (512) 338-6422.

TRD-200205278
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 14, 2002

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Public Notice Statement Amendment Number 628

The Texas Health and Human Services Commission announces its intent to submit, to the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Transmittal Number 02-09, Amendment Number 628 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. Amendment Number 628 addresses the addition of fixed-unit pricing, determined by competitive procurement, to the Medicaid reimbursement methodology for eyewear.

The proposed amendment is to be effective September 1, 2002. The fiscal impact of purchasing eyewear using the new procurement method is expected to result in an estimated 25% reduction in cost. The estimate includes assumed caseload growth and 3.5% annual inflation. The actual percent decrease from current costs is not known until a contract is awarded.

For further information or copies of the proposed reimbursement methodology contact Dee Sportsman, Texas Health and Human Services Commission, MC Y-975, 1100 West 49th Street, Austin, Texas 78756, (512) 794-5164.

TRD-200205277
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: August 14, 2002

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (GREEN CREST APARTMENTS) SERIES 2002

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Kendall Branch Library located at 14330 Memorial Drive, Houston, Texas 77079 at 6:00 p.m. on September 16, 2002 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $12,500,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Finlay Interests 34, Ltd., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 192-unit multifamily residential rental development to be constructed on approximately 10.12 acres of land located on the northwest corner of the intersection of Green Crest Drive and Westpark Drive in Houston, Harris County, Texas 77082. The project will be initially owned and operated by the Borrower.

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-200205225
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 12, 2002

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Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (HICKORY TRACE APARTMENTS) SERIES 2002

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Lee Elementary Auditorium located at 7808 Racine Drive, Dallas, Texas 75232 at 6:00 p.m. on September 12, 2002 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Hickory Trace Housing, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 260-unit multifamily residential rental development to be constructed on approximately 15 acres of land located approximately 650 feet south of Wheatland Road and approximately 1300 feet east of Bolton Boone Drive in Dallas, Dallas County, Texas 75237. The project will be initially owned and operated by the Borrower.

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-200205286
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 14, 2002

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Texas Department of Insurance

Amended Notice of Public Hearing

Notice of hearing for Docket 2528 regarding storage and sale of fireworks and license fees, originally scheduled for September 17, 2002, has been rescheduled to September 18, 2002. Notice of the hearing was published in the August 9, 2002, issue of the *Texas Register* (27 TexReg 7249).

TRD-200205249
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 12, 2002

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Insurer Services

Application to change the name of PRUDENTIAL DENTAL MAINTENANCE ORGANIZATION, INC., to AETNA DENTAL MAINTENANCE ORGANIZATION, INC., a domestic HEALTH MAINTENANCE ORGANIZATION (HMO). The home office is in Houston, Texas.

Application for admission to the State of Texas by UNITED NATIONAL CASUALTY INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Hammond, Indiana.

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-200205281
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 14, 2002

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by The Standard Fire Insurance Company proposing to use rates for their Dwelling Fire and Allied Program 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 percentage of +56% for all territories and all classifications on dwelling fire and extended coverage. The overall rate change is +20.0%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

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 September 6, 2002.

TRD-200205196
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 9, 2002

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Notice

Notice is given to the public of the application of the listed small employer carrier to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carrier has applied to be a risk-assuming carrier:

USAble Life Insurance Company.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal and Compliance Division--Jimmy G. Atkins, 333 Guadalupe, Hobby Tower 1, 9th Floor, Austin, Texas.

If you wish to comment on the application to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 302-3A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to be a risk-assuming carrier.

TRD-200205250
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 12, 2002

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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 MedSolutions of Texas, Inc., (doing business under the assumed name of RAD MSO of Texas, Inc.), a foreign third party administrator. The home office is Franklin, Tennessee.

Application for admission to Texas of Foresight, Inc., a foreign third party administrator. The home office is Norman, Oklahoma.

Application for incorporation in Texas of ERN Holdings, Inc., a domestic third party administrator. The home office is Fort Worth, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200205290
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: August 14, 2002

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Texas Lottery Commission

Instant Game No. 259 "Gold Rush"

1.0 Name and Style of Game.

A. The name of Instant Game No. 259 is "GOLD RUSH". The play style "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 259 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 259.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000, and MINER'S PICK SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 259 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SEV
08	EGT
09	NIN
10	TEN
11	ELVN
12	TWLV
13	THRTN
14	FRTN
15	FIFTN
MINER'S PICK SYMBOL	PICK

Table 2 of this section.

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 259 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
THR	$3.00
FIV	$5.00
TEN	$10.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $5.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $400.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (259), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 259-0000001-000.

L. Pack - A pack of "GOLD RUSH" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000 to 004 will be on the top page; tickets 005 to 009 will be on the next page and so on; tickets 245 to 249 will be on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "GOLD RUSH" Instant Game No. 259 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "GOLD RUSH" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) play symbols. If any of the player's YOUR NUMBERS match either of the WINNING NUMBERS, the player will win the prize shown beside that number. If the player finds a Miner's Pick symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. No duplicate non-winning prize symbols on a ticket.

C. No duplicate non-winning Your Numbers on a ticket.

D. No duplicate Winning Numbers on a ticket.

E. The auto win symbol will never appear as the Winning Number.

2.3 Procedure for Claiming Prizes.

A. To claim a "GOLD RUSH" Instant Game prize of $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $100, or $400, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $400 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "GOLD RUSH" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "GOLD RUSH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "GOLD RUSH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "GOLD RUSH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 11,698,500 tickets in the Instant Game No. 259. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 259 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,333,527	8.77
$2	515,013	22.71
$3	327,591	35.71
$5	280,854	41.65
$10	58,440	200.18
$20	23,373	500.51
$50	17,626	663.71
$100	2,447	4,780.75
$400	99	118,166.67
$1,000	48	243,718.75

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.57. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 259 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 259, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205186

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 9, 2002

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Instant Game No. 307 "Fast 5's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 307 is "FAST 5'S". The play style "add up with legend".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 307 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 307.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 307 - 1.2D

PLAY SYMBOL	CAPTION
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV

Table 2 of this section.

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 307 - 1.2E

CODE	PRIZE
TWO	$2.00
THR	$3.00
FIV	$5.00
TEN	$10.00
FTN	$15.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $15.00.

H. Mid-Tier Prize - A prize of $25.00, $55.00, $75.00, $155, or $555.

I. High-Tier Prize - A prize of $15,555.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (307), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 307-0000001-000.

L. Pack - A pack of "FAST 5'S" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000 and 001 will be on the top page, tickets 002 and 003 will be on the next page and so forth and tickets 248 and 249 will be on the last page. Please note the books will be in an A-B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "FAST 5'S" Instant Game No. 307 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "FAST 5'S" Instant Game is determined once the latex on the ticket is scratched off to expose 15 (fifteen) play symbols. The player must count the number of "5" symbol and look at the prize legend to see the prize won. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 15 (fifteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 15 (fifteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 15 (fifteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 15 (fifteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. There will be no occurrence of 3 or more non-winning play symbols on a ticket.

B. There will always be at least one "5" symbol on a ticket.

C. There will be no more than twelve "5" symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "FAST 5'S" Instant Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $25.00, $55.00, $75.00, $155, or $555, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $55.00, $75.00, $155, or $555 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "FAST 5'S" Instant Game prize of $15,555, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "FAST 5'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "FAST 5'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "FAST 5'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,077,250 tickets in the Instant Game No. 307. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 307 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	1,007,822	10.00
$3	604,732	16.66
$5	282,008	35.73
$10	120,980	83.30
$15	80,602	125.02
$25	40,309	250.00
$55	20,174	499.52
$75	10,049	1,002.81
$155	5,874	1,715.57
$555	2,530	3,983.10
$15,555	15	671,816.67

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.63. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 307 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 307, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205187
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 9, 2002

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Instant Game No. 314 "Witch's Riches"

1.0 Name and Style of Game.

A. The name of Instant Game No. 314 is "WITCH'S RICHES". The play style "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 314 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 314.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, $100, $1,000, and WITCH'S HAT SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 314 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU
WITCH'S HAT SYMBOL	AUTO

Table 2 of this section.

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 314 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $40.00 or $100.

I. High-Tier Prize - A prize of $1,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (314), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 314-0000001-000.

L. Pack - A pack of "WITCH'S RICHES" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the first page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "WITCH'S RICHES" Instant Game No. 314 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WITCH'S RICHES" Instant Game is determined once the latex on the ticket is scratched off to expose nine (9) play symbols. The player matches any the YOUR NUMBERS to the WITCH'S NUMBERS, the player will win the prize shown for that number. If the player gets a witch's hat symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly nine (9) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly nine (9) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the nine (9) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the nine (9) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. There will be no correlation between the Your Numbers play symbols and the prize symbols.

C. No duplicate non-winning Your Number play symbols on a ticket.

D. No duplicate non-winning prize symbols on a ticket.

E. The auto win symbol will never appear more than once on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "WITCH'S RICHES" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $40.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "WITCH'S RICHES" Instant Game prize of $1,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "WITCH'S RICHES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "WITCH'S RICHES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "WITCH'S RICHES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in

these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,127,000 tickets in the Instant Game No. 314. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 314 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,215,382	8.33
$2	445,454	22.73
$4	283,395	35.73
$5	80,938	125.12
$10	60,878	166.35
$20	40,508	250.00
$40	19,995	506.48
$100	1,270	7,974.02
$1,000	84	120,559.52

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.71. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 314 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 314, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205188
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 9, 2002

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Instant Game No. 317 "9's In A Line"

1.0 Name and Style of Game.

A. The name of Instant Game No. 317 is "9'S IN A LINE". The play style is "row, column, diagonal".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 317 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 317.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 2,

3, 4, 5, 6, 7, 8, 9, $1.00, $2.00, $3.00, $9.00, $19.00, $49.00, $99.00, $199, and $900.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 317 - 1.2D

PLAY SYMBOL	CAPTION
2	
3	
4	
5	
6	
7	
8	
9	
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$9.00	NINE$
$19.00	NINTN
$49.00	FRYNIN
$99.00	NTYNIN
$199	ONNYNN
$900	NINHUN

Table 2 of this section.

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 317 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
THR	$3.00
NIN	$9.00
NNT	$19.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $9.00, or $19.00.

H. Mid-Tier Prize - A prize of $49.00, $99.00, or $199.

I. High-Tier Prize - A prize of $900.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (317), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be : 317-0000001-000.

L. Pack - A pack of "9'S IN A LINE" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000 - 004 will be on the top page and tickets 005 - 009 will be on the next page and so forth with tickets 245 - 249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "9'S IN A LINE" Instant Game No. 317 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "9'S IN A LINE" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) play symbols. If a player finds three 9's in any one row, column, or diagonal, the player wins the prize. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. No ticket will contain 3 or more of a kind other than the 9 symbol.

B. Consecutive non-winning tickets will not have identical play data, spot for spot.

C. Every ticket will contain at least four 9's. The overall usage for the remaining play symbols will be approximately even.

2.3 Procedure for Claiming Prizes.

A. To claim a "9'S IN A LINE" Instant Game prize of $1.00, $2.00, $3.00, $9.00, $19.00, $49.00, $99.00, or $199, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $99 or $199 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "9'S IN A LINE" Instant Game prize of $900, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "9'S IN A LINE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "9'S IN A LINE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "9'S IN A LINE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 11,676,250 tickets in the Instant Game No. 317. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 317 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,167,635	10.00
$2	793,980	14.71
$3	373,466	31.26
$9	93,468	124.92
$19	46,705	250.00
$49	13,858	842.56
$99	3,285	3,554.41
$199	1,569	7,441.84
$900	98	119,145.41

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.68. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 317 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 317, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205189

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 9, 2002

♦ ♦ ♦

Instant Game No. 711 "Royale Riches"

This game procedure is amended to reflect changes to the number of tickets in the game, the number of prizes available for each prize level, and the odds of winning for each prize level. This amended game procedure supersedes the game procedure for this game that was published in the July 5, 2002 *Texas Register*.

1.0 Name and Style of Game.

A. The name of Instant Game No. 711 is "ROYALE RICHES". The play style in Game 1 is "beat score". The play style in Game 2 is "match

3". The play style in Game 3 is "key number match". The play style in Game 4 is "add up".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 711 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 711.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: A, K, Q, J, 10, 9, 8, 7, 6, 5, 4, 3, 2, 1, $5.00, $10.00, $25.00, $50.00, $100, $500, $1,000, $5,000, $50,000, GOLD BAR SYMBOL, MONEY BAG SYMBOL, STACK OF BILLS SYMBOL, DOLLAR SIGN SYMBOL, CHIP SYMBOL, STACK OF COINS SYMBOL, POT OF GOLD SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 711 - 1.2D

PLAY SYMBOL	CAPTION
A	ACE
K	KNG
Q	QUN
J	JCK
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
$5.00	FIVE$
$10.00	TEN$
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
GOLD BAR SYMBOL	GOLD
MONEY BAG SYMBOL	$BAG
STACK OF BILLS SYMBOL	BILLS
DOLLAR SIGN SYMBOL	MONEY
CHIP SYMBOL	CHIP
STACK OF COINS SYMBOL	STACK
POT OF GOLD SYMBOL	POTGLD

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Table 2 of this section.

Figure 2: GAME NO. 711 - 1.2E

CODE	PRIZE
$5.00	FIV
$10.00	TEN
$15.00	FTN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $25.00, $50.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, or $50,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (711), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 711-0000001-000.

L. Pack - A pack of "ROYALE RICHES" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074, while the other fold will show the back of ticket 000 and front of 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ROYALE RICHES" Instant Game No. 711 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "ROYALE RICHES" Instant Game is determined once the latex on the ticket is scratched off to expose 40 (forty) play symbols. In the Beat The Dealer section, if the player's YOUR CARD beats the DEALER'S CARD in the same game, the player will win the prize shown for that game. Aces are high. In the Match Up section, if the player matches 3 symbols across the same row, the player will win the prize shown. In the Lucky Wheel section, if the player matches the YOUR LUCKY DOLLAR AMOUNTS to the PRIZE AMOUNT in the center, the player will win that prize. In the 7-11 section, if the player's dice add up to 7 or 11 in the same roll, the player will win the prize for that roll. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 40 (forty) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 40 (forty) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 40 (forty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 40 (forty) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. In the Beat The Dealer section, there will never be 3 or more like card symbols in the 8 play spots.

C. In the Beat The Dealer section, there will be no duplicate non-winning prize symbols.

D. In the Beat The Dealer section, there will be no ties in a game.

E. In the Match Up section, there will be no duplicate non-winning games on a ticket in any order.

F. In the Match Up section, there will be no 3 or more like non-winning symbols on the ticket.

G. In the Lucky Wheel section, there will be no duplicate non-winning Your Lucky Dollar Amounts.

H. In the 7-11 section, there will be no duplicate non-winning rolls in any order.

2.3 Procedure for Claiming Prizes.

A. To claim a "ROYALE RICHES" Instant Game prize $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, and $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "ROYALE RICHES" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "ROYALE RICHES" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ROYALE RICHES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "ROYALE RICHES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,054,600 tickets in the Instant Game No. 711. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 711 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5	580,459	5.26
$10	295,219	10.35
$15	71,285	42.85
$20	40,728	75.00
$25	20,197	151.24
$50	8,684	351.75
$100	4,213	725.04
$500	763	4,003.41
$1,000	179	17,064.80
$5,000	15	203,640.00
$50,000	4	763,650.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 2.99. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 711 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 711, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205273
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 13, 2002

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Instant Game No. 712 "Magic Numbers"

1.0 Name and Style of Game.

A. The name of Instant Game No. 712 is "MAGIC NUMBERS". The play style in Game 1 is "match 3". The play style in Game 2 is "beat score". The play style in Game 3 is "key number match with auto win". The play style in Game 4 is "column, row, diagonal". The play style in Game 5 is "match 3". The play style in Game 6 is "add up".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 712 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 712.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, $5.00, $10.00, $25.00, $50.00, $100, $500, $1,000, $40,000, and STAR SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 712 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
$5.00	FIVE$
$10.00	TEN$
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$40,000	40 THOU
7	
STAR SYMBOL	AUTO

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are: Table 2 of this section.

Figure 2: GAME NO. 712 - 1.2E

CODE	PRIZE
$5.00	FIV
$10.00	TEN
$15.00	FTN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $25.00, $50.00, $100, $200, or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, or $40,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (712), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 712-0000001-000.

L. Pack - A pack of "MAGIC NUMBERS" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074, while the other fold will show the back of ticket 000 and front of 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MAGIC NUMBERS" Instant Game No. 712 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MAGIC NUMBERS" Instant Game is determined once the latex on the ticket is scratched off to expose 36 (thirty-six) play symbols. In Game 1, if the player matches 3 like amounts, the player will win that amount. In Game 2, if the player's YOUR SCORE beats THEIR SCORE in any one row across, the player will win the prize shown for that row. In Game 3, if the player matches any of YOUR NUMBERS to the LUCKY NUMBER, the player will win the prize shown. If the player gets a star symbol, the player will win that prize automatically. In Game 4, if the player gets 3 7 symbols in the same row, column or diagonal, the player will win the prize shown. In Game 5, if the player gets three like numbers, the player will win the prize shown. In Game 6, if the 2 numbers add up to exactly 10, the player will win $10. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 36 (thirty-six) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 36 (thirty-six) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 36 (thirty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 36 (thirty-six) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. In Game 1, there will be no four or more of a kind.

C. In Game 2, there will be no duplicate non-winning Your Score play symbols.

D. In Game 2, there will be no duplicate non-winning Their Score play symbols.

E. In Game 2, there will be no duplicate non-winning prize symbols.

F. In Game 2, there will be no ties within a row.

G. In Game 3, non-winning prize symbols will never be the same as the winning prize symbol.

H. In Game 3, there will be no duplicate non-winning prize symbols.

I. In Game 3, there will be no duplicate Your Number on a ticket.

J. In Game 3, no prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e. 5 and $5).

K. In Game 4, there will be no more than one occurrence of three 7 symbols in a row, column or diagonal on ticket.

L. In Game 4, there will never be 3 symbols in the same row, column or diagonal line with the exception of the 7 symbol.

M. In Game 4, there will be at least 4 sevens in every game.

N. Game 5 may only win once.

O. In Game 5, there will be no 4 or more like play symbols.

P. In Game 6, the sum of the 2 numbers will never total less than 4 or more than 15.

2.3 Procedure for Claiming Prizes.

A. To claim a "MAGIC NUMBERS" Instant Game prize $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $200, and $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $200, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MAGIC NUMBERS" Instant Game prize of $1,000, $5,000 or $40,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MAGIC NUMBERS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MAGIC NUMBERS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MAGIC NUMBERS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,054,075 tickets in the Instant Game No. 712. The approximate number and value of prizes in the game are as follows:

Table 3 of this section

Figure 3: GAME NO. 712 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5	509,189	6.00
$10	193,226	15.81
$15	122,180	25.00
$20	61,124	49.97
$25	30,912	98.80
$50	15,574	196.10
$100	4,109	743.26
$200	105	29,086.43
$500	105	29,086.43
$1,000	100	30,540.75
$5,000	10	305,407.50
$40,000	5	610,815.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.26. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 712 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 712, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200205274
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: August 13, 2002

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Texas Natural Resource Conservation Commission

Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit

For The Period of August 8, 2002

APPLICATION Regional Land Management Services, LTD. has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit for the Ponderosa Regional Landfill, a Type I municipal solid waste landfill. The facility is located on State Highway 359 appoximately 11 miles east of the intersection of State Highway 359 and Loop 20 and approximately 8 miles east of the city limits of the city of Laredo in Webb County, Texas. This application was submitted to the TNRCC on July 3, 2000.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision to issue this draft permit. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Laredo Public Library located at 1120 East Calton Road in Laredo, Texas.

MAILING LISTS. You may ask to be placed on a mailing list to obtain additional information regarding this application by sending a request to the Office of the Chief Clerk at the address below. You may also ask to be on a county-wide mailing list to receive public notices for TNRCC permits in the county.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comment or to ask questions about the application. The TNRCC will hold

a public meeting if the executive director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

You may submit additional written public comment to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 30 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or who requested to be on a mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court. A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from Regional Land Management Services, LTD. at P.O. Box 333, Laredo, Texas 78042 or by calling Mr. Roberto Trevino, President, at (956) 723- 3333.

TRD-200205269
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Notice of Application for Industrial Waste Permit/Compliance Plan

For the period of August 5, 2002

APPLICATION. BAYER CORPORATION (Baytown), located at 8500 West Bay Road, on a 727 acre tract of land near the City of Baytown, Chambers County Texas, approximately one- half mile south of the intersection of FM 565 and West Bay Road, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for renewal of hazardous waste permit (Permit No. HW-50173) and renewal of compliance plan (Compliance Plan No. CP-50173). The permit would authorize closure for a container storage area, incinerator feed tank and a carbon regeneration unit, and post-closure care for three closed surface impoundments closed as landfills. The compliance plan renewal authorizes and requires the permittee to continue to monitor the concentration of hazardous constituents in ground water and to remediate ground-water quality to specified standards.

The Executive Director of the TNRCC has prepared a draft permit and compliance plan which, if approved, would establish the conditions under which the facility must operate. The facility is located in an area subject to the Coastal Management Program (CMP). The Executive Director has reviewed this action for consistency with the goals and policies of the CMP in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

This notice satisfies the requirements of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S. 6901 et seq. and 40 CFR 124.10. Once the final permit and compliance plan decisions of the TNRCC and U.S. Environmental Protection Agency (EPA) are effective regarding this facility, they will implement the requirements of RCRA as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). The final permit and compliance plan decision will also implement the federally authorized State requirements. The TNRCC and EPA have entered into a joint permitting agreement whereby permits will be issued in Texas in accordance with the Texas Solid Waste Disposal Act, Texas Health and Safety Code Ann., Chapter 361 and RCRA, as amended. In order for the applicant to have a fully effective RCRA permit, both the TNRCC and EPA must issue the permit. All permit provisions are fully enforceable under State and Federal law. The State of Texas has not received full HSWA authority. Areas in which the TNRCC has not been authorized by EPA are denoted in the draft permit with an asterisk (*). Persons wishing to comment or request a hearing on a HSWA requirement denoted with an asterisk (*) in the draft permit should also notify in writing, Chief, RCRA Permits Branch, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733. EPA will accept hearing requests submitted to the TNRCC.

PUBLIC COMMENT / PUBLIC MEETING. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk at the address provided in the information section below, within 45 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application or if requested in writing by an affected person within 45 days of the date of newspaper publication of the notice.

CONTESTED CASE HEARING. The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 45 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed.

To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the granting of the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit your proposed adjustments to the application/permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

INFORMATION. Written hearing requests, public comments, or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Office of Public Interest Counsel, MC 103, the same address as above. Individual members of the general public may contact the Office of Public Assistance, c/o Office of the Chief Clerk, at the address above, or by calling 1-800-687-4040 to: (a) review or obtain copies of available documents (such as draft permit, technical summary, and application); (b) inquire about the information in this notice; or (a) inquire about other agency permit applications or permitting processes. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200205270
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (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 commission 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 the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 30, 2002**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission 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 proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 30, 2002**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's 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 commission in **writing**.

(1) COMPANY: 2001-Zee Manufacturing Company, Inc.; DOCKET NUMBER: 2002-0678- AIR-E; IDENTIFIER: Air Account Number BG-0539-U; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: wood cabinet manufacturing; RULE VIOLATED: 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Malcolm Ferris, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Advanced Drainage Systems, Incorporated; DOCKET NUMBER: 2002-0151- AIR-E; IDENTIFIER: Air Account Number ED-0288-E; LOCATION: Ennis, Ellis County, Texas; TYPE OF FACILITY: high density polyethylene pipe manufacturing; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to prevent dust emissions from the plant creating a nuisance condition to off-site receptors; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Amerada Hess Corporation; DOCKET NUMBER: 2001-0742-AIR-E; IDENTIFIER: Air Account Number GA-0085-T; LOCATION: Seminole, Gaines County, Texas; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.115(c), Air Permit Numbers 9235 and PSD-TX-485M1, and THSC, §382.085(b), by failing to comply with the permitted hourly emission rate of 149 pounds per hour (lbs/hr) of Sulfur Dioxide (SO2) from emission point numbers (EPN's) E4-A and E4-B; 30 TAC §122.145(2)(c) and THSC, §382.085(b), by failing to submit a deviation report; 30 TAC §122.143(4), Title 5 Federal Operating Permit Number O-00625, and THSC §382.085(b), by failing to comply with the permitted hourly emission rate of 149 lbs/hr SO2 from EPN's E4-A and E4-B; and THSC, §382.085(a), by allowing unauthorized releases of SO2 into the atmosphere; PENALTY: $55,924; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(4) COMPANY: Archer Daniels Midland Co. dba Southern Cotton Oil Company; DOCKET NUMBER: 2002-0177-AIR-E; IDENTIFIER: Air Account Number ND-0026-L and Air Permit Number O-01114; LOCATION: Sweetwater, Nolan County, Texas; TYPE OF FACILITY: cotton seed production plant; RULE VIOLATED: 30 TAC §122.145(2) and §122.146(2), and THSC, §382.085(b), by failing to submit an annual permit compliance certification and semi-annual deviation reports; PENALTY: $1,500; ENFORCEMENT COORDINATOR: George Ortiz, (915) 698- 9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(5) COMPANY: BP Products North America, Inc.; DOCKET NUMBER: 2002-0524-IWD-E; IDENTIFIER: Texas Pollution Discharge Elimination System (TPDES) Permit Number 00443-003A; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: cotton seed production plant; RULE VIOLATED: 30 TAC § 305.125(1), TPDES Permit Number 00443-003A, and the Code, §26.121, by failing to comply with its permitted effluent limits; PENALTY: $10,000; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468' REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: King K. Cole, Inc.; DOCKET NUMBER: 2002-0650-PST-E; IDENTIFIER: Enforcement Identification Number 17542; LOCATION: Centerville, Leon County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: Richard Carrol dba D and R Metal Finishing; DOCKET NUMBER: 2002- 0399-AIR-E; IDENTIFIER: Air Account Number HG-1790-Q; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: metal coatings plant; RULE VIOLATED: 30 TAC §116.115(c), Permit Number S-18193, and THSC, §382.085(b), by failing to operate within permitted usage rates for abrasive materials and keep records of hours of production and usage; and 30 TAC

§101.10 and THSC, §382.085(b), by failing to submit an emissions inventory questionnaire; PENALTY: $6,375; ENFORCEMENT COORDINATOR: Jonathan Walling, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: East Texas Petroleum Company, Inc.; DOCKET NUMBER: 2002-0807-PST-E; IDENTIFIER: Enforcement Identification Number 17756; LOCATION: Lamesa, Dawson County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Dan Landenberger, (915) 570-1359; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(9) COMPANY: El Paso Field Services, L.P.; DOCKET NUMBER: 2002-0491-AIR-E; IDENTIFIER: Air Account Number BL-0265-H; LOCATION: near Boling, Brazoria County, Texas; TYPE OF FACILITY: natural gas transmission station; RULE VIOLATED: 30 TAC §101.20(1) and §122.143, 40 Code of Federal Regulations (CFR) §60.334(b)(2), and THSC, §382.085(b), by failing to conduct daily monitoring and record the sulfur and nitrogen content of the fuel; PENALTY: $720; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2002-0514-PST-E; IDENTIFIER: PST Facility Identification Number 0066438; LOCATION: League City, Galveston County, Texas; TYPE OF FACILITY: retail gasoline station; RULE VIOLATED: 30 TAC §115.242(3)(B) and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system and replace the crimped vapor hose; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Exxon-Mobil Corporation; DOCKET NUMBER: 2002-0419-PST-E; IDENTIFIER: PST Facility Identification Number 0026584; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: retail gasoline station; RULE VIOLATED: 30 TAC §115.246(5) and THSC, §382.085(b), by failing to maintain a record of results of testing performed at the station; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: E-Z International Inc. dba E-Z Mart #6; DOCKET NUMBER: 2002-0658- PST-E; IDENTIFIER: PST Facility Identification Number 0038845; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial assurance; PENALTY: $720; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Flying J, Inc. dba Flying J Travel Plaza; DOCKET NUMBER: 2002-0566- AIR-E; IDENTIFIER: Air Account Number EE-0793-V; LOCATION: Anthony, El Paso County, Texas; TYPE OF FACILITY: gasoline dispensing; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline with a Reid vapor pressure (RVP) greater than seven pounds per square inch absolute (psia); PENALTY: $800; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(14) COMPANY: George West Truck Stop, Inc.; DOCKET NUMBER: 2002-0180-PST-E; IDENTIFIER: PST Facility Identification Number 12038; LOCATION: George West, Live Oak County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475, by failing to provide proper release detection and test a line leak detector; and 30 TAC §334.48(c), by failing to conduct appropriate inventory control procedures; PENALTY: $0; ENFORCEMENT COORDINATOR: Ed Moderow, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: Gidden Distributing, Inc.; DOCKET NUMBER: 2002-0503-PST-E; IDENTIFIER: PST Facility Identification Number 16476; LOCATION: Temple, Bell County, Texas; TYPE OF FACILITY: beer distribution; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to accurately complete and submit the UST registration and self-certification form and provide the common carrier with a copy of a valid, current delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, Waco, Texas 76710- 7826, (254) 751-0335.

(16) COMPANY: Go-Crete; DOCKET NUMBER: 2002-0572-PST-E; IDENTIFIER: PST Facility Identification Number 1238; LOCATION: DeSoto, Dallas County, Texas; TYPE OF FACILITY: concrete batch plant; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), and the Code, §26.346(a), by failing to complete a UST registration and self-certification form in a timely manner; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; and 30 TAC §334.21, by failing to pay outstanding UST fees; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Guardian Industries Corporation; DOCKET NUMBER: 2002-0717-AIR-E; IDENTIFIER: Air Account Number NB-0014-R; LOCATION: Corsicana, Navarro County, Texas; TYPE OF FACILITY: flat glass manufacturing; RULE VIOLATED: 30 TAC §122.146(1) and (2), Federal Operating Permit Number O-01091, and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Hardin Independent School District; DOCKET NUMBER: 2002-0493-MWD- E; IDENTIFIER: TPDES Permit Number 13135-001; LOCATION: Hardin, Liberty County, Texas; TYPE OF FACILITY: school district; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 13135-001, and the Code, §26.121, by failing to comply with the permitted effluent limits for total suspended solids and biochemical oxygen demand; 30 TAC §317.4(a)(8), by failing to test the backflow prevention device annually; and 30 TAC §319.11(b), by failing to utilize non- expired diethyl-phenylenediamine packets in the total chlorine analysis; PENALTY: $8,750; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 77-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: Micheul Hudman; DOCKET NUMBER: 2002-0198-OSI-E; IDENTIFIER: On-Site Sewage Facility (OSSF) Installer Number OS3171; LOCATION: Abilene and Putnam; Taylor

and Callahan Counties, Texas; TYPE OF FACILITY: septic system installer; RULE VIOLATED: 30 TAC §285.58(a)(3), (9), and (11) (now 30 TAC §285.61(4), (5), and (10)) and THSC, §366.051 and §366.054, by failing to obtain proof of a permit prior to installation of an OSSF, be present at the job site at least once each work day to supervise and verify the work performed, and notify the permitting authority of the date on which the installation of an OSSF would begin; PENALTY: $600; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(20) COMPANY: Imperial Sugar Company; DOCKET NUMBER: 2002-0396-PST-E; IDENTIFIER: PST Facility Identification Number 0009901; LOCATION: Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: sugar mill; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to submit a UST registration and self-certification form and make available to a common carrier a valid, current delivery certificate; PENALTY: $6,800; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: KMKA Corporation dba Speedy Food Mart; DOCKET NUMBER: 2002- 0337-PST-E; IDENTIFIER: PST Facility Identification Number 0061693; LOCATION: Friendswood, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases; 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial assurance; and 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to submit a UST registration and self-certification form; PENALTY: $5,600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: Kendall County; DOCKET NUMBER: 2002-0427-MLM-E; IDENTIFIER: PST Facility Identification Number 004190; LOCATION: Boerne, Kendall County, Texas; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A)(i) and (ii), and (2)(A)(i)(III) and (ii)(I), and the Code, §26.3475, by failing to ensure that release detection is provided for the UST system, monitor the USTs for releases, perform the annual line leak detector performance and operational reliability test, and monitor the piping of all three USTs; 30 TAC §334.49(b) and the Code, §26.3475, by failing to provide corrosion protection; 30 TAC §37.835(b) and the Code, §26.352, by failing to have an insurance endorsement or certificate worded as specified in the rule; 30 TAC §334.8(c)(4)(B) and (5)(C), and the Code, §26.346(a), by failing to accurately complete the UST registration and self-certification form and tag, label, or mark each UST with the proper identification numbers; and 30 TAC §324.1 and 40 CFR §279.22(c), by failing to label or mark the used oil storage tank; PENALTY: $5,830; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(23) COMPANY: Oil Patch Brazos Valley Inc.; DOCKET NUMBER: 2002-0397-PST-E; IDENTIFIER: Enforcement Identification Number 17770; LOCATION: Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner had a valid, current delivery certificate; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Parkway Utility District; DOCKET NUMBER: 2002-0536-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1010750; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(m)(4), by failing to maintain all water storage facilities and related appurtenances in a watertight condition; PENALTY: $938; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Rohail Enterprises, Inc. dba Speedy Stop; DOCKET NUMBER: 2001-1361- PST-E; IDENTIFIER: PST Facility Identification Number 0035389; LOCATION: Stafford, Fort Bend County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to submit a UST registration and self-certification form and make available to a common carrier a valid, current delivery certificate; 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; and 30 TAC §334.22(a), by failing to pay outstanding UST fees and associated late fees; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

(26) COMPANY: Saint-Gobain Vetrotex America, Inc.; DOCKET NUMBER: 2002-1076-AIR- E; IDENTIFIER: Air Account Number WH-0014-S; LOCATION: Wichita Falls, Wichita County, Texas; TYPE OF FACILITY: glass fiber manufacturing; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 5667, and THSC, §382.085(b), by failing to comply with the permitted particulate matter emissions limit of 50 lbs/hr; PENALTY: $13,125; ENFORCEMENT COORDINATOR: Carolyn Easley, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(27) COMPANY: San Antonio Independent School District; DOCKET NUMBER: 2002-0028- PST-E; IDENTIFIER: PST Facility Identification Number 03073; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: school vehicle maintenance and refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to ensure that the UST registration and self-certification form is fully and accurately completed and submitted and make available to a common carrier a valid, current delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility; PENALTY: $6,400; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(28) COMPANY: Spidle & Spidle, Inc.; DOCKET NUMBER: 2002-0315-PST-E; IDENTIFIER: Enforcement Identification Number 17679; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: transporter of petroleum products; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892 (409) 898-3838.

(29) COMPANY: Sunny and Johanna Phung dba Sunny's Texaco and Insik Kim; DOCKET NUMBER: 2002-0253-PST-E; IDENTIFIER: PST Facility Identification Number 55071; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: underground storage tanks; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III), by failing to test a line link detector for performance and reliability; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Edward Moderow, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503 (361) 825-3100.

(30) COMPANY: Clara Gates dba The Morales Store; DOCKET NUMBER: 2001-1164-PST-E; IDENTIFIER: PST Facility Identification Number 1392; LOCATION: Edna, Jackson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to obtain a valid, current delivery certificate and make available to a common carrier a valid, current delivery certificate; and 30 TAC §334.48(c), by failing to conduct inventory control; PENALTY: $600; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503 (361) 825-3100.

(31) COMPANY: The Wonder Company; DOCKET NUMBER: 2001-1559-IWD-E; IDENTIFIER: TPDES Permit Number 02901; LOCATION: New Willard, Polk County, Texas; TYPE OF FACILITY: potting soil manufacturing; RULE VIOLATED: 30 TAC §§305.125(1), (5), and (11)(B) and (C), 319.7(d) and 319.11(b), TPDES Permit Number 02901, and the Code, §26.121(a)(1), by failing to prevent unauthorized discharges of wastewater, properly operate and maintain all systems of collection, treatment, and disposal, report effluent violations, maintain a log of inspections and maintenance of the gabion filtration system, properly operate and maintain all systems of collection, treatment, and disposal, maintain accurate and complete records of monitoring activities, submit monthly effluent reports, and use an approved method of pH analysis; PENALTY: $14,963; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892 (409) 898-3838.

(32) COMPANY: Travel Mart, Inc.; DOCKET NUMBER: 2002-0111-PST-E; IDENTIFIER: PST Facility Identification Number 0010748; LOCATION: Sinton, San Patricio County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815, by failing to demonstrate the required financial responsibility; 30 TAC §334.50(b)(1)(A) and (2), and the Code, §26.3475(c), by failing to monitor USTs for releases and monitor the piping of the UST system; 30 TAC §334.7(d)(3) and the Code, §26.346(a), by failing to provide an amended registration for any change or additional information regarding USTs; 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to provide corrosion protection; and 30 TAC §334.21, by failing to pay annual PST fees; PENALTY: $600; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503 (361) 825-3100.

(33) COMPANY: Try Transportation, Incorporated; DOCKET NUMBER: 2002-0143-AIR-E; IDENTIFIER: Air Account Number EE-1692-V; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by allowing the transfer of gasoline from a storage vessel with a RVP greater than seven psia; PENALTY: $600; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206 (915) 834-4949.

(34) COMPANY: Upper Valley Materials dba Tabasco Rock Crushing Plant; DOCKET NUMBER: 2002-0380-AIR-E; IDENTIFIER: Air Account Number HN-0258-S; LOCATION: Penitas, Hidalgo County, Texas; TYPE OF FACILITY: rock crusher; RULE VIOLATED: 30 TAC §116.116(b) and THSC, §382.085(b), by failing to obtain a permit amendment; PENALTY: $2,160; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Hidalgo, Texas 78550-5247 (956) 425-6010.

(35) COMPANY: Victoria County WCID No. 2; DOCKET NUMBER: 2002-0551-PWS-E; IDENTIFIER: PWS Number 2350006; LOCATION: Placedo, Victoria County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1) and (r), by failing to institute special precautions during the low distribution pressure and water outage and provide a minimum pressure of 20 psi throughout the distribution system; PENALTY: $400; ENFORCEMENT COORDINATOR: Edward Moderow, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503 (361) 825-3100.

(36) COMPANY: Jerry W. Waller dba Jerry Waller Tire Service; DOCKET NUMBER: 2002- 0229-MSW-E; IDENTIFIER: Scrap Tire Transporter Registration Number 26486; LOCATION: Seagoville, Dallas County, Texas; TYPE OF FACILITY: scrap tire generator, transporter and storage business; RULE VIOLATED: 30 TAC §328.56(d)(2), (3), and (4), by failing to obtain a scrap tire storage site registration, sort, mark, classify, and arrange in an organized manner all good used tires for resale, and provide measures to control mosquitos and other vectors; PENALTY: $3,000; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951 (817) 588-5800.

(37) COMPANY: Western Gas Resources, Inc.; DOCKET NUMBER: 2002-0235-AIR-E; IDENTIFIER: Air Account Number RC-0004-K; LOCATION: near Midkiff, Reagan County, Texas; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §106.264(7) and THSC, §382.085(b), by failing to register the replacement-in-kind engines B-10 and B-11; 30 TAC §116.115(c) and THSC, §382.085(b), by failing to comply with special provision number one of Permit 19592 by exceeding the maximum operating hours of 44 and 4380 hours per year for the flare and Source 80 heater; 30 TAC §111.111(a)(4)(A)(ii) and THSC, §382.085(b), by failing to keep a visible emissions flare log for process filters; and 30 TAC §122.145 and THSC, §382.085(b), by failing to report deviations; PENALTY: $25,000; ENFORCEMENT COORDINATOR: Mark Newman, (915) 655-9479; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013 (915) 655-9479.

(38) COMPANY: Ysleta Del Sur Pueblo; DOCKET NUMBER: 2002-0200-AIR-E; IDENTIFIER: Air Account Number EE-2253-V; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by having accepted the delivery of gasoline with a RVP greater than seven psia; PENALTY: $800; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901- 1206 (915) 834-4949.

TRD-200205256
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Notice of Water Quality Applications

The following notices were issued during the period of July 30, 2002 through August 12, 2002.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CITY OF ANNA has applied for a major amendment to TPDES Permit No. 11283-001 to authorize an increase in the discharge of treated

domestic wastewater from a daily average flow not to exceed 250,000 gallons per day to a daily average flow not to exceed 750,000 gallons per day and to add a new outfall. The facility is located approximately 4,000 feet west of State Highway 5 and 4,600 feet south of Farm-to-Market Road 455 in Collin County, Texas.

CITY OF ARANSAS PASS has applied for a renewal of TPDES Permit No. 10521-002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,600,000 gallons per day. The facility is located at 527 Ransom Island Road, approximately 1/2 mile east of State Highway 361 in the City of Aransas Pass in San Patricio County, Texas.

AUS-TEX PARTS & SERVICE, LTD. has applied for a renewal of TPDES Permit No. 14060- 001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 123,750 gallons per day. The facility is located approximately 2.6 miles northwest of the intersection of State Highway 21 and County Road 127 in Hays County, Texas. The treated effluent is discharged to an unnamed tributary of Brushy Creek; thence to Brushy Creek; thence to Plum Creek in Segment No. 1810 of the Guadalupe River Basin. The unclassified receiving water uses are no significant aquatic life uses for the unnamed tributary of Brushy Creek. The designated uses for Segment No. 1810 are high aquatic life uses, aquifer protection and contact recreation.

KEITH BLAIR has applied for a renewal of TPDES Permit No. 12960-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located approximately 1.0 mile south of the intersection of Farm-to-Market Road 515 and Farm-to-Market Road 17; approximately 5.0 miles north of the intersection of Farm- to-Market Road 17 and State Highway 182 in Wood County, Texas.

CITY OF BRENHAM has applied for a major amendment to TPDES Permit No. 10388-001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 2,550,000 gallons per day to an annual average flow not to exceed 3,550,000 gallons per day. The proposed amendment requests authorization for marketing and distribution of Class A sewage sludge. The facility is located at 2005 Old Chappell Hill Road, approximately 3,300 feet southeast of the intersection of Farm-to-Market Road 577 and State Highway 105, south of and adjacent to Hog Branch in the City of Brenham in Washington County, Texas. The sludge treatment works will be located in the same site as the wastewater treatment facility.

FAIRVIEW JOINT VENTURE has applied for a renewal of TPDES Permit No. 13806-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 3,500 gallons per day. The facility is located east of U.S. Route 75, one mile south of the intersection of State Route 121 and U.S. Route 75 in Collin County, Texas.

FORT DAVIS WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. 10971-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 123,000 gallons per day. The facility is located one mile south of State Highway 17, approximately 500 feet north of Cemetery Road and 0.5 mile east of Fort Davis in Jeff Davis County, Texas.

CITY OF GOODRICH has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 12711-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 65,000 gallons per day. The plant site is located on the west side of the Southern Pacific Railroad which is approximately 1,200 feet southwest of the intersection of Farm-to-Market Road 393 and U.S. Highway 59 northwest of the City of Goodrich in Polk County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 32 has applied for a major amendment to TPDES Permit No. 13152-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 200,000 gallons per day to a daily average flow not to exceed 650,000 gallons per day. The facility is located approximately 4,500 feet south of the intersection of Farm-to-Market Road 2920 and Kuykendahl Road, approximately 9,500 feet northeast of the intersection of Stuebner Airline Road and Spring Cypress Road in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NUMBERS 166, 257, and 276, has applied for a renewal of TNRCC Permit No. 12474-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 625,000 gallons per day. The facility is located at 16,302 West Little York Road, approximately 3,000 feet west of the intersection of State Highway 6 and West Little York Road in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 374 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14354-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located approximately 1.7 miles south of the intersection of Highway 290 and Spring Cypress Road in Harris County, Texas.

CITY OF KENEDY has applied for a renewal of TPDES Permit No. 10746-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 983,000 gallons per day. The facility is located approximately 500 feet east of Farm-to-Market Road 792 and 600 feet north of Main Street in the City of Kenedy in Karnes County, Texas

MOSCOW WATER SUPPLY CORPORATION has applied for a major amendment to TPDES Permit No. 11139-001 to authorize the relocation of Outfall 001 to Outfall 002. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 600 feet southeast of the intersection of U.S. Highway 59 and Loop 177 in the City of Moscow in Polk County, Texas.

NORTH FOREST MUNICIPAL UTILITY DISTRICT has applied for a renewal of TNRCC Permit No. 10905-001 , which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The plant site is located 16230 Ella Boulevard (formally Medberry Road), approximately 1.4 miles southwest of the intersection of Interstate Highway 45 and Farm-to-Market Road 1960-West in Harris County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 10262-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 1.2 miles south-southwest of the intersection of State Highway 205 Farm-to-Market Road 552 in Rockwall County, Texas.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 6 has applied for a renewal of TPDES Permit No. 11884-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 475,000 gallons per day. The facility is located approximately 1,000 feet north of Greens Bayou and approximately one mile west of Bammel North Houston Road in Harris County, Texas.

RICHARDS INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 13527-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located approximately

550 feet north of Farm-to-Market Road 149 and 1,800 feet west of the Chicago, Rock Island and Pacific Railroad in Grimes County, Texas.

SEBASTIAN MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 13742-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 225,000 gallons per day. The facility is located 1 mile west of U.S. Highway 77 and 1/3 mile south of State Highway 506 in Cameron County, Texas.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. 11915-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,440,000 gallons per day. The facility is located approximately 6 miles northwest of the intersection of U.S. Highways 84 and 79 and Farm-to-Market Road 645, and approximately 2 miles west of the intersection of Farm-to-Market Roads 645 and 3328 in Anderson County, Texas.

CITY OF TRINITY has applied for a Texas Pollutant Discharge Elimination System (TPDES) wastewater permit. The applicant has an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 10617-001. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 610,000 gallons per day. The plant site is located approximately 1,500 feet east-southeast of the intersection of Pegoda Road (Farm-to-Market Road 356) and Ramey Street in southeast Trinity in Trinity County, Texas.

CITY OF WHITESBORO has applied for a major amendment to TPDES Permit No. 10464-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 450,000 gallons per day to a daily average flow not to exceed 900,000 gallons per day. The facility is located on Mineral Creek, approximately 1,000 feet east of U.S. Highway 377 and approximately 0.8 mile north of the intersection of U.S. Highway 82 and 377 in the City of Whitesboro in Grayson County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 10 DAYS OF THE ISSUED DATE OF THIS NOTICE

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to LA JOYA INDEPENDENT SCHOOL DISTRICT, P. O. Box J, La Joya, Texas 78560, to authorize the inclusion of a provision for routing wastewater generated from the kitchen to a grease trap. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,570 gallons per day. The facility is located on Farm-to-Market Road 886, approximately 0.4 mile south of intersection of U. S. Highway 83 and Farm-to-Market Road 886 in Hidalgo County, Texas.

TRD-200205271
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Proposal for Decision

The State Office Administrative Hearing issued a Proposal for Decision and Order to the Texas Natural Resource Conservation Commission on August 8, 2002 Executive Director of the Texas Natural Resource Conservation Commission, Petitioner v. Abid Sheikh dba Pronto's; SOAH Docket No. 582-01-3742; TNRCC Docket No. 2000-0863-PST-E. In the matter to be considered by the Texas Natural Resource Conservation Commission on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105 TNRCC PO Box 13087, Austin Texas 78711-3087. If you have any questions or need assistance, please contact Doug Kitts, Chief Clerk's Office, (512) 239-3317.

TRD-200205268
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Reschedule of Postponed Public Meeting Regarding the Intent to Take No Further Action at the Stoller Chemical Company Proposed State Superfund Site and to Delete the Site from the State Registry

This public notice supersedes the previous public notice regarding the Stoller Chemical deletion from the state Superfund Registry (27 TexReg 6453).

The executive director (ED) of the Texas Natural Resource Conservation Commission (TNRCC or commission) is issuing this public notice of intent to take no further action at the Stoller Chemical Company State Superfund site (the site) and to delete the site from its proposed-for-listing status on the state registry. The state registry is 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. The commission is proposing this deletion because the ED has determined that the site no longer presents such an endangerment due to the removal actions that have been performed at the site.

The site was proposed for listing on the state registry in the July 14, 2000 issue of the *Texas Register* (25 TexReg 6851). The site, including all land, structures, appurtenances, and other improvements is located at 5200 North Columbia Street, Plainview, Hale County, Texas. The site also included any areas where hazardous substances had come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

The Stoller Chemical facility has been inactive since March 1992 when it filed for Chapter 7 bankruptcy. The facility formerly mixed micronutrients for agricultural production. The facility was also illegally used as a container storage area. The facility covers approximately 4.99 acres and includes a warehouse and a fenced storage area and an abandoned cattle trailer that contained leaking drums of hazardous waste. The warehouse includes a former process area equipped with a channel sump system.

In April 1993, the Texas Water Commission (predecessor agency to the TNRCC) inspected and sampled the site. The sample results indicated the site was contaminated with heavy metals and 4,4'-DDE.

On October 24, 1995, TNRCC and United States Environmental Protection Agency (EPA) personnel conducted a preliminary assessment at the site. This assessment identified wastes both inside and outside the warehouse. Inside the warehouse were 11 55-gallon drums and various 5-gallon containers of unknown materials, four pallets of liquid sodium sulfate fertilizer, six pallets of Pelham phosphate, six pallets of liquid sulfur, fertilizer, and kickoff seed treatment. Outside the warehouse in

a fenced area were seven 5,500 - 6,000-gallon storage tanks, and approximately 15 55-gallon drums and numerous 5-gallon containers. A cattle trailer containing 25 drums of hazardous and unknown wastes, with a drip pan placed underneath, was documented on the site.

Between January 6 and 9, 1998, TNRCC removed 25 drums from the cattle trailer. After the removal action, some drums and storage containers of hazardous wastes remained at the site pending further investigation and remedial activities.

Remedial Investigation (RI) activities commenced in July 2000. During the period from May 2001 to May 2002, surface and subsurface soils were sampled and analyzed for volatile organic compounds, semivolatile organic compounds, metals, pesticides, and herbicides. The analytical results indicated that no surface or subsurface soils exceeded the commercial/industrial cleanup levels. The groundwater near the site was also sampled for these same constituents. The analytical results indicated that no constituents were detected at levels that exceeded the established groundwater cleanup levels.

Additional removal activities during this same time frame consisted of removal and off-site disposal of 35 55-gallon drums, approximately 40 5-gallon containers, and six aboveground storage tanks. Removal also included decontamination of the warehouse building floor and the floor sump.

In July 2002, the commission approved a technical memorandum which described the RI and removal activities. The technical memorandum concluded that no further investigation activities were necessary at the site.

The TNRCC has concluded that all waste removal activities have been accomplished. The surface and subsurface soils on site do not exceed the commercial/industrial soil cleanup criteria established under 30 TAC §350.79, Texas Risk Reduction Program Protective Cleanup Level (TRRP) Tier II and do not pose any unacceptable risk. The groundwater on site does not exceed the groundwater cleanup criteria established by §350.79 and does not pose any unacceptable risk.

As a result of the removal actions that have been performed at the site, the ED determined that the Stoller Chemical Company State Superfund site no longer presents an imminent and substantial endangerment to public health and safety and the environment. The removal activities consisted of transportation and off-site disposal of 35 55-gallon drums, approximately 40 5-gallon containers, and six aboveground storage tanks. The contents included 25 cubic yards of Class 1 waste, 50 cubic yards of Class 2 waste, 32 cubic yards of solid hazardous waste, and 662 gallons of liquid hazardous waste. Therefore, no further action is necessary at the site and the site is eligible for deletion from the state registry as provided by 30 TAC §335.344(c).

The commission will hold a public meeting to receive comment on the proposed deletion of the site and the determination to take no further action. This public meeting will be legislative in nature and is not a contested case hearing under Texas Government Code, Chapter 2001. The public meeting on this proposal will be held in Plainview on October 1, 2002 at 7:00 p.m. at the City Hall Council Chambers, 901 Broadway.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted prior to the public meeting must be received by 5:00 p.m., October 1, 2002, and should be sent in writing to Mr. Alvie L. Nichols, Project Manager, Remediation Division, Texas Natural Resource Conservation Commission, MC-143, P. O. Box 13087, Austin, TX 78711-3087. The public comment period for this action will end at the close of the public meeting on October 1, 2002.

A portion of the record for this site, including documents pertinent to the proposed deletion of the site is available for review during regular business hours at the Unger Memorial Library, 825 North Austin Street, Plainview, Texas 79072-7235, (806) 296-1148. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Records Customer Service, Building E, First Floor, MC-199, 12100 Park 35 Circle, Austin, Texas 78753, telephone numbers (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Handicapped parking is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information regarding this meeting or the site, please call Mr. Bruce McAnally, Texas Natural Resource Conversation Commission, Community Relations, at (800) 633-9363.

TRD-200205257
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: August 13, 2002

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Public Utility Commission of Texas

Notice of Amendment to Interconnection Agreement

On August 6, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Sage Telecom, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under 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 2002) (PURA). The joint application has been designated Docket Number 26415. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26415. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 3, 2002, 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 the commission's 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 action, 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, or by phone 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 26415.

TRD-200205237
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Notice of Amendment to Interconnection Agreement

On August 6, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and NOS Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2002) (PURA). The joint application has been designated Docket Number 26416. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26416. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 3, 2002, 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 the commission's 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 action, 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, or by phone 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 26416.

TRD-200205238
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Notice of Amendment to Interconnection Agreement

On August 7, 2002, Southwestern Bell Telephone, LP d/b/a Southwestern Bell Telephone Company and MCIWireless, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing 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 2002) (PURA). The joint application has been designated Docket Number 26422. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26422. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 4, 2002, 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 the commission's 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 action, 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, or by phone 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 26422.

TRD-200205239
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Notice of Application for Amendment to Certificate of Operating Authority

On August 9, 2002, Cumby Telephone Cooperative, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its certificate of operating authority (COA) granted in COA Certificate Number 50017. Applicant intends to expand its geographic area to include the entire Dallas Local Access and Transport Area.

The Application: Application of Cumby Telephone Cooperative, Inc. for an Amendment to its Certificate of Operating Authority, Docket Number 26451.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 28, 2002. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26451.

TRD-200205259
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On August 9, 2002, Snappy Phone of Texas, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60231. Applicant intends to reflect a change in ownership/control, and to remove the resale-only restriction.

The Application: Application of Snappy Phone of Texas, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 26421.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 28, 2002. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26421.

TRD-200205258
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 8, 2002, to relinquish a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Telseon Carrier Services, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 26432 before the Public Utility Commission of Texas.

Applicant intends to relinquish its certificate.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than August 28, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26432.

TRD-200205254
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214.

Docket Title and Number. Valor Telecommunications of Texas, LP Application for Approval of LRIC Study for Valor Value Plus Unlimited and Valor Total Value Unlimited Pursuant to the commission's Substantive Rule §26.214 on August 22, 2002, Docket Number 26460.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26460. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205264
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214

Docket Title and Number. Sugar Land Telephone Company Application for Approval of LRIC Study for New Optional Service Offering for Sugar Land Digital Centrex Customers, Customer Provided Music on Hold Pursuant to the commission's Substantive Rule §26.214 on August 23, 2002, Docket Number 26466.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26466. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205287
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 14, 2002

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Notice of Interconnection Agreement

On August 9, 2002, CenturyTel of Lake Dallas, Inc., CenturyTel of San Marcos, Inc., CenturyTel of Port Aransas, Inc., and Rosebud Telephone, LLC, 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 2002) (PURA). The joint application has been designated Docket Number 26448. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26448. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 6, 2002, 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 the commission's 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 action, 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, or by phone 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 26448.

TRD-200205261
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Interconnection Agreement

On August 9, 2002, CenturyTel of Lake Dallas, Inc., CenturyTel of San Marcos, Inc., CenturyTel of Port Aransas, Inc., and Realtime Communications, Inc., 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 2002) (PURA). The joint application has been designated Docket Number 26449. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26449. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 6, 2002, 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 the commission's 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 action, 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, or by phone 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 26449.

TRD-200205262
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Interconnection Agreement

On August 9, 2002, CenturyTel of Lake Dallas, Inc., CenturyTel of San Marcos, Inc., CenturyTel of Port Aransas, Inc., and National Discount Telecom, LLC, 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 2002) (PURA). The joint application has been designated Docket Number 26450. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26450. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 6, 2002, 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 action, 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, or by phone 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 26450.

TRD-200205263
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 13, 2002

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Notice of Interconnection Agreement

On August 13, 2002, CenturyTel of Lake Dallas, Inc., CenturyTel of San Marcos, Inc., CenturyTel of Port Aransas, Inc., and Universal Telecom, Inc., 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 2002) (PURA). The joint application has been designated Docket Number 26467. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 26467. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 9, 2002, 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 the commission's 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 action, 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, or by phone 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 26467.

TRD-200205288
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 11, 2002

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Notice of Workshop and Request for Comments on the Activities of the Ordering and Billing Forum

The Public Utility Commission of Texas (commission) will hold a workshop regarding an inquiry into the activities of the industry's Ordering and Billing Forum on Thursday, October 3, 2002 at 9:30 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26375, *Inquiry Into the Activities of the Telecommunications Industry's Ordering and Billing Forum*, has been established for this proceeding.

Prior to the workshop, the commission requests that interested persons file comments on the following questions:

1. Does your company participate in the development of the Ordering and Billing Forum (OBF) standards? If so, please describe the level of participation. If not, please explain why.

2. Does your company follow any of the OBF standards? If so, which ones? What standards has the OBF adopted related to local competition?

3. What OBF standards has the commission already adopted? (Please provide the Project or Docket number).

4. What OBF standards is the commission currently addressing in another proceeding (e.g., Project Number 24389, *Establishment of CLEC-to-CLEC and CLEC-to-ILEC Migration Guidelines*)? (Please provide the Project or Docket number).

5. Are there any issues or problems before the OBF that the commission should also address? If so, please provide a detailed description of the issue and how the commission should address the issue.

6. Are there any other issues being addressed in industry forums other than the OBF that the commission should also be addressing?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 20 days of the date of publication of this notice. All responses should reference Project Number 26375. The commission request comments be limited to 30 pages.

This notice is not a formal notice of proposed rulemaking, however, the parties' responses to the questions and comments at the workshop will assist the commission in developing a commission policy or determining the necessity for a related rulemaking.

Ten days prior to the workshop the commission shall make available in Central Records under Project Number 26375 an agenda for the format of the workshop. Questions concerning the workshop or this notice should be referred to Andrew Kang, Legal Division at (512) 936-7293. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205240
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Notice of Workshop for Lesson's Learned: Evaluation of the Performance of the ERCOT Wholesale Market

The Public Utility Commission of Texas (commission) will hold a workshop regarding lesson's learned during the first year of operations of the ERCOT wholesale market, on Friday, September 6, 2002, at 9:30 a.m. in the Commissioner's Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26330, *Lesson's Learned: Evaluation of the Performance of the ERCOT Wholesale Market*, is established for this proceeding. The overall purpose is to confirm the areas that are working well and to identify areas that need improvement. To assist the Staff in planning the workshop, please respond to the questions below. Parties are encouraged to base their

comments on their experience in the market. Comments are due by 3:00 p.m. on Friday, August 30, 2002 and should address activities related to the day-ahead market for ancillary services, the balancing energy market, the bilateral markets, congestion management, the Protocols, the interaction between market participants and ERCOT, the interaction between market participants, or other key aspects of the wholesale market. In your comments, please be specific and provide examples.

The commission will sponsor a second workshop in October 2002 under Project Number 26331, *ERCOT Markets: Operational Problems and Solutions*. Please reserve your comments concerning the technical aspects of operational issues in ERCOT-run markets for this second workshop.

Prior to the workshop, the commission request interested persons file comments to the following questions:

1. List the top five areas in which the ERCOT wholesale market is not working as well as it should and provide a short explanation. Provide suggestions for improving those areas.

2. What criteria should be used to evaluate competition in the ERCOT wholesale market? Please respond in regards to the bilateral market as well as the ancillary services markets administered by ERCOT.

3. Is there adequate competition in the bilateral market? In the ancillary services markets administered by ERCOT? How can competition be enhanced in those markets?

4. Is market power exercised in the bilateral wholesale market? In the ERCOT administered ancillary services markets? If so, please explain in what way market power is exercised. What steps can be taken to mitigate the exercise of market power?

5. What barriers to entry have been experienced by new market entrants, including new merchant plants, and nonaffiliated retailers with respect to the wholesale market? What can be done to eliminate such barriers?

6. Are there areas in which the commission, and in particular the Market Oversight Division (MOD), should be more proactive to address market inefficiencies and enhance market performance? Please list these areas and explain in what way you would like the commission and MOD to be more pro-active.

7. The workshop will have discussion panels covering various areas of the wholesale market. Suggest the topics that you would like the panels to address and any persons that you suggest participate in the panels.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within seven days of the date of publication of this notice. All responses should reference Project Number 26330.

Five days prior to the workshop the commission shall make available in Central Records under Project Number 26330 an agenda for the format of the workshop.

Questions concerning the workshop or this notice should be referred to Tony Grasso, Market Oversight Division, (512) 936-7385. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205246
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Notice of Workshop on Implementation of Public Utility Commission Substantive Rule §25.472

The Public Utility Commission of Texas (commission) will hold a workshop to discuss the implementation of substantive rule §25.472 relating Privacy of Customer Information as it concerns the mass customer list on Tuesday, August 27, 2002, at 9:30 a.m., in the Commissioners' Hearing Room, located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. This workshop will be held in Project Number 23400, *Electric Restructuring Transition Implementation Issues*. The primary goal of the workshop is to facilitate interested parties' participation in the development of the process and format that will be used for the release of the price to beat mass customer list by retail electric providers on December 31 of each year from 2002 to 2006 in accordance with substantive rule §25.472.

Questions concerning the workshop or this notice should be referred to Connie Corona, Director, Electric Policy Analysis, Policy Development Division, (512) 936-7212 or Bridget Headrick, Chief Policy Analyst, Policy Development Division, (512) 936-7016. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200205248
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 12, 2002

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Border WorkWorks, Big 5 Colonia, P.O. Box 132, San Juan, Texas 78589, received April 23, 2002, application for financial assistance in an amount not to exceed $93,745 from the Colonia Self-Help Account of the Water Assistance Fund.

The Rensselaerville Institute, Vecinos Unidos Colonia, Rensselaerville, New York, 12147, received June 28, 2002, application for financial assistance in an amount not to exceed $63,418 from the Colonia Self-Help Account of the Water Assistance Fund.

City of Asherton, Texas, 1001 West Carter, Asherton, Texas, 78827, received May 1, 2002, application for financial assistance in the total amount of $2,157,594 from the Economically Distressed Areas Account of the Texas Water Development Funds.

Hudspeth County Conservation and Reclamation District No. 1, P.O. Box 125, Fort Hancock, Texas, 79839, received June 25, 2002, application to contract for preparation of feasibility study in an amount not to exceed $143,560 from the Water Bank Account.

Delta Lake Irrigation District, Route 1, Box 225, Edcouch, Texas, 78538, received June 26, 2002, application to contract for preparation of feasibility study in an amount not to exceed $253,020 from the Water Bank Account.

Hidalgo and Cameron County Irrigation District No. 9, P.O. Box 237, Mercedes, Texas, 78570, received June 27, 2002, application to contract for preparation of feasibility study in an amount not to exceed $88,230 from the Water Bank Account.

Hidalgo County Irrigation District No. 6, P.O. Box 786, Mission, Texas, 78572, received June 26, 2002, application to contract for preparation of feasibility study in an amount not to exceed $153,060 from the Water Bank Account.

Maverick County Water Control and Improvement District No. 1, Route 2, Box 4700, Eagle Pass, Texas, received June 26, 2002, application to contract for preparation of feasibility study in an amount not to exceed $308,882 from the Water Bank Account.

San Jacinto River Authority, P.O. Box 329, Conroe, Texas, 77305, received April 1, 2002, application for financial assistance in an amount not to exceed $2,069,600 from the Research and Planning Fund.

Tetra Tech, Inc., 501 Soledad, San Antonio, Texas, 78205, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

MGT of America, Inc., 502 East 11th Street, Suite 300, Austin, Texas, 78701, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Texas A & M University, Kingsville MSC 213, Kingsville, Texas, 78363-8202, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Reed, Stowe and Yanke, LLC, 5806 Mesa Drive, Suite 301, Austin, Texas, 78731, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Halliburton KBR, 505 East Huntland Drive, Suite 220, Austin, Texas, 78752, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Lockwood, Andrews, & Newnam, Inc., 2925 Briarpark Drive, Houston, Texas, 77042, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

OPTECH, 4100 Northwest Loop 410, Suite 230, San Antonio, Texas, 78229, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Turner Collie & Braden, Inc., 400 West 15th Street, Suite 500, Austin, Texas, 78701, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Camp Dresser & McKee, Inc., 9111 Jollyville Road, Suite 105, Austin, Texas, 78759, received June 3, 2002, application for financial assistance from the Research and Planning Fund.

Aldine Community Improvement District, P.O. Box 22167, Houston, Texas, 77227-2167, received June 7, 2002, application for financial assistance in an amount not to exceed $207,323 from the Research and Planning Fund.

R.W. Harden and Associates, Inc., 3409 Executive Center Drive, Suite 226, Austin, Texas, 78731, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

Waterstone Environmental Hydrology and Engineering, Inc., 1650 38th Street, Suite 201E, Boulder, Colorado, 80301, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

Intera, Incorporated, 9111-A Research Blvd., Austin, Texas, 78758, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

Daniel B. Stephens & Associates, Inc., 6020 Academy Northeast, Suite 100, Albuquerque, New Mexico, 87109, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

LBG-Guyton Associates, 1101 South Capital of Texas Highway, Suite B-220, Austin, Texas, 78746, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

URS Corporation, 1223 17th Street, Suite 200, Denver, Colorado, 80301, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

AMEC Earth and Environmental, Inc., 12758 Cimarron Path, Suite 128, San Antonio, Texas, 78249, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

U.S. Geological Survey, 8027 Exchange Drive, Austin, Texas, 78754, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

CH2M Hill, 6210 Highway 290 East, Suite 430, Austin, Texas, 78723, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

AES-Regulatory Services Inc., 2013 Wells Branch Parkway, Suite 206, Austin, Texas, 78728, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

LBG-Guyton Associates, 1101 South Capital of Texas Highway, Suite B-220, Austin, Texas, 78746, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

MFG, Inc., 4807 Spicewood Springs Road, Building 4, First Floor, Austin, Texas, 78759, received June 7, 2002, application for financial assistance from the Research and Planning Fund.

TRD-200205157

Gail L. Allan

Director of Administration and Northern Legal Services

Texas Water Development Board

Filed: August 7, 2002

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How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 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).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

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